

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 18 April 2023

**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 relating to complaints by number and type at a specified property. The Home Office would neither confirm nor deny holding the information, citing section 38(2) (Health and safety) of FOIA.
2. The Commissioner's decision is that the Home Office was entitled to rely on section 38(2) to refuse to confirm or deny whether it holds any information falling within the scope of the request.
3. The Commissioner does not require the Home Office to take any steps as a result of this notice.

#### **Request and response**

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4. On 10 March 2022, the complainant wrote to the Home Office and requested information in the following terms:

"[Address redacted] is and [sic] HMO [house in multiple occupation] used to provide accommodation via SERCO [Science and Engineering Support Council] under the AASC Contract [Asylum Accommodation and Support Services Contracts].

Please provide anonymous details of the number and reason for calls to MIGRANT HELP regarding complaints about this property.

On a month-by-month basis, since the start of the current AASC contract and the 28/2/22, please provide:

A - total number of new housing complaints logged each month at this property

B - a breakdown of the above number by all types of complaint - for example (but not exclusively) damp, leak, broken heating, infestations,

C - total number of calls each month received in regard to housing complaints at this property (to include second or third calls to chase action on initial complaint)

D - total number of housing complaints resolved each month at this property and closed on MH system.

E - average time a housing complaint takes to be resolved at this property.”

5. The Home Office responded on 4 April 2022. It refused to confirm or deny that it held the requested information, citing section 38(2) of FOIA, the ‘neither confirm nor deny’ provision within the health and safety exemption.
6. The complainant requested an internal review on 10 April 2022. Following its internal review the Home Office wrote to the complainant, late, on 27 May 2022 upholding its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 30 October 2022 to complain about the way her request for information had been handled. She argued that she was only seeking numerical information for the vulnerable female asylum seekers she states are housed at the location, which she claims will demonstrate that the living conditions/environment are problematic.
8. The Commissioner has considered whether the Home Office was entitled to neither confirm nor deny that the requested information is held.

### **Reasons for decision**

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#### **Neither confirm nor deny (‘NCND’)**

9. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. This is commonly known as “the duty to confirm or deny”. However, there are exemptions to this duty.
10. Section 38(2) of FOIA excludes a public authority from complying with the duty where simply confirming or denying that it holds information has the potential to endanger the health or safety of any individual.

11. The Home Office has taken the position of neither confirming nor denying whether it holds the requested information by citing section 38(2) of FOIA. The issue that the Commissioner has to consider here is not the disclosure of any requested information that may be held; rather, it is whether or not the Home Office is entitled to NCND whether it holds the information requested by the complainant.
12. Put simply, in this case, the Commissioner must consider whether or not the Home Office is entitled to NCND by virtue of section 38(2) of FOIA, whether it holds any complaints records in respect of the named property where female asylum seekers may or may not be housed. A confirmation or denial would reveal whether the specified property is used to house asylum seekers. Whether or not the requested information is suitable for disclosure is a different matter, and not one that is considered in this decision notice.
13. The Commissioner does not know whether, as a matter of fact, the Home Office does or does not hold information falling within scope of the request. He does not consider it necessary to know this in order to reach a decision in this NCND case.

### **Section 38 – Health and safety**

14. Section 38(1) of FOIA states:

“Information is exempt information if its disclosure under this Act would, or would be likely to –

- a) endanger the physical or mental health of any individual, or
- b) endanger the safety of any individual.”

15. As set out above, section 38(2) provides an exemption from the duty to confirm or deny where doing so would, or would be likely to, have the effects mentioned in subsection 38(1).
16. The Commissioner’s guidance on section 38<sup>1</sup> states that the degree of endangerment involved must be considered and whether it is significant enough to engage the exemption. The guidance includes examples of the types of information that might pose a risk to an individual’s health and safety if disclosed, or if confirmation or denial is given, as in this case. The list includes the following:

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<sup>1</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-38-health-and-safety/>

“any plans or policies relating to the accommodation of individuals, or groups of individuals where disclosure could lead to them being threatened or harassed (eg asylum seekers, ex-offenders)”.

17. In its correspondence to the complainant, the Home Office recognised that:

“The primary issue in this case is whether the confirmation or denial that the information is held would or would be likely to endanger the physical or mental health or safety of any individual, not whether disclosure of the information itself (if held) would or would be likely to do so. It is not suggested that reporting the number and nature of housing complaints in respect of any premises used for asylum accommodation would endanger the physical or mental health, or the safety, of residents in such accommodation. The position, is that confirming or denying whether specified premises are used to house asylum seekers would be likely to do so.

