

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 27 November 2023

**Public Authority:** Ministry of Justice

**Address:** 102 Petty France  
London  
SW1H 9AJ

#### Decision (including any steps ordered)

---

1. The complainant requested information about damages and costs paid as a result of assaults on biologically female prisoners by biologically male prisoners in UK prisons. The Ministry of Justice (the 'MOJ') refused to confirm or deny whether it held the requested information, citing the 'neither confirm nor deny' provision within section 40(5) of FOIA (the exemption for personal information).
2. The Commissioner's decision is that the MOJ has properly relied on section 40(5B)(a)(i) of FOIA to refuse to confirm or deny whether any information associated with the specified assaults is held.
3. No steps are required as a result of this notice.

#### Background

---

4. The Commissioner notes that the complainant in this current case made a similar request to the MOJ, where section 40(5B)(a)(i) of FOIA was relied on. This resulted in the following decision notice<sup>1</sup> being issued in

---

<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024641/ic-195538-f9b5.pdf>

March 2023 where the Commissioner upheld the MOJ's reliance on section 40(5B)(a)(i) of FOIA.

5. The Commissioner is also aware that the complainant has appealed the outcome of the previous decision but that this appeal is yet to be heard by the First-tier Tribunal. In the absence of any appeal outcome, the Commissioner has considered the current case on its merits, but has taken the earlier decision notice into account.

## Request and response

---

6. On 20 July 2023, the complainant wrote to the MOJ and requested information in the following terms:

"please [sic] disclose, in date order, a list all compensation/damages payments and legal costs made between 1 January 2017 and today, by you, to biologically female prisoners as a result of them being assaulted/sexually assaulted by a biologically male prisoner in a UK prison.

Disclose the TOTAL amount paid as compensation/damages payments made between 1 January 2017 and today, by you, to biologically female prisoners as a result of them being assaulted/sexually assaulted by a biologically male prisoner in a UK prison."

7. Later that same day, he clarified that the request "only refers to assault which took place in a woman's prison".
8. The MOJ responded on 17 August 2023. It refused to confirm or deny whether the requested information was held, citing the 'neither confirm nor deny' ('NCND') provision under section 40(5B)(a)(i) of FOIA – the exemption for personal information.
9. The complainant requested an internal review on 21 August 2023 , asking the MOJ to explain why confirming or denying whether it held the requested information would breach the UK General Data Protection Regulation ('UK GDPR').
10. Following its internal review, the MOJ wrote to the complainant on 14 September 2023. It maintained that section 40(5B)(a)(i) applied, and stated that:

"You have asked for an explanation why confirming or denying would breach the GDPR. This explanation has already been provided. It was explained that FOI is a public disclosure regime,

not a private regime. This means that any information disclosed under the FOIA by definition becomes available to the wider public. If any information were held, or not held, confirming this would be to the world at large. If any information were held, (or not held), such information would constitute the personal data of that individual. To disclose this fact would breach the General Data Protection Regulation and/or the Data Protection Act 2018 principles.

You are aware that the First Tier Tribunal has this question under consideration (reference: EA/2023/0148), as you raised it in the context of an earlier Freedom of Information request [reference redacted]. We await the Tribunal's decision."

## **Scope of the case**

---

11. The complainant contacted the Commissioner on 15 September 2023 to complain about the way his request for information had been handled.
12. The Commissioner has considered the MOJ's reliance on section 40(5B)(a)(i) of FOIA – the NCND provision for personal information.

## **Reasons for decision**

---

### **Section 40 – Personal information**

13. Section 40(5B)(a)(i) of 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 UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
14. Therefore, for the MOJ to be entitled to rely on section 40(5B) of 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, if held, constitute the disclosure of a third party's personal data?**

15. Section 3(2) of the Data Protection Act 2018 ('the DPA 2018') defines personal data as:

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

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

17. 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.

18. It is initially noted that the request does not actually seek to know the number of victims, only any associated money damages and legal costs in respect of any claims they may have made. However, given the Commissioner's knowledge from his involvement in the earlier decision notice, he is aware that the numbers of assaults are low. The Commissioner considers that those within the prison community will be aware of the victims thereby making them identifiable.

19. The Commissioner is therefore satisfied that these low numbers mean that any cost or damage-related information that may be held, would be their personal data and its disclosure (by confirmation or denial in this case) would make information about them available to the prison community.

20. Given the low numbers, the Commissioner considers that reidentification is likely and revealing something about the assault victim(s) would be possible through a confirmation or denial as to whether any costs or damages have been paid. As the Commissioner has already determined that the small numbers mean that those concerned are identifiable, even if it is only within the prison community, a confirmation or denial would reveal something about them.

21. For the reasons set out above the Commissioner is satisfied that if the MOJ confirmed whether or not it held the requested monetary information this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.

22. The fact that confirming or denying whether the requested is held would reveal the personal data of a third party does not automatically prevent the MOJ 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.

23. 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?**

24. 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 MOJ can only confirm whether or not it holds the requested information - if to do so would be lawful, fair, and transparent, and would not breach any of the data protection principles.
25. When considering whether confirmation or denial of the requested information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure is necessary, and whether these interests override the rights and freedoms of the individual that the personal information relates to.
26. The Commissioner accepts that there may be some legitimate interest in the MOJ being open and transparent about information it holds regarding the subject matter; this is particularly so as it may involve a cost to the public purse.
27. The Commissioner must next consider whether it is necessary to issue a confirmation or denial under FOIA. He is not aware that the necessity test could be met by any means other than under FOIA.
28. However, it is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the relevant individuals' interests, fundamental rights, and freedoms. In doing so, the Commissioner must consider the impact of the confirmation or denial.
29. A request that is being considered under FOIA concerns a disclosure to the public at large, and therefore to any person. The Commissioner must therefore consider the wider public interest issues and fairness to the relevant individuals to whom the request relates when deciding whether or not to confirm or deny if the information is held.
30. It is the Commissioner's view that the individuals who can be identified from the request would not have any reasonable expectation that information about whether or not they had made any claims or been awarded any damages would be placed into the public domain.

31. In addition, in the Commissioner's opinion, to confirm or deny whether information is held may cause such individuals damage and distress.
32. The Commissioner concludes that there is insufficient legitimate interest in this case to outweigh the relevant individuals' fundamental rights and freedoms. He therefore considers that disclosure of personal information which confirms whether or not the requested information is held would not be lawful in this instance.
33. The Commissioner, therefore, finds that the MOJ was entitled to refuse to confirm or deny whether it holds the requested information on the basis of section 40(5B)(a)(i) of FOIA.

## Right of appeal

---

34. 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)

35. 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.
36. 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 .....**

**Michael Lea**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**