

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 27 August 2020

**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 from the Home Office about its contacts with The Queen's grandchildren, Zara Tindall MBE and Peter Phillips, about a named businessman.
2. The Home Office refused to confirm or deny holding information within the scope of the request.
3. The Commissioner's decision is that the Home Office was entitled to rely on section 40(5B) (personal information) of the FOIA to neither confirm nor deny holding the requested information.
4. The Commissioner requires no steps to be taken as a result of this decision.

#### Request and response

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5. On 16 August 2019, the complainant wrote to the Home Office and requested information in the following terms:

*"I would like to request the following information under the Freedom of Information Act and the Environmental Information Regulations.*

...

*1. Since 1 January 2018 have Zara Tindall and or Peter Phillips (acting together or as individuals) sent written correspondence and communications to The Secretary of State which in any way relates to the following.*

*(a) The [redacted] businessman [name redacted]. This correspondence and communications will include but not be limited to communications about his actual and proposed investments and his actual and proposed business activities in both the UK and abroad. It will also include but not be limited to his actual and proposed charity commitments in the UK and overseas. It will also include but not be limited to [name redacted]'s residency or amount of time spent in the UK; Please note that I am interested in all correspondence and communication irrespective of how it relates to [name redacted].*

*(b) The [redacted] owned by [name redacted]. This will include correspondence and communications about the company's actual and proposed business activities in the UK and abroad. Again I am interested in all correspondence and communication irrespective of how it relates to [redacted].*

*(c) Any other business which you know is owned by [name redacted].*

*2. If the answer to question one is yes can you please provide copies of this written correspondence and communication including any letters, faxes, emails (sent and received through private and official accounts/addresses) and any communications sent through encrypted messaging services.*

*3. Did The Secretary of State reply to this correspondence and communication.*

*4. If the answer to question three is yes can you please provide copies of this written correspondence and communication including any letters, faxes, emails (sent and received through private and official accounts/addresses) and any communications sent through encrypted messaging services".*

6. The Home Office responded on 16 September 2019. It refused to provide the requested information, citing section 12 (cost of compliance) of the FOIA.
7. Following an internal review, the Home Office wrote to the complainant on 18 February 2020. It upheld its original position, clarifying that it considered that section 12(2) of the FOIA applied.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 1 March 2020 to complain about the way his request for information had been handled.

9. He considered that the request could have been processed within the financial and time constraints laid down by the relevant access regimes. He was also dissatisfied with the length of time taken by the Home Office to conduct the internal review.
10. However, he told the Commissioner:

*"My primary concern is with the departments failure to provide the information I think it may hold rather than with the application of any particular exemption".*
11. He asked the Commissioner to determine if the requested information can be released:

*"... taking into account the presumption in favour of disclosure at the heart of both access regimes".*
12. The Commissioner wrote to both parties setting out the scope of her investigation. She noted that the complainant considered that the Home Office ignored that the request was made under both the FOIA and the EIR.
13. In her correspondence to the Home Office, the Commissioner explained that this was the opportunity to finalise its position and invited it to revisit the request. This was in accordance with her standard practice when writing to a public authority regarding the conduct of her investigation.
14. Having revisited its handling of the request, the Home Office notified both the complainant and the Commissioner that it considered that section 40(5) (personal information) of the FOIA applied in this case, rather than section 12.
15. With reference to the complainant's request that the matter be considered under both the FOIA and EIR, it told him:

*"The equivalent provision in the EIR is regulation 13(5A), because of the condition at regulation 13(5B)(a)(i)".*
16. The Commissioner accepts that a public authority has the right to claim an exemption or exception for the first time before the Commissioner or the Tribunal. The Commissioner does not have discretion as to whether or not to consider a late claim.
17. The complainant confirmed that he remained dissatisfied with the Home Office's handling of his request.

18. The analysis below considers whether the Home Office was entitled to neither confirm nor deny holding information within the scope of the request.

## Reasons for decision

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### *Section 40 - personal information*

19. Section 40(5B)(a)(i) of the FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
20. Therefore, for the Home Office to be entitled to rely on section 40(5B) of the FOIA to refuse to confirm or deny whether it holds information falling within the scope 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 data protection principles.

*Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?*

21. Section 3(2) of the DPA 2018 defines personal data as: -

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

22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
23. 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.
24. In this case, as the complainant clearly refers to named individuals in his request for information, the Commissioner is satisfied that the requested information, if held, would be those individuals personal data.
25. For the reasons set out above the Commissioner is satisfied that if the Home Office confirmed whether or not it held the requested information this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.

26. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent the Home Office from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
27. The Commissioner agrees that the most relevant data protection principle is principal (a).

*Would confirming whether or not the requested information is held contravene one of the data protection principles?*

28. 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"*

29. 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 as in this case the public authority 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 conditions of lawful processing listed in Article 6(1) GDPR), be fair, and be transparent.

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

30. 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.
31. The Commissioner considers that the condition 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"<sup>1</sup>.*

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<sup>1</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".*

32. 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: -

(i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

(ii) **Necessity test:** Whether confirmation as to whether the requested information is held (or not) 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.

33. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

*(i) Legitimate interests*

34. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

35. In the complainant's view, there are strong public interest grounds for disclosure by way of confirmation or denial. He considers that the public

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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 sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

has a right to know if Mrs Tindall or Mr Phillips has been lobbying on behalf of the businessman named in the request.

36. From the information the complainant has provided, the Commissioner is satisfied that the request was made in pursuit of a legitimate interest – namely to establish whether or not particular individuals had lobbied on behalf of a third party.

*(ii) Is confirming whether or not the requested information is held necessary?*

37. '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 confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
38. The Commissioner acknowledges that, in support of his complaint, the complainant referred to press reports linking the individuals named in the request.
39. However, she is not aware of anything in the public domain from the Home Office that verifies whether such ties were linked to written correspondence and/or communications sent by Mrs Tindall or Mr Phillips to the Secretary of State.
40. The Commissioner therefore considers that confirmation or denial would be necessary to satisfy the particular legitimate interests identified in this case.

*(iii) 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 confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
42. In that regard, the Home Office told the Commissioner:



*"We consider that we have a general duty to respect the data protection rights of individuals who might write to the Home Secretary".*

43. The Home Office told the Commissioner that it considered that people have a reasonable and legitimate expectation that information about whether or not they have written to the Home Secretary about a particular subject will not be disclosed to the world at large without their knowledge or consent.
44. In the circumstances of this case, it said:

*"This expectation is not removed because someone is prominent or well known, for example because they are members of the Royal Family".*
45. It confirmed that it had not sought consent in this case.
46. The Commissioner has taken into account that disclosure under FOIA, by way of confirmation or denial, is to the world at large. She has also taken into account the wording of the request and the breadth of the information requested.
47. The Commissioner considers that disclosing whether or not the requested information was held would reveal whether, during the timeframe specified in the request either, or both, of Mrs Tindall and Mr Phillips had sent relevant written correspondence or communications to the Secretary of State.
48. Furthermore, she considers that all three individuals named in the request are inextricably linked by virtue of the wording of the request.
49. It follows that disclosure, by way of confirmation or denial, would disclose the personal data of all three individuals named in the request. This is because all three data subjects are named and any confirmation or denial would necessarily say something about them personally as they are the focus of the request.
50. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedom, and that confirming whether or not the requested information is held would not be lawful.
51. The Commissioner has therefore decided that the Home Office was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5B)(a)(i) of the FOIA.

*Regulation 13*



52. The Commissioner accepts that the complainant asked the Home Office to consider his request under the EIR as well as the FOIA. However, taking into account the wording of the request, she is not satisfied that information within the scope of the request is self-evidently environmental. Nor has the complainant advanced any arguments in support of the requested correspondence being environmental information.
53. In the circumstances, and in light of her decision with regard to its application of section 40(5B), the Commissioner has not found it necessary to consider whether the Home Office was entitled to apply regulation 13 in this case.

## Other matters

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### *Internal review*

54. 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.
55. In this case, while the complainant requested an internal review on 17 September 2019, the Home Office did not provide the results of its internal review until 18 February 2020.
56. The Commissioner acknowledges that the Home Office told her:  
  
*"... we recognise that we need to improve our performance on internal reviews and we are actively considering ways in which to achieve this".*
57. The Commissioner expects the Home Office to ensure that the internal reviews it handles in the future adhere to the timescales she has set out in her guidance.

## Right of appeal

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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@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)

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 .....**

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