

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 February 2019

Public Authority: The Foreign and Commonwealth Office

Address: King Charles Street

London

SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted a three part request to the Foreign and Commonwealth Office (FCO) seeking information about a British national being held in Bangladesh. The FCO provided some information falling within the scope of part 1 of the request but sought to withhold the further information it held on the basis of section 40(2) (personal data) of FOIA. With regard to parts 2 and 3 of the request the FCO refused to confirm or deny whether it held any information on the basis of section 40(5) of FOIA. The Commissioner has concluded that the FCO can rely on sections 40(2) and 40(5) in the manner in which it has. However, she has also concluded that the FCO breached section 17(1) by failing to issue its refusal notice within 20 working days of the request.

Request and response

2. The complainant submitted the following request to the FCO on 10 April 2018:

'1. Please provide the dates on which the foreign office or the high commission has communicated with the Bangladeshi authorities on the case of Yasin Talukder?

2. Do the British government have evidence/intelligence that Yasin Talukder is still alive?

3. Do the British government have evidence that Yasin Talukder is being held by the Bangladeshi authorities?'

3. The FCO responded to the request on 7 August 2018 and refused to confirm or deny whether it held any information on the basis of section 40(5) of FOIA.
4. The complainant contacted the FCO on 6 September 2018 and asked it to undertake an internal review into this decision.
5. The FCO informed him of the outcome of the internal review on 5 November 2018. The review upheld the decision to apply section 40(5) of FOIA.

Scope of the case

6. The complainant first contacted the Commissioner on 29 July 2018 in order to complain about the FCO's failure to respond to his request. Following the FCO's response, and its completion of the internal review, the complainant explained to the Commissioner that he was dissatisfied with the FCO's handling of his request. More specifically, he argued that the information he had requested should be disclosed under FOIA and furthermore he was unhappy with the length of time it took the FCO to process this request.
7. During the course of the Commissioner's investigation of this complaint, the FCO explained to her that it wished to modify its response to the request. It explained that it was now prepared to confirm that it held information falling within the scope of part 1 of the request. More specifically, the FCO was content to confirm that 'Mr Talukder's case was raised by the then Minister of State for Foreign and Commonwealth Affairs during a meeting with the Bangladeshi Foreign Minister in Dhaka on 3 March 2017'.¹ However, the FCO considered that any further information it held falling within the scope of this request was exempt from disclosure on the basis of section 40(2) of FOIA. With regard to parts 2 and 3 of the request, it maintained its position to refuse to confirm or deny whether it held any information falling within the scope of these parts of the request on the basis of section 40(5) of FOIA.
8. Therefore, the Commissioner has considered whether the FCO is entitled to rely on these exemptions in the manner in which it has. In relation to this complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: section

¹ The Commissioner notes that this confirms the response previously given in a response to this Parliamentary Question - <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-03-13/67531>

1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.

9. Therefore, in relation to part 1 of the request the Commissioner has simply considered whether the FCO is entitled to reply on section 40(2) of FOIA to refuse to disclose the dates on which it has communicated with the Bangladeshi authorities on the case of Yasin Talukder. However, in relation to parts 2 and 3 of the request the Commissioner has only considered whether on the basis of section 40(5) the FCO is entitled to refuse to confirm or deny whether it holds information falling within the scope of these parts of the request. The Commissioner has not considered whether the requested information falling within the scope of parts 2 and 3 of the request – if held – should be disclosed.

Reasons for decision

Section 40 – personal information

Part 1 of the request

10. As the FCO's refusal of the request was after 25 May 2018, the date the new Data Protection Act 2018 (DPA 2018) and General Data Protection Regulation (GDPR) came into force, the Commissioner considers that the DPA 2018/GDPR applies.
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(3) or 40(4) is satisfied.
12. In this case the relevant condition is contained in section 40(3A)(a).² This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data set out in Article 5 of the GDPR ('the DP principles').
13. The first step for the Commissioner is to determine whether the information falling within the first part of the request constitutes

² As amended by Schedule 19 Paragraph 58(3) of the DPA 2018

personal data as defined by the DPA 2018. If it is not personal data then section 40 FOIA cannot apply.

14. 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 DP principles.

Is the information falling within the scope of part 1 of the request personal data?

