

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 November 2023

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

Decision (including any steps ordered)

1. The complainant has requested information relating to passport control at Luton Airport. The Home Office refused to disclose some of the requested information, citing section 40(2) (personal information) of FOIA as its basis for doing so. It also stated that it does not hold the remaining information within the scope of the request.
2. The Commissioner's decision is that the Home Office was entitled to rely on section 40(2) of FOIA to withhold the information at parts 1 and 2 of the request. The Commissioner is also satisfied that, on the balance of probabilities, the Home Office does not hold the information at part 3 of the request. Finally, the Commissioner finds that the Home Office breached section 10(1) and section 17(1) of FOIA as it failed to provide its response to the request within the statutory 20 working days.
3. The Commissioner does not require the Home Office to take any further steps.

Request and response

4. On 10 May 2023, the complainant wrote to the Home Office and requested information in the following terms:

"I request information regarding an incident that happened at Luton airport passport control.

[1] I need to identify Border Force employee working at till number 6 at Luton arrivals terminal on the 10th of May 2023 between 20:00-21:00 hours, and the 2 other Border force employees that have been part of the incident at the same hour. They have refused to identify, except one which provided a collar number

[2] I also would like to request information if there existed previous complaints on those above and if there have arrests requested by them for former Romanian nationals and the number of Romanians arrested by this employee.

[3] I also request any CCTV footage of till number 6 between hours 20:10 and 21:00"

5. The Home Office responded on 20 July 2023. It refused to comply with the request as a whole, citing section 31(1)(e) (law enforcement – the operation of immigration controls) and section 40(2) (personal information) of FOIA.
6. Following an internal review the Home Office wrote to the complainant on 8 August 2023. It partially upheld its original position, maintaining its reliance on section 40(2) of FOIA to refuse parts 1 and 2. However, it amended its position in respect of part 3, stating that it in fact does not hold the CCTV footage.

Reasons for decision

Section 40 – personal information

7. 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.
8. In this case the relevant condition is contained in section 40(3A)(a). 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 D principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
9. 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.

10. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

“any information relating to an identified or identifiable living individual”.

12. The two main elements of personal data are that the information must relate to a living individual and that the person must be identifiable.
13. 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.
14. 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.
15. In the circumstances of this case, having considered the withheld information at parts 1 and 2 of the request, the Commissioner is satisfied that the information does relate to the data subjects. The names of the data subjects, and statistics relating to the performance of their duties and whether they have had any previous complaints made about them, quite obviously is information that both relates to and identifies those concerned.
16. The information at parts 1 and 2 of the request therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
17. 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.
18. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

19. 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”.

20. 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, fair and transparent.
21. 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

22. 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”¹.

23. 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:-
 - 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.
24. 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

¹ 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 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”.

25. 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 case specific interests.
26. 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.
27. The Commissioner understands that the complainant wishes to pursue a formal complaint regarding the alleged incident which the requested information relates to.

Is disclosure necessary?

28. '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.
29. The Commissioner understands the complainant's wish to raise a formal complaint regarding the concerns they have about the alleged incident. Concerns of this nature should typically be raised via the public authority's internal complaints process in the first instance, or alternatively via the Parliamentary and Health Service Ombudsman when the public authority's own complaints processes have failed to resolve the concerns.
30. The Commissioner considers that the complainant is still able to raise a complaint regarding the alleged incident by providing all of the details which are already known to them such as the time and location of the incident, without knowing the Border Force officers' names and details of their performance of their duties or complaints made against them.
31. Disclosure of information in response to a request under FOIA is essentially a disclosure to the world at large. It is not a private transaction between the public authority and the requester. The Commissioner is therefore satisfied that it would not be an appropriate or proportionate step for the Home Office to place the Border Force officer's personal information into the public domain. This is because there are less intrusive avenues available for addressing the complainant's concerns regarding the alleged incident. As such, the Commissioner concludes that it is not necessary for the Home Office to disclose the information at parts 1 and 2 of the request.

32. As the test of necessity has not been met, the Commissioner does not need to go on to consider the balance between the legitimate interests and the interests or fundamental rights and freedoms of the data subjects.
33. As the Commissioner is satisfied that disclosure is not necessary, there is no lawful basis for disclosure and therefore the Home Office was entitled to rely on section 40(2) of FOIA to withhold the information at parts 1 and 2 of the request.

Section 1 – general right of access

34. Section 1(1) of FOIA provides that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request, and, if that is the case, to have that information communicated to them.
35. In cases where a dispute arises over whether recorded information is held by the public authority at the time of the request, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is more likely than not that the public authority holds information relevant to the complainant's request.
36. The Home Office explained to the Commissioner that it is standard practice across all UK airports that the airport operators own the premises and the CCTV equipment within each of those premises, including in passport control and immigration areas of the airport. Therefore, the data controller for the CCTV footage in this case is London Luton Airport Ltd, and the footage is only released by them at their discretion, including to the Home Office Border Force. The Home Office does not own or hold the CCTV footage. The Home Office itself has to submit a request to the airport operator if/when it has valid reason to require access to CCTV footage.
37. The Commissioner is satisfied that, on the balance of probabilities, the Home Office does not hold the CCTV footage sought by part 3 of the request.

Procedural matters

38. Section 10(1) of FOIA provides that, subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

39. As the Home Office did not notify the complainant that the information at part 3 of the request was not held within the statutory twenty working days, the Commissioner finds that it breached section 10(1).
40. Section 17(1) of FOIA provides that a public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information, within the time for complying with section 1(1), give the applicant a notice which-
 - (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
41. As the Home Office did not issue a refusal notice in relation to parts 1 and 2 of the request within the statutory twenty working days, the Commissioner finds that it breached section 17(1).

Right of appeal

42. 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

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

43. 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.
44. 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

Cressida Woodall
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