

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 14 October 2019

**Public Authority:** The Foreign and Commonwealth Office

**Address:** King Charles Street  
London  
SW1A 2AH

### Decision (including any steps ordered)

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1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) seeking the number of British nationals assisted by the FCO with any sexual crimes in various Caribbean countries. For each incident, the complainant also sought the date it took place, the nature of the incident, the specific location of the incident (eg inside a resort), as well as the age and sex of each victim. The FCO directed the complainant to online data it had published about the number of individuals it had assisted in 2018. However, it argued that the remaining information falling within the scope of his request was exempt from disclosure on the basis of section 40(2) (personal data) of FOIA.
2. The Commissioner has concluded that the FCO is entitled to rely on section 40(2) of FOIA to withhold this information.
3. The Commissioner does not require the FCO to take any steps as a result of this finding.

### Request and response

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4. The complainant submitted the following request to the FCO on 23 January 2019:

*'I would like to request information on the number of British nationals assisted by the FCO with any sexual crimes (sexual assault, rape, inappropriate touching etc) from the start of 2018 until the date this request is received in the following Caribbean countries.'*

*Jamaica, St Lucia, Antigua, Bahamas, Grenada, Barbados, Cuba, Tobago, Dominican Republic, Trinidad and Tobago*

*For each incident can you provide the following:*

*Date of incident*

*Nature of the incident*

*The specific location of the incident eg inside a resort*

*The age and sex of each victim'*

5. The FCO responded on 18 February 2019 and explained that information relevant to the request was available online and directed the complainant to statistics regarding sexual assault cases.<sup>1</sup> The FCO explained that such information was considered to be exempt from disclosure on the basis of section 21 (reasonably accessible to the requester) of FOIA. However, the FCO explained that it had withheld a breakdown of numbers which were equal or lower to five on the basis of section 40(2) (personal data) of FOIA.
6. The complainant contacted the FCO on the same day and asked it to conduct an internal review of this refusal. He argued that disclosure of the information he had requested would not lead to any victims being identified.
7. The FCO informed him of the outcome of the internal review on 27 February 2019. The FCO argued that even if the names of the victims in question were not disclosed, the withheld information could still be used, along with information from a variety of other sources, to identify the victims. The FCO therefore remained of the view that the withheld remaining information that fell within the scope of his request was exempt from disclosure on the basis of section 40(2) of FOIA because it would lead to the victims being identified and this would breach the Data Protection Act 2018 (DPA).

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<sup>1</sup> <https://www.gov.uk/government/publications/foreign-commonwealth-office-consular-data-2018>

## Scope of the case

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8. The complainant contacted the Commissioner on 29 April 2019 in order to complain about the FCO's handling of his request. He remained of the view that the withheld information could be disclosed without any of the victims being identified. In particular he argued that the location of each incident could be disclosed without any risk of identification. The complainant explained that by 'location' he was seeking information as specific as possible, eg the name of particular resort and where in the building it took place, eg in a bedroom. The complainant also argued that there was a significant public interest in the disclosure of this information. The complainant's submissions to support these arguments are considered below.

## Reasons for decision

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### Section 40 - personal information

9. 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.
10. In this case the relevant condition is contained in section 40(3A)(a)<sup>2</sup>. 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 ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
11. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by DPA. If it is not personal data then section 40 of FOIA cannot apply.
12. 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.

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<sup>2</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

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

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

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

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

15. 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.

16. 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.

17. The Commissioner's guidance on 'What is personal data?'<sup>3</sup> offers further guidance on circumstances such as this case where a living individual may be identified indirectly if information is processed. That is to say, if the FCO processed the withheld information, ie by disclosing it under FOIA, could the victims still be identifiable from this information?

18. In particular the guidance explains that:

*'Sometimes, whether someone can be identified may depend on who may have access to the information and any other information that can be combined with it.'*

*It's important to be aware that you may hold information, which when combined with other information held outside of your organisation, could lead to an individual being indirectly identified or identifiable.'*

19. And the guidance gives the following example where these considerations are relevant:

*'A public authority releases information about complaints in response to a request under Freedom of Information Act 2000. It does not reveal the names or addresses of the complainants, but other information is*

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<sup>3</sup> <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/what-is-personal-data/>

*in the public domain that can easily be used to match the identity of those complainants.'*

20. The Commissioner's guidance also explains that:

*'There will be circumstances where it remains uncertain whether particular data is personal data. If this is the case we consider that, as a matter of good practice, you should still treat the information collected as though it is personal data. You still need to protect information because of the risk that otherwise someone may, with greater or lesser certainty, be able to infer something about a particular individual. For example if it was published and combined with information held by other organisations.'*

21. In its submissions to the Commissioner the FCO argued that the countries which are the focus of the request are small and have extremely small numbers of cases. It argued that release of the requested information could make it easier for a journalist or member of the public to use local online sources such as newspaper articles and police or court records in the public domain to search for the person's identity. The FCO noted that it was not aware as to whether the countries involved have the same level of protection of personal information as the UK.
22. The FCO argued that there is also the possibility that if it provided the additional information it would be possible for someone to seek the identity of a victim by questioning relevant locals such as hotel or hospital staff. The FCO suggested that this is a real risk, given that the complainant asked for so much detail in terms of age, sex and exact location of the crime. It suggested that each of these pieces of information increases the likelihood of identification and when used together would increase it even further. The FCO emphasised that in its view disclosure of only the location of the attack would still pose a great risk of identification in small communities with extremely low numbers of such cases.
23. The complainant disagrees that such identification is possible. In support of this he explained that he was a journalist and he was aware of the problem of victims of crime potentially be identified following the publication of news stories and he took considerable steps to ensure that this did not happen. The complainant explained the he was familiar with the law regarding reporting incidents of sexual assaults and would not break it in this case. He explained that in journalism this is called the 'jigsaw effect' where disparate pieces of information are enough that people can work out who the person is. He emphasised that he did not think that giving the location will identify anyone, especially if the FCO did not release the other parts of the information falling within the scope

of his request. Albeit, that the complainant explained that in his view all of the requested information could be disclosed without the victims being identified.

