

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 16 December 2010**

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

#### Summary

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The complainant made two related and overlapping requests to the Home Office. He requested information about individuals banned from entering the UK on the grounds of security, public order or any related reason and the names of anyone banned from entering the UK in the last three years (including both those who have tried to enter and those who have not). The Commissioner finds that the information was correctly withheld under section 40 (personal information). However, he finds that procedural breaches were committed. He requires no steps to be taken.

#### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

#### Background

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2. Shortly after the July 2005 London bombings Charles Clarke, the then Home Secretary, announced that he would use his power to exclude or deport individuals who engaged in certain kinds of unacceptable behaviour. The power is broad, but is normally used in circumstances involving national security, unacceptable behaviour (extremism), international relations or foreign policy, and serious and organised

- crime. The Commissioner understands that the decision to exclude an individual is always based on intelligence from the police and security services.
3. The Home Secretary already had the power to exclude individuals from the United Kingdom when he considered that this would be conducive to the public good.
  4. Exclusion decisions made by the Home Secretary are open to judicial review.
  5. Where the Home Secretary has directed that a person be excluded, any application that the person makes for a visa, or for leave to enter the UK, will fall to be refused by an Entry Clearance Officer or immigration officer respectively, under paragraph 320(6) of the Immigration Rules. An individual does not need to have applied to come to the UK in order to be excluded by the Home Secretary.
  6. Following a review of the exclusions policy, announced by Jacqui Smith the then Home Secretary on 28 October 2008, limited information relating to certain individuals excluded from the UK has been published on the UK Border Agency's website.
  7. The UK Border Agency (UKBA), an agency of the Home Office, is responsible for securing the UK border and controlling migration in the UK. It manages border control for the UK, enforcing immigration and customs regulations. It also considers applications for permission to enter or stay in the UK, and for citizenship and asylum.

## The Request

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8. The history of the requests is somewhat complex. The complainant wrote to the Home Office on 18 February 2009 with the following request:

*"I would like to request a list of individuals who are banned from entering the UK on the grounds of security, public order or any related reason.*

*In each case I would request the reason for the ban.*

*I would also like to request Home Office guidelines for how and why individuals are banned from entering the UK".*

9. The Home Office told the Commissioner that it has no record of receiving this request and only became aware of its existence on 16 April 2009 as a result of the complainant emailing to ask what progress was being made with his request.
10. Following communications with the Home Office about the fact that he had not had a response to his first request, the complainant subsequently modified that request on 12 June 2009:  
  
*"on my first request which could be interpreted as requesting a list of people banned from the UK over the course of history, can I clarify that I am just looking for the names of anyone banned from entering the UK in the last three years (including both those who have tried to enter and those who have not)".*
11. In the meanwhile, the complainant made a second, related, request to the Home Office on 12 May 2009:  
  
*"I would like to request the name of each of the 101 individuals who were banned from entering the UK between August 2005 and the end of March 2009. I would also like to request the names of any additional individuals banned from the UK from the end of March 2009 until the date of this request.*  
  
*For each individual I would like to request their nationality and the reason for them being banned from entering the UK".*
12. Having not received a response, the complainant contacted the Commissioner on 14 July 2009. The Commissioner wrote to the Home Office on 7 August 2009 reminding it of its responsibilities under the Act. The Home Office wrote to the complainant on 20 August 2009, apologising for the delay in responding. It advised him simply that the request raised a number of issues but that it hoped to provide a substantive response by the end of September.
13. Despite the Commissioner's intervention, it was not until 9 March 2010 that the Home Office responded, sending the complainant a combined response to the two related requests. In this correspondence, the Home Office provided information on how and why individuals are banned from entering the UK. However, it refused to disclose the other aspects of the requested information, citing the exemptions in sections 40(2) (personal information), 22 (information intended for future publication), 23(1) (information supplied by, or relating to, bodies dealing with security matters) and 31(1)(a), (b), (c) and (e) (law enforcement) of the Act.

14. The complainant requested an internal review on 10 March 2010. In addition to asking the Home Office to reconsider its reliance on the exemptions cited, he specifically asked whether the Home Office had approached any of the individuals on the list about his request.
15. The Home Office upheld its decision to withhold the information in its internal review correspondence of 10 April 2010. The Commissioner notes that it was at this stage that the Home Office stated its reasons for claiming that the public interest in withholding the information outweighed any interest in disclosure.

