

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 February 2020

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information about Ethiopian asylum applicants from the Home Office ("HO"). The HO refused to confirm or deny whether it holds any information, citing sections 40(5B) (personal information) and 38(2) (health and safety) of the FOIA. The Commissioner does not find either exemption to be engaged. She also finds a breach of section 17(3) (refusal of request) of the FOIA.
2. The Commissioner requires the HO to take the following steps to ensure compliance with the legislation:
 - confirm or deny whether information falling within the scope of the request is held, and either disclose any information identified or issue a refusal notice which is compliant with section 17 of the FOIA.
3. The HO must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 21 May 2019 the complainant wrote to the HO and requested information in the following terms:

"I seek the following information:

1. How many claims by Ethiopian asylum applicants have been refused on the basis that the individual committed war crimes,

crimes against humanity, terrorist acts or other serious criminal offences?

2. How many of these claims have been upheld on appeal?

3. Of the claims initially refused, (a) how many of the individuals were members of the Derg/military government between 1975 and 1991; (b) how many of the individuals were members of the government which came to power in 1991 (e.g. from the Tigray People's Liberation Front and the Eritrean Liberation Front); (c) how many of the individuals were members of the Oromo Liberation Front”.

5. On 15 August 2019, following an extension in which it considered the public interest in disclosure, the HO responded. It refused to confirm or deny whether it holds the requested information, citing sections 38 (health and safety) and 40 (personal information) of the FOIA.
6. Following an internal review, the HO wrote to the complainant on 2 October 2019. It maintained its position.

Scope of the case

7. Following earlier correspondence, the complainant contacted the Commissioner on 10 October 2019 to complain about the way his request for information had been handled. He did not specify any particular grounds of complaint but did stress that he did not believe he was seeking any personal information.
8. The Commissioner will consider the application of exemptions to the request below. She has also considered timeliness.

Reasons for decision

Neither confirm nor deny (“NCND”)

9. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in the request. However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would in itself disclose sensitive or potentially exempt information. In these circumstances, section 2(1) of the FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.

10. The decision to use a NCND response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
11. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
12. The HO has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety, citing two exemptions. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not the HO is entitled to NCND whether it holds any information of the type requested by the complainant.
13. Put simply, in this case the Commissioner must consider whether or not the PA is entitled to NCND whether it holds any of the requested information about claims by Ethiopian asylum applicants.
14. The HO has said that the information described in the request, if it was held, would be fully exempt from disclosure by virtue of sections 40 and 38 of the FOIA.

Section 40 - personal information

15. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
16. Therefore, for the HO to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

17. Section 3(2) of the DPA 2018 defines personal data as:-

"any information relating to an identified or identifiable living individual".

18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. An identifiable, living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
20. Information will relate to that person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
21. The Commissioner initially notes that the HO did not at any stage explain to the complainant whose personal data the information, if held, would be, and how they could be identified by the disclosure of the requested figures.
22. In its response to the Commissioner, the HO explained its position as follows:

"It is our view that confirming or denying in itself carries a non-negligible risk that an individual could be identified or, for that matter, could be mis-identified.

To help explain this position I have set out the following 'steps' below where;

Step 1 – Person A is trying to identify a particular individual(s) (Person B).

Step 2 – Person A, by gleaning information from various sources of information, suspects that they have identified Person B but they are not completely certain

Step 3 – Person A makes an FOI request to the Home Office and asks for information which in their view will allow them to confirm their suspicions about Person B.

The Home Office now has three options:

Option 1

The Home Office confirms that information is held. By confirming that information is held, the Home Office has confirmed the

suspensions of Person A. The Home Office has indirectly identified Person B.

Option 2

The Home Office confirms that information is not held. By confirming that information is not held the Home Office has cast doubt on the suspicions of Person A. In our view, what would likely happen next is that Person A would submit a series of information requests (each time changing a slight detail) in order to attempt – by the process of elimination – to determine what information is held by the Home Office. This approach would be based on the fact that the Home Office appears to be content to confirm that no information is held in this particular case, so would likely adopt a similar approach for any future requests. (Any change in this position would likely be interpreted that information is held).

Option 3

The Home Office neither confirms nor denies (NCND) whether it holds the requested information. By adopting this approach, we are protecting not so much the information itself (if held) but the principle of NCND as it applies to requests on this particular subject.

For example, if the Home Office confirmed that it did not hold the information at this time, but the same request was lodged 3 months later, and the Home Office at that time did hold the information (but did not want to confirm that it did), it would then look to apply NCND. However, applying NCND only when information is held, would by the very fact of applying NCND, give the perception that information is indeed held, each time NCND is applied. To counter this and protect the NCND principle, this is precisely why NCND should be applied consistently in cases where information is held, and also in those cases where information is not held.

In conclusion, although the request does not refer to any individual(s), confirming or denying would in our view carry a risk of the identification of individual(s) and hence the disclosure of personal data”.

The Commissioner's view

23. A test used by both the Commissioner and the First-tier tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so, in this case by confirmation or denial as to whether any information is held. The 'motivated intruder' is described as a person who will take all

reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.

24. The ICO's Code of Practice on Anonymisation¹ notes that:

"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".