15. Section 3(2) of the DPA 2018 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. The complainant argued that the information he had requested from the FCO could not be considered to be Mr Talukder’s personal data. However, the Commissioner is satisfied that the dates on which the FCO has communicated with the Bangladeshi authorities about Mr Talukder’s detention does constitute his personal data as such information clearly relates to him and is of biographical significance to him.
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) 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 (i.e. would meet one of the lawful bases listed in Article 6(1) GDPR), fair, and transparent.

Lawful processing: Article 6(1)(f) GDPR

24. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases listed in the Article applies.

25. The Commissioner considers that the lawful basis most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

"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".³

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

³ 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 2018) provides that:- "In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second subparagraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

- 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.
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 to the public 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. The complainant explained that the purpose of his request was to establish whether the FCO was raising Mr Talukder’s case with the Bangladeshi authorities or not. The complainant argued that if the FCO responded to his request it could reassure the public that his case was being addressed. The complainant also argued that Mr Talukder’s case was identical to that of Nazanin Zaghari Ratcliffe. He noted that during Prime Minister’s Questions on 5 September 2018 the Prime Minister offered answers to questions relating to when Nazanin Zaghari Ratcliffe’s case had been raised with Iranian officials and President Rouhani. He argued that there was therefore a clear precedent in answering basic questions about British citizens in danger.
31. The Commissioner accepts that there is a legitimate interest in the public knowing what action the British government is taking to assist those being detained abroad, particularly in cases where there is some controversy or confusion as to nature of their detention which, at least according to this report⁴, appears the case here. Disclosure of a list of

⁴ <https://www.amnesty.org/download/Documents/ASA1353592016ENGLISH.pdf>

dates, beyond the date which the FCO has now disclosed, on which the FCO had communicated with the Bangladeshi authorities could serve this legitimate interest.

Is disclosure necessary?

32. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so disclosure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
33. The Commissioner is satisfied that there is no other obvious way in which this legitimate aim could be addressed other than disclosure of the withheld information and therefore disclosure of the information is necessary.

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

34. 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.
35. The FCO acknowledged that there is a general interest in transparency regarding the support it gives to British nationals overseas. However, in its view that interest is outweighed by the rights and freedoms of the data subject in this case. The FCO explained that where it received requests for information about consular cases it needed to consider the impact that the release of details about the case would have on its outcome, and, by definition, on the individual concerned. The FCO explained that it takes a number of factors into consideration, including whether it had consent from the individual to share their information with others, and whether releasing information risks hindering its efforts to support that individual.
36. Regarding the complainant's comments on the case of Ms Zaghari Ratcliffe, the FCO acknowledged that the British government had made a number of public statements about discussions with the Iranian authorities in that regard. However, the FCO argued that it did not follow that it should do so here; rather the FCO explained that it considered requests for information regarding consular assistance given to specific individuals on a case by case basis. The FCO explained that

when responding to FOI requests on Ms Zaghari Ratcliffe's case, it had adopted a similar approach to the one outlined above, taking into account any information that had already been made public by, or with the consent of, the data subject.

37. The Commissioner recognises that the FCO has already confirmed one particular date on which Mr Talukder's case was raised, ie in response to the Parliamentary Question cited above and now confirmed in response to this FOIA request. However, the Commissioner accepts that there is distinction between the FCO, confirming one particular date on which a consular case was discussed with another state, and the FCO revealing the list of *all* dates on which it was discussed. Taking into account the FCO's approach to such cases, she accepts that an individual may expect the FCO to reveal some limited details of the British government's discussions with another state, but this would not usually extend to the disclosure of the dates of all and any such contact. Consequently, the Commissioner is persuaded that Mr Talukder is unlikely to expect the FCO to disclose a list of all dates on which it has raised his case. With regard to the harm that such a disclosure would have, the Commissioner considers that disclosure of the withheld information, given Mr Talukder's situation, is arguably unlikely to have a significant infringement on his rights and freedoms in comparison to his incarceration. Nevertheless, the Commissioner still accepts that disclosure of the withheld information could, to some limited degree, infringe upon his privacy. The Commissioner also notes the FCO's comments about disclosure of information about consular cases having the potential to undermine efforts in supporting the individual.
38. 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, and that the disclosure of the information falling within the scope of part 1 of the request would not be lawful.

Fairness

39. The Commissioner has therefore concluded that disclosure would not meet the condition under Article 6(1)(f) and would therefore be unlawful.
40. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair and transparent.

Parts 2 and 3 of the request

41. 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 DP principles to provide that confirmation or denial.
42. Therefore, for the FCO 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 parts 2 and 3 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 principles.