## The Investigation

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### Scope of the case

16. On 20 April 2010 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. In addition to his complaint about the Home Office's refusal to provide the requested information, the complainant asked the Commissioner to consider the following points:
  - *"the unacceptable amount of time taken to process the original request";* and
  - *"the failure of the UKBA [UK Borders Agency] to provide proper updates about the ongoing progress of the request, its failure to provide an adequate explanation for the delay and its failure to provide an alternative date for response".*
17. The focus of the Commissioner's investigation has been on whether the Home Office lawfully refused to disclose the remaining requested information (the names of individuals excluded from entering the UK from August 2005 to the date of the final request, their nationality and reason for exclusion) when it applied the exemptions in sections 22, 23, 31 and 40 of the Act. He has also considered the timeliness with which the Home Office handled the request.

### Chronology

18. The Commissioner wrote to the Home Office on 19 May 2010 asking it for further explanation of its reasons for citing sections 22, 23, 31 and 40 in relation to the requests, including, where applicable, its reasons for concluding that the public interest in maintaining the exemptions

outweighed the public interest in disclosure of the information requested.

19. The Home Office provided a substantive response on 24 June 2010. In this response, it advised the Commissioner that it would be using the term “excluded” for what was described in the request as “banned”. The Commissioner has also adopted this terminology in his Decision Notice.
20. In its correspondence, the Home Office explained that, in responding to the requests, UKBA took the view that the complainant wished to be provided with the names and nationalities of the individuals the Home Secretary had excluded from the UK on grounds of national security, unacceptable behaviour, serious and organised crime or foreign policy, together with the reasons for exclusion in each case. It had earlier confirmed with the complainant that it had interpreted the requests to refer to people who have been specifically excluded by the Home secretary from entering the UK, as opposed to those refused entry by immigration officials at points of entry or who have been refused visas.

## Analysis

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### Exemptions

#### Section 40 Personal information

21. Section 40(2) of the Act is an absolute exemption which relates to the personal information of persons other than the requestor.

*“Any information to which a request for information relates is also exempt information if -*

*(a) it constitutes personal data which do not fall within subsection (1), and*

*(b) either the first or the second condition below is satisfied.”*

22. Section 40(2) together with the condition in section 40(3)(a)(i) or 40(3)(b) provides an absolute exemption if disclosure of information falling within the definition of personal data contained in section 1(1) of the Data Protection Act 1998 (the DPA) would breach any of the data protection principles.

23. In order to reach a view on the Home Office's arguments in relation to this exemption, the Commissioner has first considered whether the withheld information is the personal data of one or more third parties.

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

24. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:

*"data which relate to a living individual who can be identified-*

*(a) from those data, or*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."*

25. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way. The information can be in any form, including electronic data, images and paper files or documents.

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

26. Sensitive personal data is defined in section 2 of the DPA. It is personal data which falls into one of the categories set out in section 2 of the DPA. In this case, the Home Office argued that the nationalities of individuals, as requested by the complainant, could come within the definition of sensitive personal data at subsection 2(a):

*(a) "the racial or ethnic origin of the data subject".*

A full citation of the section can be found in the Legal Annex at the end of this Decision Notice.

27. In this case, the withheld information constitutes the names of those individuals specifically excluded by the Home Secretary from entering the UK, their nationality and reason for being excluded. Accordingly, as it identifies specific individuals, the Commissioner is satisfied that the withheld information falls within the definition of 'personal data' as set

out in section 1(1) of the Data Protection Act 1998. With regard to the nationalities of the individuals, the Commissioner accepts that this could come within the definition of sensitive personal data.

***Would disclosure breach one of the Data Protection principles?***

28. Having accepted that the requested information constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles.

*The first principle*

29. The first data protection principle states that:

*'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*

- (a) at least one of the conditions in Schedule 2 is met, and*
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met'.*

*Would it be fair to disclose the requested information?*

30. In determining whether a disclosure is fair under the first principle of the Data Protection Act 1998 for the purposes of section 40 of the Freedom of Information Act, the Commissioner considers it appropriate to balance the consequences of any disclosure and the reasonable expectations of the data subject with general principles of accountability and transparency. He also considers it reasonable to take account of whether the individual has consented to the disclosure.

