

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

### **Decision notice**

**Date:** 19 January 2016

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

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

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1. The complainant requested information relating to any contact that the spouse of an MP, who is also employed by that MP, has had with the Home Office as part of that employment. The Home Office refused to confirm or deny whether it held this information and cited the exemption provided by section 40(5) of the FOIA.
2. The Commissioner's decision is that section 40(5) is not engaged and so the Home Office is now required to provide to the complainant confirmation or denial as to whether the requested information is held.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
  - Write to the complainant with confirmation or denial as to whether the requested information is held. In relation to any information that is held, this should either be disclosed to the complainant, or the complainant informed of the grounds on which the information is withheld.
4. The Home Office 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 FOIA and may be dealt with as a contempt of court.

## Request and response

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5. On 12 June 2015 the complainant wrote to the Home Office and requested information in the following terms:  
  
*"Please can you tell me whether you have received any communications from [name redacted] in her capacity as caseworker for [name redacted] MP? I want to know whether you have any emails from her from a Parliament address, or any written mail or records of phone calls. If so, how many and over how long a span of time?"*
6. The Home Office responded on 18 June 2015. It refused to confirm or deny whether the requested information was held and cited the exemption provided by section 40(5) (personal information) of the FOIA.
7. The complainant responded on 21 June and 30 July 2015 and requested an internal review. In a response dated only as August 2015, the Home Office gave the internal review outcome, which was that the refusal to confirm or deny under section 40(5) was upheld.

## Scope of the case

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8. The complainant contacted the Commissioner on 29 October 2015 to complain about the refusal of his information request. The complainant disagreed with the citing of section 40(5).

## Reasons for decision

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### Section 40(5)

9. Section 1(1)(a) of the FOIA imposes a duty on public authorities to confirm or deny whether requested information is held. Section 40(5) provides an exemption from that duty where confirmation or denial would involve disclosure of personal data and where that disclosure would be in breach of any of the data protection principles.
10. Consideration of this exemption involves two stages. First, confirmation or denial in response to the request must involve a disclosure of personal data and, secondly, that disclosure must be in breach of at least one of the data protection principles.
11. Covering first whether confirmation or denial in response to the complainant's request would involve a disclosure of personal data, the definition of personal data is given in section 1(1) of the DPA:

*"personal data' means data which relates 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".*

12. The Commissioner considers it clear that confirmation or denial in response to this request would disclose information that both identifies and relates to the individual named in the request. That information would, therefore, constitute personal data according to the definition given in section 1(1) of the DPA.
13. The complainant argued that, as any correspondence falling within the scope of the request would relate to that individual in her professional capacity, the confirmation or denial would not involve a disclosure of personal data. However, the question here is only whether confirmation or denial in response to the request would involve disclosure of information that identifies and relates to that individual. The Commissioner's view is that it would, albeit that this personal data would relate to the data subject in her professional capacity.
14. The next step is to consider whether disclosure of that personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on the first data protection principle, which states that personal data shall be processed fairly and lawfully. In particular, the focus here is on whether disclosure would be, in general, fair to the data subject.
15. In forming a conclusion on this point the Commissioner has taken into account the reasonable expectations of the data subject and what consequences disclosure may have. He has also considered what legitimate public interest there may be in disclosure of the information in question.
16. Covering first the reasonable expectations of the data subject, as mentioned above the personal data disclosed through confirmation or denial would relate to the data subject in her professional capacity. The general approach of the Commissioner is that it will be less likely to be unfair to disclose information relating to an individual in a professional capacity than it would be in relation to information concerning an individual's private life. The likelihood of disclosure will generally increase where the relevant information relates to a publicly funded role they fulfilled at the time the information was recorded.

17. The Home Office did not directly dispute that the confirmation or denial would relate to the data subject in her professional capacity, but it did suggest that the data subject being employed by her husband meant that it was difficult to separate the data subject's professional and personal roles. The Commissioner does not agree; his view is that writing to the Home Office in her capacity as part of the staff of an MP would clearly be work undertaken in her professional capacity. That the MP in question is her husband is not relevant. In any event, if it was the case that her salaried role in her husband's office was not clearly defined as personal or professional, this would raise serious questions over whether it was appropriate for her to receive a publicly funded salary for that role and this would add to the public interest in disclosure covered below.
18. The Commissioner is also of the view that the loss of privacy through disclosure of the confirmation or denial would be minimal. The question here is only if it should be stated whether the named individual has written to the Home Office in her professional capacity. The possibility of disclosure of the content of any information that is held is not at issue. Given that this information relates to this individual acting in a professional and publicly funded role, and that the Commissioner's view is that any loss of privacy through confirmation or denial would be minimal, he believes that the data subject could reasonably hold only a very limited expectation that this information would not be disclosed.
19. As to the consequences of disclosure upon the individual named in the request, the question here is whether disclosure would be likely to result in damage and distress to that individual. On this point, the Commissioner accepts that some minor distress may occur through disclosure contrary to the very limited expectation of confidentiality referred to above. He does not, however, believe that any more material damage would be likely to occur.
20. The next step is to consider whether there would be any legitimate public interest in the disclosure of this information. Whilst section 40(5) is an absolute exemption and not qualified by the public interest, the public interest is relevant here as it is necessary for there to be a legitimate public interest in order for disclosure to be compliant with the DPA.
21. The issue of how MPs spend the public funds allocated to them has been a matter of great controversy in recent times, and brief research reveals that the particular issue of MPs employing family members has been the

subject of considerable disquiet. This has been the subject of much media coverage and a call from the Committee on Standards in Public Life for this practice to end<sup>1</sup>.

22. Given that the employment of family members at public expense by MPs is a matter of such controversy, the Commissioner believes that there is a legitimate public interest in disclosure of information on this subject, where this can be accomplished with a minimal loss of privacy to any individual. This public interest extends to the confirmation or denial in question in this case.
23. For disclosure to be in line with the first data protection principle, disclosure must be *necessary* in order for the legitimate interests identified above to be satisfied. This is required by Schedule 2 Condition 6 of the DPA. The Commissioner's published guidance<sup>2</sup> on this matter states that disclosure should be necessary in order to satisfy a pressing social need. It also states that:

*"...the general need for transparency regarding public bodies may constitute a sufficiently 'pressing social need'".*
24. In this case, as well as the general need for transparency, the Commissioner is of the view that there is a specific need for transparency in relation to this confirmation or denial for the same reasons as referred to previously when covering the public interest.
25. A second issue that must be addressed when considering necessity is whether the information may already be available elsewhere. In this case the Commissioner relies on the refusal of the Home Office to disclose the confirmation or denial as evidence that it is not available elsewhere.
26. For the first data protection principle to be satisfied, disclosure must be lawful, as well as fair. The approach of the Commissioner to the issue of lawfulness under the first data protection principle is that he will find that disclosure would be lawful unless the public authority has advanced

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/336903/MP\\_expenses\\_main\\_report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336903/MP_expenses_main_report.pdf) (page 56)

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[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf](http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf)

convincing arguments as to why disclosure would be unlawful. In this case the Home Office has advanced no arguments on the issue of lawfulness and the Commissioner has no reason to believe that disclosure would not be lawful.

27. The Commissioner has found that disclosure of the confirmation or denial would be both fair and lawful and, therefore, would satisfy the first data protection principle. As there would be no breach of the first data protection principle through the disclosure of this confirmation or denial, the overall conclusion of the Commissioner is that the exemption provided by section 40(5) is not engaged. At paragraph 3 above, the Home Office is now required to write to the complainant with confirmation or denial on whether the requested information is held.

## Right of appeal

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28. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

29. 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.
30. 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 .....**

**Gerrard Tracey  
Principal Adviser  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
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SK9 5AF**