

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 5 July 2011

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

Summary

The complainant asked the Home Office (the “public authority”) to provide information relating to a person who he believed had fraudulently obtained access to the UK. The public authority withheld the information using the exemption in section 40(2) of the Freedom of Information Act (the “Act”).

The subject matter of the case prompted the Commissioner to consider whether the public authority should instead have given a ‘neither confirm nor deny’ response. The Commissioner finds that confirmation or denial would be likely to disclose personal data and that the disclosure of this personal data would be in breach of the first data protection principle. The exemption provided by section 40(5)(b)(i) should therefore have been applied.

The public authority’s handling of the request also resulted in breaches of certain procedural requirements of the Act as identified in this Notice.

The public authority is not required to take any steps.

The Commissioner’s role

1. The Commissioner’s duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the “Act”). This Notice sets out his decision.

Background

2. The complainant has provided the Commissioner with the following correspondence which he received from an Embassy:

"I agree that the lady in question appears to have used deception to obtain a British visa from this embassy in 1973, but we have no knowledge of how she managed to do so as the files from 1973 were all destroyed more than 25 years ago. The visa would have been valid for 3 months and its issue would have subsequently been overtaken by a number of events

- (a) the grant of entry in the UK for a limited period of time, by an Immigration Officer at port of entry*
- (b) the grant of a number of re-entry visas by the visa office of the Foreign & Commonwealth office in London (which no longer operates as the re-entry office closed down a number of years ago)*
- (c) a number of extensions of stay granted by the Home Office, culmination in the grant of indefinite leave to remain (i.e. permanent residence status)*
- (d) naturalisation as a citizen of the United Kingdom and Colonies by the Home Office*
- (e) issue of her first British passport by the Passport Office (now the Identity and Passport Service)*

If deception and concealment of material facts were employed to obtain (a) – (e), as seems to have been the case, and the crime of bigamy has been committed, this is a matter for the Home Office in London, the police and the Crown Prosecution Service, but it is not a matter for this Embassy, from whom she obtained a visa by deception 34 years ago".

3. The information sought relates to the same individual and the complainant has suggested several names by which she might have been known.

The request

4. Some of the earlier correspondence on this case was initiated by the complainant's MP on his behalf. It was dealt with as 'ministerial correspondence' by the public authority; however, the Commissioner has included it in this Notice to put the request in better context.

5. On 19 December 2010 the complainant's MP wrote, on his behalf, to the Minister of State for Borders & Immigration (the "Minister") asking:

"... as I understand the law, the Data Protection Act (DPA) can only apply to a person if they use one identity. If they use multiple identities, then the DPA can only apply to one of those identities. Importantly, in this case, [name removed] does appear to be using different identities.

- [various names removed]

Given the limitations of the DPA, please could you set out what information you have on [name removed] under each of these names – including details of the immigration status that each of them has".

6. By way of a response, the MP was informed by the Minister:

"The [DPA] sets out the rules governing the protection and processing of personal data (information relating to identifiable living individuals). As long as the information relates to an identifiable living person it is 'personal data' regardless of the number of identities that a person may have assumed.

Any personal data held by the Home Office and its executive agencies is governed by the [DPA], and can only be disclosed to those individuals who are authorised to receive it.... The effect of these provisions is that I am unable to provide any of the information that [the complainant] has requested".

7. On 18 February 2011 the complainant wrote to the Commissioner. Within this correspondence he stated:

"May I respectfully ask that you exercise your enforcement powers that the SSHD (Secretary of State for Home Department), and / or the Home Office, and all its agencies and departments provide the requested information in [his MP's] latest letter dated 17 December 2010...

- a. *Also concerning all information held by the Home Office and its various agencies and departments concerning [name removed]".*

8. On 4 April 2011 the Commissioner wrote to the public authority. He advised that he had received a complaint and raised some initial queries.