*Have the individuals consented to disclosure?*

31. When requesting an internal review, the complainant said he would like the review *"to ascertain whether it [the UK Border Agency] approached any of the individuals on the list to see if they were minded to have their identities released."*
32. The Home Office responded, saying that it had not approached the individuals in this regard. The Home Office provided the complainant with an explanation as to the rationale behind this decision. During his investigation, the Home Office provided the Commissioner with further clarification as to why it had not contacted the data subjects to seek their consent to disclosure.

33. The Commissioner is satisfied that the data subjects concerned have not consented to disclosure. He also notes that in such circumstances the Home Office does not have an obligation under the Act to seek consent proactively.

*Consequences of disclosure on the data subjects*

34. The Home Office has expressed serious concerns about the possible consequences should the information be released. It has argued that it is not inconceivable that, in circumstances where an individual was detained or under investigation in another country at the time of their exclusion from the UK, any notification of the exclusion could place the individual at risk or potentially prejudice any case against them. In this respect, the Commissioner understands that, in the case of two individuals, whose names have appeared on a list of excluded individuals, they were, at the time, serving prison sentences abroad.
35. Even where the consequences of disclosure are not such as to place an individual at risk, the Commissioner considers that the consequences of disclosure in this case could be distressing to the individuals concerned. In this respect, he notes the extent of the media coverage which has appeared in the past when details of excluded individuals have been made known.
36. In considering this matter, the Commissioner is mindful of the fact that an individual does not need to have applied to come to the UK in order to be excluded by the Home Secretary. He notes that, in the case of one individual whose name appeared on the list of those excluded from the UK, the media reported that the individual "*had not been planning to travel to Britain anyway*".
37. The Commissioner accepts that he is not in a position to predict the reaction of individuals to media coverage. Nevertheless, the Commissioner considers it likely that, given the circumstances, the effect of disclosure in this case would be distressing to at least some of the individuals concerned.

*Reasonable expectations of the data subjects*

38. In the Commissioner's view, an individual's reasonable expectation as to whether their personal data will be disclosed is a relevant factor when determining whether disclosure would be fair. He considers the nature of the information itself and the consequences of it being released will help shape the expectations of the data subject as to whether their personal data will be released to the public.



39. In confirming that he wished to pursue his complaint, the complainant wrote to the Commissioner saying:

*"... but don't individuals who are included on a list like this have a right to know. Should they also be consulted about possible disclosure?"*

40. The Commissioner's remit in this case is not to consider whether or not an individual has the right to know that they have been excluded by the Home Secretary from entering the United Kingdom. Rather it is to address the question of whether disclosure under the Act would breach one of the principles of the Data Protection Act. In this respect, the Commissioner notes that disclosure under the Act is effectively disclosure to the world at large.
41. Given the fact that an individual does not need to have applied to come to the UK in order to be excluded by the Home Secretary, the Commissioner recognises that individuals may not be aware that their information is being held for exclusion purposes. In the circumstances, the Commissioner has considered whether disclosure would be an unwarranted interference with their privacy. In his view, it is relevant when considering this, to take into account the fact not only that an individual may be unaware of the fact that they have been excluded but also that they may not be intending to travel to the UK in any event.
42. In determining the matter of whether disclosure would be an unwarranted interference, the Commissioner has looked at the Guidance which he has issued which differentiates between an individual's public and private life. This Guidance can be accessed at the following link: -
- [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/personal\\_information.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/personal_information.pdf)
43. Having considered the Guidance, the Commissioner's view is that disclosure would be unwarranted as the withheld information in this case is solely relevant to the individuals' private lives and does not encompass any form of public function or duty.

#### *Accountability and transparency*

44. In considering this case, the Commissioner has taken into account the fact that the Home Office explained to the complainant its policy with respect to disclosure. It told the complainant that its general policy is not to disclose, to a third party, personal information about another

person. However, it confirmed that *"limited information relating to certain individuals who have been excluded from the United Kingdom has been published on the UK Border Agency's website"*.

45. It told him that the move to disclose that certain individuals have been excluded from the United Kingdom for engaging in unacceptable behaviour followed the review of the exclusions policy, as announced by the former Home Secretary on 28 October 2008.
46. In this respect, the Commissioner notes the following explanations regarding disclosure which the Home Office provided to the complainant:

*"A decision to disclose that a person has been excluded is only taken if we consider it to be in the public interest to do so. Where names and information have been withheld, it is because we do not consider their disclosure to be in the public interest";*

and

*"where we consider it to be in the public interest to disclose that a person has been excluded from the UK for engaging in unacceptable behaviour, this information will be published as part of our rolling 6 monthly publication on the UK Border Agency site.... Upon careful review of a case we may decide that the public interest in disclosing the information is outweighed by other considerations, such as the substantial damage or distress that the release of information might cause to an individual or the adverse effect that it may have on international relations"*.