25. In summary, the motivated intruder test is that if the risk of identification is "*reasonably likely*" the information should be regarded as personal data.
26. The main issue for the Commissioner to consider here is whether or not the confirmation or denial would reveal the identities of any individuals.
27. The explanation provided by the HO initially requires Person A, for example the complainant in this case, to be seeking to identify a third party. However, there is nothing in the wording of the request, and no evidence has been provided by the HO, to suggest that this is the case. The initial two parts of the request are 'open-ended' date wise and the possible time frame for any data which may be held is not known – albeit this seems likely to cover the time period from 1975 to the present day based on the wording of the latter part of the request.
28. Having considered the rationale provided by the HO above, the Commissioner does not accept that knowing whether or not there were any such refusals, or upheld appeals, could realistically lead to the identification of any party.
29. The third part of the request does specify a time frame, however, it still spans a considerable length of time, being 16 years. It also refers to members of specific political groups which would narrow the field of possible individuals to some degree, if members of the groups are known. However, this decision notice is not considering whether or not any withheld information should be disclosed, it is only considering whether confirmation or denial as to whether any information is held might allow for the identification of an individual.

¹ <https://ico.org.uk/media/fororganisations/documents/1061/anonymisation-code.pdf>

30. The Commissioner has conducted online searches to ascertain whether or not confirmation or denial might afford reidentification of any specific individual or individuals. She has been unable to locate any information which would indicate how such reidentification would be possible by confirmation or denial only.
31. For the reasons set out above, the Commissioner has concluded that if the HO confirmed or denied whether or not it held the requested information this would not result in the disclosure of a third party's personal data. Therefore, the first criterion set out above is not met and the HO cannot rely on section 40(5B) of FOIA in the circumstances of this case to refuse to confirm or deny whether the requested information is held.

Section 38 – health and safety

32. Section 38(1)(a) and (b) of the FOIA state that:

"Information is exempt information if its disclosure under this Act would, or would be likely to—

*(a) endanger the physical or mental health of any individual, or
(b) endanger the safety of any individual".*

33. Section 38(2) removes the duty to confirm or deny:

"if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1)".

34. In section 38 the word 'endanger' is used rather than the word 'prejudice' which is the term used in other similar exemptions in FOIA. However, in the Commissioner's view the term endanger equates to prejudice.

35. In order for a prejudice based exemption, such as section 38(1) to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the public authority confirmed whether or not it withheld information has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the confirmation or denial of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, confirmation or denial 'would be likely' to result in prejudice or it 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

36. Section 38 is also a qualified exemption and is subject to the public interest test.

37. In this case, the HO considered that both limbs of section 38(1) applied. In that respect, it told the complainant, in its internal review response, that it considered that:

"... the release of this information (if it is held) would jeopardise the personal security of individuals by potentially making them targets of intimidation, serious injury or harm. This would put their wellbeing in danger and endanger their health and safety. Therefore, it would clearly not be in the public interest to either confirm or deny whether we hold the requested information".

38. As is her practice in a case such as this, the Commissioner asked the HO to explain why disclosure of the information would, or would be likely to, endanger the health or safety of an individual.

39. In its submission to the Commissioner, the HO relied on its engagement of section 40 to the request. In support of the application of section 38, it told the Commissioner:

"The argument for relying on section 38 depends on the risk that an individual(s) could be identified. As you are aware from our reliance on the exemption at section 40, we do consider that an individual(s) could be identified, and therefore because such identification could occur, this would be likely to put these individuals at risk and endanger their health and safety".

40. As the Commissioner has concluded above that section 40 is not engaged it follows that section 38 is also not engaged as no individual is identifiable from confirmation or denial as to the existence of any of the requested information.

41. As neither section 40(5B) nor 38(2) of the FOIA are engaged, the HO is required to comply with the step in paragraph 2 above.

Section 17 – public interest test

42. Although not referred to by the complainant, the Commissioner has noted the considerable delay in providing a response in this case.

43. Section 1(1) of the FOIA states that:

*"Any person making a request for information to a public authority is entitled –
(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him."*

44. Section 10(1) of the FOIA states that a public authority must respond to a request promptly and *"not later than the twentieth working day following the date of receipt"*.

45. Section 17(3) of the FOIA states that where a public authority is relying on a qualified exemption, it can have a "reasonable" extension of time to consider the public interest in maintaining the exemption or disclosing the information.

46. Although the FOIA does not define what constitutes a reasonable time, the Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days. This means that the total time spent dealing with the request should not exceed 40 working days, unless there are exceptional circumstances. A public authority would need to fully justify any extension beyond 40 working days.

47. In this case, the total time taken by HO has exceeded 60 working days. The Commissioner does not consider there to be any exceptional circumstances and she finds that, by failing to complete its deliberations on the public interest within a reasonable time frame, the HO has breached section 17(3) of the FOIA.

Other matters

48. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Information Notice

49. As the HO failed to respond to the Commissioner's enquiries in a timely manner, despite being allowed additional time for responding, it was necessary for her to issue an Information Notice in this case, formally requiring a response.

50. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft Openness by Design strategy² to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our Regulatory Action Policy³.

² <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

³ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

51. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

52. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
53. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Carolyn Howes
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