Would the confirmation or denial that the information falling within the scope of parts 2 and 3 of the request is held constitute the disclosure of a third party's personal data?

43. The Commissioner is satisfied that this criterion is met. This is because if the FCO confirmed whether it held information falling within the scope of parts 2 and 3 of the request it would reveal whether Mr Talukder was still alive and whether he was being held by the Bangladeshi authorities. In the context of this request the Commissioner is satisfied that this would clearly tell you something of biographical significance about him.

Would confirming whether or not information falling within the scope of parts 2 and 3 of the request is held contravene one of the data protection principles?

44. As explained above article 5(1)(a) GDPR states that:-

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

45. As also noted above, 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 – or in terms of parts 2 and 3 of the request the FCO can only confirm whether or not it holds the requested information - if to do so would be lawful (i.e. it would meet one of the lawful bases of lawful processing listed in Article 6(1) GDPR), be fair, and be transparent.

Lawful processing: Article 6(1)(f) GDPR

46. As explained above, Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if

and to the extent that at least one of the " conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

47. Again, as with part 1 of the request, for parts 2 and 3 of the request the Commissioner considers the most applicable condition to be Article 6(1)(f) GDPR. Therefore the Commissioner has to consider the same three part test as she did with regard to part 1 of the request, namely (i) the legitimate interest test; (ii) necessity test; and (iii) the balancing test.

Legitimate interests

48. For the reasons discussed above, the Commissioner accepts that there is a legitimate interest in the public knowing what action the British government is taking in respect of Mr Talukder's case and this extends to the FCO confirming whether it holds any information sought by parts 2 and 3 of the request.

Is confirming whether or not the requested information is held necessary?

49. The Commissioner is also satisfied that confirming or denying whether the requested information is held is necessary in order to serve this particular interest.

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

50. The FCO argued that confirming or denying whether it held this information would release very specific information about Mr Talukder into the public domain. Again, it acknowledged the general interest in transparency, but it considered that the arguments it set out in relation to part 1 of the request were also relevant to parts 2 and 3 and it was of view that rights of the data subject outweigh any general interest in confirming or denying whether the requested information is held.
51. Furthermore, the FCO argued that confirming whether or not it held information would have implications for future requests regarding consular assistance cases where the circumstances of the individual are not in the public domain. If, for example, the FCO confirmed that it had evidence that an individual was still alive in one case, then refused to confirm or deny such information in a future case, the latter could be interpreted as meaning the FCO had evidence that that the individual was no longer alive. The FCO argued that this could cause unwarranted speculation and distress to the family of the individual concerned. The FCO acknowledged that it could not adopt a blanket approach to requests, and that this risk is a more speculative one that touches on

the interests of other, as yet unidentified, individuals, it argued that nevertheless in its view it is a relevant factor when considering the legitimacy of any other interests in disclosure. The FCO therefore considered that it was important to use a neither confirm nor deny (NCND) response consistently for requests for such specific and sensitive information.

52. As noted above, the Commissioner recognises that there is a legitimate interest in the disclosure of information concerning Mr Talukder's case. However, she agrees with the FCO's view that if it confirmed or denied whether it held information falling within the scope of parts 2 and 3 of the request this would reveal very specific personal data about him. Even taking into account the information concerning Mr Talukder that is already in the public domain, the Commissioner is satisfied that if the FCO confirmed whether or not it held this information this would have a considerable infringement into his privacy. Furthermore, the Commissioner also agrees with the FCO's point that consideration has to be given to applying NCND exemptions on a consistent basis.
53. 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, and that confirming whether or not the FCO holds information falling within the scope of parts 2 and 3 of the request would not be lawful.

Fairness

54. The Commissioner concludes that confirming or denying would not meet the condition under Article 6(1)(f) and would therefore be unlawful.
55. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that she does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and transparent. The Commissioner has therefore decided that the FCO was entitled to refuse to confirm whether or not it holds information falling within the scope of parts 2 and 3 of the request on the basis of section 40(5)(B)(a)(i) of FOIA.

Section 17(1) – refusal of request

56. Section 17(1) specifies that a refusal notice must be provided no later than 20 working days after the date on which the request was received.
57. In this case the complainant submitted his request on 10 April 2018 but the FCO did not issue its refusal notice until 7 August 2018, significantly outside of 20 working days, and therefore breached section 17(1).

Right of appeal

58. 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

59. 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.
60. 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

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