### **Conclusion**

47. In the Commissioner's view, the greater the distress or damage to be caused, the more likely it will be that disclosure will be unfair. In this case, the Commissioner is mindful that the individuals concerned are not necessarily aware that the Home Office holds their personal information. He has also taken into account the potential for harm or distress in a personal capacity and the media intrusion and scrutiny that would inevitably result from disclosure.
48. Having considered the information involved and the purposes for which it was generated, the Commissioner has concluded that it would be unfair and therefore a breach of the first data protection principle to disclose it. As disclosure would not be fair, the Commissioner has not gone on to consider whether disclosure is lawful or whether one of the Schedule 2 DPA, or in the case of any sensitive personal data Schedule

3 DPA, conditions is met. Accordingly, he has decided that the information should not be disclosed due to the exemption contained in section 40(2) by virtue of section 40(3)(a)(i).

49. As section 40 is an absolute exemption there is no need to consider the public interest in disclosure separately.

### **Other exemptions**

50. As the Commissioner has found that it would be unfair to disclose the requested information, he has not gone on to consider the other exemptions cited by the Home Office in this case.

### **Procedural Requirements**

#### *Section 10 Time for compliance*

51. Section 10(1) states:

*"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt".*

52. In this case the complainant made the first of his two related requests on 18 February 2009 and the second on 12 May 2009, but the Home Office failed to confirm that it held information relevant to his request until 9 March 2010. It therefore took over 9 months for the Home Office to respond to the information requests.

53. The complainant told the Commissioner that he had had to chase the Home Office for a progress update *"on numerous occasions and often without success"*.

54. In its internal review correspondence, in which it reviewed the handling of his request, the Home Office apologised to the complainant for *"the excessive delay"* in responding to him. It told the complainant:

*"Though the material requested, and the exemptions engaged, necessitated careful consideration, I must conclude that UKBA's delay in responding to [the complainant] was excessive and unwarranted".*

55. In this respect, the Home Office told the Commissioner:

*"We do acknowledge that we could have handled [the complainant's] requests better and kept in touch with him".*

56. The Commissioner notes that the excessive time which the Home Office took to issue its refusal notice was clearly in breach of the statutory timescale. Accordingly, the Commissioner finds that, in failing to confirm or deny within 20 working days whether it held the requested information, the Home Office breached the requirements of section 10(1).

### *Section 17 Refusal of request*

57. Section 17(1) of the Act provides that:

*"A public authority which ... is to any extent relying:*

*.....*

*- on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which*

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*(a) states that fact,*

*(b) specifies the exemption in question, and*

*(c) states (if that would not otherwise be apparent) why the exemption applies."*

58. In failing to provide a valid refusal notice within the statutory time limit, the Home Office breached section 17(1).

## **The Decision**

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59. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- it correctly withheld the information to which it applied section 40(2).

60. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- it breached section 10(1) by failing to inform the complainant whether it held the requested information within 20 working days of the request; and
- it breached section 17(1) by failing to issue a valid refusal notice within the statutory time limit.

## Steps Required

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61. The Commissioner requires no steps to be taken.

## Other matters

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62. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
63. On 22 February 2007, the Commissioner issued guidance on the time limits for considering the public interest test (PIT). This recommended that public authorities should aim to respond fully to all requests in 20 working days. Although it suggested that it may be reasonable to take longer where the public interest considerations are exceptionally complex, the guidance stated that in no case should the total time exceed 40 working days. The Commissioner is concerned that in this case it took over 9 months for the authority to communicate the outcome of the public interest test to the complainant, despite the publication of his guidance on the matter. The Commissioner notes that the authority's internal review acknowledges the unacceptable nature of the delay in this instance. He expects that future requests received by the authority will not be subjected to such delays.

## Right of Appeal

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64. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

**Dated the 16<sup>th</sup> day of December 2010**

**Signed .....**

**Jon Manners  
Group Manager**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Personal information

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Sensitive personal data is defined in the Data Protection Act:

“In this Act ‘sensitive personal data’ means personal data consisting of information as to—

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,

- (d) whether he is a member of a trade union (within the meaning of the [1992 c. 52.] Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings".