

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 October 2017

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

Decision (including any steps ordered)

1. The complainant requested information relating to Border Force disciplinary matters including the number of Border Force Officials dismissed and the number disciplined, within a specified timeframe, for committing a criminal offence while on duty.
2. The Home Office provided some information but refused to provide the remainder citing section 40(2) (personal information) of the FOIA.
3. The Commissioner's decision is that the Home Office incorrectly applied the exemption for personal data at section 40(2) of the FOIA as the withheld information is sufficiently anonymised to take it out of the definition of personal data. The Commissioner requires the Home Office to disclose the withheld information.
4. The Home Office must take this step 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

5. On 5 June 2016, the complainant wrote to the Home Office using the 'whatdotheyknow' website and requested information in the following terms¹:
 - "(a) please provide the full content of all policies, procedures, manuals, Operating Procedures (or similar) relating to the disciplinary process for Border Force officers*
 - (b) please provide, per year from 2012 to 2016, the number of Border Force officials who have been dismissed having committed a criminal offence (e.g theft) while on duty.*
 - (c) please provide, per year from 2012 to 2016, the number of Border Force officials who have been disciplined (other than by way of dismissal) having committed a criminal offence (e.g theft) while on duty".*
6. Following the issuing of a Decision Notice requiring the Home Office to respond, (case reference FS50640452²), the Home Office responded on 9 November 2016. It provided information within the scope of part (a) of the request but refused to provide the information requested in parts (b) and (c). It cited the section 40(2) exemption (personal information) as its basis for doing so.
7. On 23 November 2016, the complainant requested an internal review of the Home Office's handling of parts (b) and (c) of the request.
8. The Home Office acknowledged the request for internal review on 24 November 2016. It told the complainant that it aimed to respond by 22 December 2016.
9. In the absence of a response, the complainant wrote to the Home Office again on 27 December 2016.

¹ https://www.whatdotheyknow.com/request/border_force_disciplinary_matter

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1625112/fs50640452.pdf>

Scope of the case

10. The complainant contacted the Commissioner on 26 January 2017 to complain about the way his request for information had been handled.
11. The Commissioner wrote to both parties on 28 March 2017 regarding the Home Office's failure to respond to the request for review.
12. The complainant contacted the Commissioner again on 6 May 2017 confirming that, despite her intervention, no response had been received from the Home Office to his request for a review of its handling of parts (b) and (c) of the request.
13. In the circumstances, the Commissioner used her discretion to investigate the case without an internal review.
14. The complainant told the Commissioner that, in his view, the Home Office's general handling of this request was "*utterly appalling*" and that the level of delay "*has been utterly shameful*".
15. During the course of the Commissioner's investigation, the Home Office confirmed that it held information within the scope of parts (b) and (c) of the request but that it was exempt from disclosure under section 40(2) of the FOI Act by virtue of section 40(3)(a)(i).
16. It told the Commissioner that, having been reminded by the complainant that he had not received a response to his request for a review, a final response was sent to him on 24 January 2017 upholding its position. It also told the Commissioner:

"However, it appears that [the complainant]'s email address was incorrectly typed; which explains why he did not receive it and I apologise for this oversight and for the inconvenience that it has caused".
17. The analysis below considers the Home Office's application of section 40(2) of the FOIA to the withheld information. That information comprises the number of Border Force officials dismissed or disciplined having committed a criminal offence, such as theft, while on duty, broken down per year from 2012 to 2016.
18. The Commissioner has also considered the timeliness of the internal review in 'Other matter's' below.

Reasons for decision

Section 40 (personal information)

19. Section 40(2) of the 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(3) or 40(4) is satisfied.
20. In this case, the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (DPA).
21. The first step for the Commissioner to determine is whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 cannot apply.
22. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

Is the information personal data?

23. The definition of personal data is set out in section 1 of the DPA. Section 1 defines personal data 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."

24. 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 or has them as its main focus.
25. From the definition above it follows that information, or a combination of information, that does not relate to and identify an individual, is not personal data.

26. In its correspondence of 24 January 2017, the Home Office told the complainant :

"The Department's position is that the information held, which relates to parts 2 and 3 of your request, concerns a very low number of Border Force officials and its disclosure carries a non-negligible risk that individuals could be identified".

27. During the course of the Commissioner's investigation the Home Office confirmed its view that disclosure in this case carries a 'non-negligible' risk that individuals could be identified.
28. The Home Office also confirmed that it considered that the information comprises personal information and that disclosure would contravene the first principle because it would not be fair to the Border Force individuals concerned.
29. Furthermore, it argued that, given that the requested information relates to individuals who have committed a criminal offence, it constitutes sensitive personal data as defined in section 2 of the DPA.
30. The Commissioner is satisfied that information about a person's commission of a criminal offence undoubtedly relates to them. However, she initially needs to establish whether the withheld information identifies any individual.
31. The Home Office put forward its arguments for refusing to provide the requested information in its submission to the Commissioner. For example, regarding the risk of an individual being identified from the requested information, it told the Commissioner:

"We acknowledge that staff may have left Border Force during that period for a variety of reasons, such as transferring to another department or retirement; however, to provide the number of officials who were dismissed or disciplined, might lead someone to an incorrect conclusion, in terms of guessing who those individuals were".

32. In support of its view that disclosing the requested numbers may lead to the identification of those concerned, the Home Office argued that certain information – including more granular information not within the scope of the request in this case – could be used to build up a picture. In that respect, the Home Office told the Commissioner:

"We consider that a motivated individual could use this information together with other information to identify individuals".

33. 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 the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of re-identification of an individual from information which, on the face of it, appears truly anonymised.

34. The ICO's Code of Practice on Anonymisation³ 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".

35. In summary, the motivated intruder test is that if the risk of identification is *reasonably likely* the information should be regarded as personal data.
36. The requested information in this case comprises numbers, broken down by year, of Border Force officials who have been dismissed or disciplined having committed a criminal offence while on duty.
37. With due regard to the wording of the request, the Commissioner is mindful of both the timeframe and the context of the request. In that respect she asked the Home Office to provide her with an indication of the number of individuals employed as Border Force officials in each of the years specified in the request. The Home Office estimated the number to be in the region of 7,500 for each of those years.
38. Having viewed the withheld information, the Commissioner accepts that the numbers within the scope of the request are low. However, even where the number may be low, the Commissioner does not consider that this in itself means that the information is personal data, or in this case sensitive personal data.
39. She recognises that Border Force numbers vary due to staff turnover. She also recognises that while staff turnover may be as a result of dismissal, it is more likely to be for other reasons including, for example, retirement and resignation. Furthermore, the request does not stipulate any particular location and the Border Force's website⁴ explains

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

⁴ <https://www.gov.uk/government/organisations/border-force/about>

that its officers: "work at 140 sea and air ports across the UK and overseas" which further reduces any possibility of re-identification.

40. In light of the above, and having considered the withheld information, the Commissioner could not easily establish how an individual who had left having been dismissed for having committed a criminal offence while on duty – as opposed to one who had left the Border Force for other reasons - could be identified from the withheld information.
41. Similarly, she recognises that there may be reasons, other than the commission of a criminal offence while on duty, that would cause a Border Force official to be disciplined. Again, having considered the withheld information and the Home Office's arguments, the Commissioner could not easily establish how a Border Force official who had been disciplined as a result of the commission of a criminal offence – as opposed to another reason - could be identified from the withheld information.
42. Consequently, she has decided that the withheld information does not constitute personal data and that the exemption in section 40(2) is not applicable.

Other matters

43. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA. However, the Commissioner has issued guidance in which she has stated that in her view internal reviews should take no longer than 20 working days to complete, and even in exceptional circumstances the total time taken should not exceed 40 working days.
44. In this case, the Home Office told the Commissioner:

"As to the overall delay in providing a response to the internal review request, while we do strive to answer the majority of requests within 20 working days, a response was sent (albeit not received) within 40 working days; which is within our parameters for complex cases".
45. Given the Home Office's initial poor handling of the request necessitating her intervention, the Commissioner considers that it would have been good practice for the Home Office to check that its internal review response was successfully received by the complainant.

46. In the circumstances, she finds that the internal review was not completed in accordance with her guidance.

Right of appeal

47. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

48. 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.
49. 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

Jon Manners
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