9. On 8 April 2011 the public authority responded advising that it had not treated the requests above under the terms of the Act, but rather had dealt with it as 'ministerial correspondence'. However, it did advise the Commissioner that it had since received a further request from the complainant which it had dealt with under the Act.
10. On 15 February 2011 the complainant had made the following request under the Act:

"In addition to [the information detailed in paragraph 5 above] please confirm and send me ... the following concerning [name removed] ...

- a. entry application and permit(s) to remain in the UK*
- b. details of subsequent entries lawful and/or unlawful*
- c. UK citizenship application and permit*
- d. Details dates [sic] of [name removed]'s British passport(s) and renewal numbers*
- e. Details and dates of entries and exist [sic] using this or other passport(s)*
- f. Any other relevant copies and data including detailing each you do not have or hold".*

He added:

"It would be helpful if you would supply this information ... under the Data Protection Act as well as under the Freedom of Information Act not to mention 'subject access request'".

11. Receiving no response the complainant re-sent his request on 23 February 2011 and again on 27 March 2011.
12. On 30 March 2011 the public authority responded. It apologised for the lack of response to the first request saying that it had been received but misallocated. It explained its 'subject access' procedure to the complainant and refused to provide the requested information under the Act by virtue of the exemption in section 40(2).
13. On 2 April 2011 the complainant sought an internal review. This was provided on 5 May 2011. The public authority upheld its earlier position.

The investigation

Scope of the case

14. There is much correspondence on this case, some of which has been considered under the terms of the Act and some which has not. For simplicity, the Commissioner has agreed to consider the wording contained in the complainant's letter to him of 18 February 2011 as the basis for his investigation, i.e. *"all information held by the Home Office and its various agencies and departments concerning [name removed]"*.
15. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Analysis

Exemption

Section 40(5)(b)(i) – personal information

16. The full text of the relevant provisions of the Act referred to in this section is contained within the Legal Annex.
17. The Commissioner will not proactively seek to consider exemptions in all cases before him, but in cases where personal data is involved the Commissioner believes he has a duty to consider the rights of data subjects. These rights, set out in the DPA, are closely linked to article 8 of the Human Rights Act and the Commissioner would be in breach of his obligations under the Human Rights Act if he ordered disclosure of information or confirmation/denial without having considered these rights, even where the exemption has not been cited. Therefore, although the public authority has cited section 40(2), the Commissioner believes he should first consider section 40(5)(b)(i) in this particular case.
18. Section 40(5)(b)(i) provides that a public authority is not obliged to confirm or deny whether requested information is held if to do so would:
 - constitute a disclosure of personal data, and
 - this disclosure would breach any of the data protection principles or section 10 of the Data Protection Act (DPA).

19. The Commissioner's analysis of whether the above criteria would be satisfied follows.

Would confirming or denying that the requested information is held constitute a disclosure of personal data?

20. The DPA defines personal information as:

"...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the data controller or any person in respect of the individual."

21. In his guidance on the section 40 exemption¹, the Commissioner expanded on what constitutes personal data:

"The two main elements of personal data are that information must 'relate to' a living person, and that person must be identifiable. Information will 'relate to' a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way."

22. The Commissioner considers that the way in which the request is worded clearly indicates that the complainant is seeking information which can be linked with a named individual, even though he believes that this individual may use various different names. The Commissioner considers that to comply with section 1(1)(a) of the Act (i.e. to either confirm or deny holding the information) would inevitably put into the public domain information about the existence or otherwise of information about that individual, under one or more of the aliases alleged by the complainant, which would constitute the disclosure of information that would relate to that individual.
23. Therefore, the Commissioner considers that to confirm or deny whether the requested information is held would in itself constitute a disclosure of personal data.

¹http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/personal_information.pdf

Would disclosure of this personal data breach a data protection principle?

24. The first data protection principle requires that personal data is processed fairly and lawfully and that:
- at least one of the conditions in Schedule 2 is met, and
 - in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
25. The Commissioner's considerations here focus on the general issue of whether disclosure would be fair to the relevant individual.