Disclosure under the FOIA is in effect to the world at large. To confirm or deny whether the information is held would, in my view, confirm whether the address is used to provide asylum accommodation. This would, in turn, confirm that the Home Office houses asylum seekers in the specific accommodation. The Home Office does not make public the name or location of any premises where asylum seekers are accommodated, for the very good reason that this would be likely to attract attention from individuals or groups who are opposed to the provision of asylum accommodation or the asylum process in general. This could attract protests at the premises in question and there is a real and non-negligible risk that the physical or mental health of any asylum seekers living there would be endangered.”

18. In response to the Commissioner, the Home Office stated that to confirm or deny that the requested information is held would identify whether or not the named property is one that is used to house asylum seekers. It said that asylum seekers, and immigration more broadly is:

“a highly contentious issue which elicits strong views, and some asylum seekers have been, and continue to be, targeted for abuse and intimidation”.

19. The Home Office submitted that speculation about possible asylum seeker locations has led to the targeting of properties by those prepared

to break the law, intimidate, abuse and cause criminal damage. It gave an example of such an incident in February 2023 within a hotel<sup>2</sup>.

20. The Home Office said a similar matter had been considered by the Commissioner in a previous published decision notice<sup>3</sup> involving an asylum seeker related request in which the Home Office had relied on section 38(2) of FOIA, a position which was upheld. The Home Office argued that the current case poses a similar risk.
21. Whilst previous decision notices are not binding upon the Commissioner, and he considers each case on its individual merits, the Commissioner has reviewed the content of the previous notice and accepts that the issues at stake are indeed similar.
22. The Home Office advised the Commissioner that it wished to rely on the higher level prejudice, ie that the endangerment "would" occur should it issue a confirmation or denial in this case.
23. The Commissioner has considered the Home Office's arguments carefully and he agrees that section 38(2) is engaged. He must next determine whether the associated public interest test favours confirming or denying that the requested information is held.

### **Public interest test**

24. The Commissioner notes that the complainant has concerns about the condition of the named property. He has taken into account that there is a public interest in the Home Office being transparent in its approach to accommodating asylum seekers. The Home Office has told the Commissioner it recognises this public interest and therefore proactively publishes some data on asylum and resettlement<sup>4</sup>, together with costs<sup>5</sup>.
25. Given that the name and address of the property are in the request, if the Home Office were to confirm or deny that the information was held, this in itself would disclose information on matters relating to the location of asylum seekers, ie it would indicate whether or not they were housed at that particular address.
26. In addition, if it were to confirm or deny whether the information is held, this would weaken the Home Office's stance on protecting the health

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<sup>2</sup> <https://www.independent.co.uk/news/uk/home-news/migrant-hotel-riot-knowsley-curfew-security-b2282633.html>

<sup>3</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022389/ic-155600-d0j5.pdf>

<sup>4</sup> <https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets>

<sup>5</sup> <https://www.gov.uk/government/collections/ho-annual-reports-and-accounts>

and safety of vulnerable people and endangerment to their health and safety is, according to the Home Office, "more probable than not".

27. In addition to the Home Office's duty to provide safety and protection for asylum seekers, the Commissioner also acknowledges that this duty extends to any employees who may work at the property or any residents staying there, irrespective of whether or not they may be asylum seekers.
28. The Commissioner accepts the Home Office's argument that the threat of reprisals, harassment and actual threats to asylum seekers and those assisting them is very real and can include physical violence.
29. As such, the Commissioner is satisfied that, in this case, the public interest test favours maintaining the exemption.
30. It follows that the Commissioner's decision is that the Home Office was entitled to rely on section 38(2) of FOIA to neither confirm nor deny whether it holds the requested information.

### **Other matters**

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31. In this case, the Home Office failed to respond to the request for an internal review within the recommended 20 working days' timeframe, which the Commissioner has logged.
32. He will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in his draft "Openness by Design strategy"<sup>6</sup> to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our FOI and Transparency Regulatory Manual<sup>7</sup>.

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<sup>6</sup> <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

<sup>7</sup> [https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1\\_0.pdf](https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1_0.pdf)

## Right of appeal

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33. 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: 0203 936 8963  
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)

34. 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.
35. 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 .....**

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