

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 22 February 2022

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

### **Decision (including any steps ordered)**

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1. The complainant has requested information from the Home Office regarding asylum claims, legal aid claims and the country of origin of the individuals involved.
2. The Commissioner's decision is that the Home Office was entitled to rely on section 40(2) of FOIA to withhold the requested information.
3. The Commissioner requires no steps to be taken as a result of this decision notice.

### **Request and response**

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4. On 30 October 2020, the complainant wrote to the Home Office and requested information in the following terms:  
  
"Please can you tell me if the [redacted] have made asylum claims in the UK?  
  
I also wish to know:  
  
\*if they have made claims for legal aid, and if any such claims have been granted  
  
\*their countries of origin."

5. The Home Office responded on 11 November 2020. It stated that the information was withheld under section 40(2) of FOIA – personal information.
6. Following an internal review the Home Office wrote to the complainant on 10 September 2021. It stated that it was upholding its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 15 September 2021 to complain about the way their request for information had been handled.
8. The Home Office set out in both the initial response and the internal review why it considered that the requested information is personal data and that disclosure of it would be unfair.
9. As the Commissioner is also the regulator of data protection legislation, he has decided that he has sufficient information to reach a decision in this case, based on the arguments already provided by the Home Office and from his own expertise, without seeking further arguments from the Home Office.
10. The Commissioner considers that the scope of the case is to determine if the Home Office is correct to withhold the information on the basis of section 40(2).

### **Reasons for decision**

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#### **Section 40 personal information**

11. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
12. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA

processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').

13. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

***Is the information personal data?***

15. Section 3(2) of the DPA defines personal data as:

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

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.
18. Information will relate to a 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.
19. In the circumstances of this case, having considered what the withheld information would likely contain, the Commissioner is satisfied that the information would relate to the data subjects. The citizenship status of the individuals involved, along with financial information quite obviously is information that both relates to and identifies those concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
20. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
21. The most relevant DP principle in this case is principle (a).

***Would disclosure contravene principle (a)?***

22. Article 5(1)(a) of the UK GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

23. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
24. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

***Lawful processing: Article 6(1)(f) of the UK GDPR***

25. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"<sup>2</sup>.*

26. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

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<sup>2</sup> Article 6(1) goes on to state that:-

*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

27. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

*Legitimate interests*

28. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
29. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
30. In this case, the complainant has explained that they are seeking access to the withheld information as they believe it is in the public interest.
31. The Commissioner considers that there may be a wider legitimate interest, i.e how asylum claims are processed. There is also a legitimate interest in the Home Office being accountable for its functions.

*Is disclosure necessary?*

32. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
33. However, if the requester is pursuing a purely private concern, unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. Legitimate interests may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
34. As disclosure under FOIA is disclosure to the world at large, it is rare that such processing will be necessary to achieve a legitimate interest.
35. The Commissioner is satisfied that the specific information requested in this case has not otherwise been made available to the public and that therefore, in this case there are no less intrusive means of achieving the legitimate aims identified.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

36. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
37. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
38. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
39. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
40. The Commissioner is mindful that disclosure under FOIA is disclosure to the world at large and not just to the requestor. It is the equivalent of the Home Office publishing this information on its website.
41. The Commissioner has not seen any information which suggests that the withheld information is already available in the public domain.
42. The complainant has explained that they believe that section 40(2) of FOIA is being applied too widely in this case and that the information requested is not specific personal details.
43. The complainant also advised that the location of the individuals is not known, and due to the length of time passed, they don't see why the information cannot be disclosed.
44. The complainant has also stated to the Commissioner that there is overwhelming public interest in the case, given its paramount

importance to the safety of UK waters, shipping and in the immigration process.

45. The Home Office has explained that as the information relates to a small number of individuals, the requested information is considered personal data.
46. The Home Office also explained that due to the low numbers involved, providing the information under FOIA, could lead to the identification of individuals.

#### The Commissioner's decision

47. The information that has been requested relates to individuals asylum status, their country of origin and claims for legal aid. Should this information be disclosed, it would reveal something about those individuals' status.
48. Whilst the Commissioner notes the complainant's arguments that they don't consider the information is personal data, due to the small number of individuals involved, other interested parties may have a different degree of access to other information concerning the individuals. This in turn could lead to them being identified and their personal information would be in the public domain.
49. 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. The 'motivated intruder' is described as a person who will take all reasonable steps to identify an individual, or individuals, but begins without any prior knowledge.
50. The ICO's Code of Practice on Anonymisation<sup>3</sup> notes that The High Court in R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)<sup>4</sup> 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.
51. In summary, the motivated intruder test is that if the risk of identification is 'reasonably likely', the information should be regarded

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<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>

<sup>4</sup> [https://informationrights.decisions.tribunals.gov.uk/DBFiles/Appeal/i344/CO-13544-2009\\_HC\\_Judgment\\_20110420.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Appeal/i344/CO-13544-2009_HC_Judgment_20110420.pdf)

as personal data, and in the circumstances of this case, the Commissioner considers that it is reasonably likely that the individual(s) could be identified.

52. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
53. The Commissioner's decision is that the Home Office was correct to cite section 40(2) of FOIA in response to this request.

## **Other matters**

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### **Section 45 – internal review**

54. The Commissioner cannot consider in a decision notice the amount of time it took a public authority to complete an internal review because such matters are not a formal requirement of FOIA. However, it is good practice to offer an internal review, and, where a public authority chooses to do so, the code of practice established under section 45 of FOIA sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales.
55. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances.
56. The Commissioner has noted the time it has taken the Home Office to respond to the complainant's request for an internal review. He can see that the request for an internal review was made on 11 November 2020 and a response was not provided until 10 September 2021, some 10 months later. The Home Office therefore failed to act in accordance with the section 45 code.



## Right of appeal

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57. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

58. 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.
59. 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 .....**

**Michael Lea**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**