Fairness

26. In establishing whether disclosure is fair, the Commissioner will look to balance the consequences of any release of personal data and the reasonable expectation of the data subject, with general principles of accountability and transparency.
27. The personal data that would potentially be disclosed here would relate to the individual in a private capacity. This is significant in that previous decisions issued by the Commissioner have been guided by the principle that information about an individual's private life will be likely to deserve more protection than information about someone acting in an official or work capacity.
28. The Commissioner would therefore consider that in the circumstances of this case, the individual would have a legitimate expectation that information which may or may not confirm whether they are lawfully residing in the UK would not be released to the general public. The Commissioner also notes that the public authority has a process by which members of the public can report alleged immigration offences and it provided details of how to go about this in its internal review.
29. To disclose this information would be an unwarranted intrusion into the rights and freedoms of the data subject, given the distress that the release of the information could potentially cause, particularly were it unfounded.
30. In considering whether the exemption contained within section 40(5)(b)(i) should have been applied to the request the Commissioner has taken into account that the Act is designed to be applicant blind and that disclosure should be considered in its widest sense – which is to the public at large. If information were to be disclosed it would, in principle, be available to any member of the public. A confirmation or denial in the circumstances of this case would reveal to the public

information which is not already in the public domain and is not reasonably accessible to the general public, about a person who may or may not be unlawfully resident in the UK. Whilst the Commissioner understands the complainant's genuine concerns that the individual concerned is resident in the UK under false pretences, he does not accept that the correct way to address that concern would be for the public authority to put any information which it may hold into the public domain. Indeed, were the complainant's concerns justified, it might be the case that a release of information would subsequently interfere with the administration of justice.

Conclusion

31. Leading on from these considerations, the Commissioner has determined that to confirm or deny whether the requested information is held would be unfair to the data subject. As disclosure would therefore breach the first data protection principle, section 40(5)(b)(i) is engaged and the correct approach should have been for the public authority to have neither confirmed nor denied holding the requested information.

Procedural requirements

Section 10(1) - Time for compliance

32. Section 10(1) 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."

33. Section 1(1) provides that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

34. The Commissioner finds that the public authority breached section 10(1) by failing to discharge its obligation under section 1(1)(a) within 20 working days of the request.

Section 17(1) - Refusal of request

35. Section 17(1) of the Act 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 must, 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."

36. In failing to provide a valid refusal notice within the statutory time limit, the Constabulary breached section 17(1).

The Decision

37. The Commissioner's decision is that the public authority did not have a duty to comply with section 1(1)(a) of the Act on the basis of the exemption contained within section 40(5)(b)(i).

38. The Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- in failing to provide a timely response it breached sections 10(1) and 17(1).

Steps required

39. The Commissioner requires no steps to be taken.

Other matters

40. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters.

Ministerial correspondence

41. The initial correspondence included under '*The request*' above was dealt with by the public authority 'outside' the terms of the Act. As this was clearly ministerial correspondence, passed between two particular Ministers, then the Commissioner agrees that this was an acceptable way for the public authority to have dealt with that correspondence.

Subject access

42. The complainant has also made reference to wanting to make a 'subject access' request. The public authority has advised the complainant of the procedure he needs to follow to undertake this. The Commissioner would like to reinforce that such a request, were the complainant to make one, would only entitle him to his own personal information (unless exempt). It would not entitle him to access information about anyone else.

Right of Appeal

43. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

Dated the 5th day of July 2011

Signed

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

Legal annex

Freedom of Information Act 2000

Section 1(1) provides that -

Any person making a request for information to a public authority is entitled–

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him,*

Section 40(5) provides that –

The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and*
- (b) does not arise in relation to other information if or to the extent that either-*
 - (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or*
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).*

Data Protection Act 1998

Section 1(1) provides that –

'personal data' means data which relate to a living individual who can be identified-

- (a) from those data, or*
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.*

The first data protection principle provides that –

Personal data shall be processed fairly and lawfully...