24. The Commissioner has considered the arguments made by both parties carefully. She acknowledges the complainant's point that he would not seek to identify any of the victims and would take steps to ensure that this did not happen as a result of his reporting. However, it must be remembered that disclosure of the information under FOIA constitutes the disclosure of information to the world at large. Therefore, if any third party – not simply a requester - could use the requested information, allied to other information, to identify an individual then the requested information constitutes personal data for the purposes of the DPA.
25. In the circumstances of this case the Commissioner is persuaded that disclosure of the withheld information could allow third parties to identify the victims via the methods set out by the FCO. Moreover, the Commissioner considers that disclosure of such information could also potentially result in the friends and families of the individuals concerned identifying them as victims. The Commissioner accepts that disclosure simply of the location of an attack is likely to reduce the chances of a victim being identified but in her opinion it does not eliminate it given the very small number of cases, the relatively small communities in which these attacks took place, and the fact that the request covers a relatively short period of time, ie just over 12 months. In reaching this finding the Commissioner accepts that there is some uncertainty as to whether disclosure of the withheld information would allow *all* of the victims to be identified. However, as her guidance notes, in cases where such uncertainty exists it is a matter of good practice to treat the information as personal data. The Commissioner considers this is an appropriate approach to take in the circumstances of this case given the nature of the information that is being requested and the risks to the individuals concerned if they were identified.
26. Therefore, the Commissioner is satisfied that the withheld information constitutes the personal data of the victims and falls within the definition of 'personal data' in section 3(2) of the DPA.
27. 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.
28. The most relevant DP principle in this case is principle (a).

## Would disclosure contravene principle (a)?

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

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

30. In the case of an 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.

31. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

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

32. 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>4</sup>.*

33. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under 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;

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<sup>4</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 GDPR would be contravened by the disclosure of information, Article 6(1) of the 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'.*



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

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

34. 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*

35. 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.
36. 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.
37. The complainant explained that an investigation in the US had looked into sexual assaults that had involved US tourists at holiday resorts in the Caribbean and that investigation had shown that the resorts involved were involved covering up these incidents.<sup>5</sup> In light of this investigation, the complainant explained that he had submitted the request in order to look into into sexual assaults happening to British tourists in resorts in the Caribbean. In particular, he explained that he needed to be provided with the location of the incident in order to examine the roles of the resorts where such assaults may have occurred. The complainant anticipated that disclosure of the withheld information could reveal a similar position to that identified in the US reporting and he argued that there was a consequently a clear legitimate interest in the disclosure of the withheld information.
38. In light of the complainant's submissions, the Commissioner accepts that there is legitimate interest in the disclosure of the requested information in order to inform the public about the crime rates and types of crime that British citizens have been the victims of whilst in the Caribbean.

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<sup>5</sup> <https://eu.freep.com/story/news/local/michigan/detroit/2018/10/30/jamaica-resorts-tripadvisor-sexual-assault/1520587002/>



*Is disclosure necessary?*

39. '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.
40. With regard to whether disclosure is necessary, the Commissioner notes that the consular data the FCO already publishes includes information about the number of victims of sexual assault by country for each calendar year, with any figures less than five being withheld. Consequently, there is some data already in the public domain relating to this subject matter. However, the Commissioner accepts that such information cannot be used to meet the legitimate interests identified above. Disclosure of the withheld information is therefore necessary in order for this aim to be met.

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

41. 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.
42. 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.
43. 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.

44. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
45. The FCO argued that consular customers have a high expectation that information relating to them will not be shared with third parties. It emphasised that the information falling within the scope of this request was extremely sensitive. The FCO explained that it strongly believed that disclosure of such data would have a particularly traumatic and potentially dangerous effect on the victims' physical and mental health and on their families. It explained that it did not consider it appropriate to seek consent from the victims of such crimes individually to ask if they would consider the release of their data. In any case, the FCO explained that it did not believe that the victims would agree to release of their data in order to comply with this request. The FCO argued that there were not strong and defensible reasons for releasing information that would risk revealing the identities of the victims of such crimes and believed it would be unfair to the victims and families to do so.
46. For the reasons identified above at paragraph 37, the complainant considers there to be a compelling legitimate interest in the disclosure of the withheld information.
47. Given the nature of the withheld information, and the circumstances which have led the FCO to hold such information, the Commissioner is satisfied that the individuals in question would have a very clear expectation that such information would not be placed into the public domain by the FCO. Again, given the nature of the information requested, the Commissioner shares the FCO's view that the disclosure of such information, which risks the individuals being identified as victims of sexual assault, would represent a significant invasion of their privacy and result in very considerable harm and distress to the individuals concerned. Whilst the Commissioner accepts that in light of the complainant's submissions that there is a legitimate interest in the disclosure of this information, in her view this is considerably outweighed by the legitimate interests of the victims of the assaults.
48. The Commissioner has therefore determined that there is insufficient legitimate interest to outweigh the data subjects' 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.
49. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

50. The Commissioner has therefore decided that the FCO was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

## Right of appeal

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51. 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@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)

52. 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.
53. 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 .....**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**