

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 October 2022

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

Decision (including any steps ordered)

1. The complainant submitted a request for information under FOIA to the Home Office on 27 September 2021. The request was for information provided to the Home Secretary to support statements made in specific press articles about the abuse of the Modern-Day Slavery system.
2. The Home Office provided an initial response to the request but withheld information that related to case studies provided, under Section 40 (personal information) of FOIA.
3. Following the involvement of the Information Commissioner, the public authority also confirmed it relied upon section 31 (law enforcement – the operation of immigration control) and section 35 (formulation of government policy).
4. The Commissioner's decision is that the Home Office was entitled to rely on section 40(2) of FOIA to withhold the information. As section 40(2) is engaged the Commissioner has not found it necessary to go on to consider section 31 or section 35 in this notice.
5. The Commissioner has found due to the delay in their initial response, the Home Office is in breach of section 10 of FOIA. The Commissioner does not require the Home Office to take any further steps in relation to this decision notice.

Request and Response

6. On 27 September 2021, the complainant made the following request under FOIA to the Home Office:

“Please provide the evidence given to the Home Secretary to which her statement in the Sun newspaper (<https://www.thesun.co.uk/news/14397127/u>) and via the Home Office website (<https://www.gov.uk/government/news/alarm>) relied on when asserting child rapists, those who posed a threat to national security, serious criminals and failed asylum seekers were abusing the Modern-Day Slavery System”.

7. The Home Office acknowledged receipt of the request on 27 September 2021, confirming a case worker had been allocated and they hoped to respond by 25 October 2021. It contacted the complainant again on 25 October 2021, indicating it required a further 20 days but was considering exemption under section 35 of FOIA.
8. The complainant contacted the Home Office on 23 November 2021 to request an internal review as they had not received a response to their request.
9. On 23 November 2021, the complainant also complained to the Information Commissioner's office about the Home Office's handling of the request for information.
10. The Home Office provided an initial response on 20 December 2021. It advised that some information was in the public domain and provided a link to the “New Plan for Immigration Policy Statement” on the government website. However, the Home Office stated that the information informing the plan was sensitive. It explained the information consisted of case studies that contained personal information which would identify individuals. The Home Office therefore withheld this information under section 40(2) of FOIA.
11. Following the involvement of the Information Commissioner's Office on 17 February 2022, the Home Office provided an internal review. The Home Office maintained its position in relation to the withheld information under section 40(2) of FOIA.

Scope of the case

12. The complainant contacted the Commissioner's office on 17 February 2022 to complain about the Home Office's handling of the request for information. They stated they remained dissatisfied following receipt of the internal review.
13. The Home Office issued an updated response to the complainant on 15 July 2022. It advised having reviewed the information, it had also applied two further exemptions, section 31, and section 35 of FOIA to the information.
14. The scope of this decision notice is to consider if section 40(2) was appropriately engaged to all the information withheld, as if this is the case, the Commissioner considers it is not necessary to consider the additional exemptions.

Reasons for decision

Section 40 (personal information)

15. 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.
16. In this case the relevant condition is contained in section 40(3A)(a)¹. 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 UK General Data Protection Regulation ('UK GDPR').
17. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then section 40 of FOIA cannot apply.
18. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of

¹ As amended by Schedule 19 Paragraph 58(3) DPA

that data would breach any of the DP principles Section 3(2) of the DPA defines personal data as:

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

Is the information personal data?

19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
20. 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.
21. 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.
22. The Home Office has confirmed that the information withheld relates to case studies provided by individuals to the Home Office. The case studies contain personal information and details of individuals.
23. In the circumstances of this case, having had sight of the withheld information, the Commissioner is satisfied that the information relates to individuals who have provided personal accounts to the Home Office. The case studies contain information that would make them identifiable if released to the world at large.
24. The Commissioner agrees with the Home Office that even if personal details were redacted, the accounts by their very nature relate to individual circumstances which could still make the person identifiable to those who may hold other information.
25. The Commissioner accepts that different members of the public may have different degrees of access to the 'other information' needed for identification to take place. 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 an individual, or individuals, but begins without any prior knowledge.
26. The ICO's Code of Practice on Anonymisation 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.

27. In summary, the motivated intruder test is that if the risk of identification is 'reasonably likely', the information should be regarded as personal data.
28. The Commissioner accepts there could be persons who could potentially gather additional information and knowledge, or who already hold some knowledge about the individuals that would make them identifiable.
29. 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.
30. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

32. 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.
33. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

34. 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"².

² Article 6(1) goes on to state that:-

35. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- a. **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - b. **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - c. **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
36. 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

37. 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.
38. 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.
39. The complainant has indicated they consider it is in the public interest for the information that supports the Home Secretary's statements in the newspapers to be released.

"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 UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".

40. The Commissioner accepts the complainant has a legitimate interest in obtaining the information.
41. The Home Office have acknowledged the legitimate interest in relation to the requested information in terms of transparency, however, do not consider this outweighs the need for privacy for those who have provided the case studies.

Is disclosure necessary?

42. '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.
43. The Commissioner is satisfied that disclosure of the requested information would be necessary to achieve the legitimate aims identified and that there are no less intrusive means of achieving these aims.

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

44. 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.
45. 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.
46. In the Commissioner's view, a key issue is whether the individual(s) concerned have a reasonable expectation 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.

47. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
48. The Home Office has provided withheld information to the Commissioner. The information is detailed and provides accounts of individuals who have been referred under the National Referral Mechanism due to allegations of Modern-Day Slavery.
49. It is the Commissioner's view that it is unlikely the individuals would have any expectation for information to be disclosed in a way that might make them identifiable. It is likely that such disclosure would cause them distress.
50. The Commissioner believes it is unlikely the individuals concerned would have any expectation for their data to be shared on a wider basis, particularly where other information could make their identity known.
51. The law provides that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate.
52. Whilst the Commissioner understands the complainant's need for obtaining this information, he is mindful that disclosure under the FOIA is disclosure to the world at large and not just to the requester.
53. The Commissioner therefore considers that disclosure of this information would be disproportionately intrusive to the data subjects in this situation and interference with their rights to privacy would not be proportionate.

Commissioner's conclusion

54. 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 in this case. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
55. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that it is not necessary to go on to separately consider whether disclosure would be fair or transparent.
56. The Commissioner has therefore decided that the Council was entitled to withhold the information under section 40(2) of FOIA by way of section 40(3A)(a).

Right of appeal

57. 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

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

58. 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.
59. 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

Phillip Angell
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