

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 28 November 2016

**Public Authority:** Ministry of Justice

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

#### Decision (including any steps ordered)

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1. The complainant requested information about the offence of using '0808' numbers at a named prison. Having initially confirmed there were no such offences during the specified time period, the Ministry of Justice (the 'MOJ') advised, following an internal review, that there had been ten instances. However, it applied section 40(2), personal information, to those found guilty in the associated adjudications, on the basis that revealing any numbers less than five could lead to individuals being identified.
2. The Commissioner has decided that the MOJ should have instead relied on the 'neither confirm nor deny' provision in section 40 of FOIA in response to this request. The reasons for this are set out in this notice. Therefore, the Commissioner's decision is that under FOIA, the MOJ was not obliged to confirm whether or not it held the requested information on the basis of sections 40(5)(a) and 40(5)(b)(i). The Commissioner requires no steps to be taken as a result of this decision. However, the MOJ has breached section 17(1) of FOIA by failing to issue its refusal notice within 20 working days.

#### Request and response

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3. On 28 January 2016 the complainant wrote to the MOJ and requested information in the following terms:

*"This information request is about HMP [name redacted];*

- *How many IS1 adjudication notices were given to prisoners for the alleged offence of using 0808 numbers between 17/11/2015 to 1/1/2016?*
  - *How many prisoners from question 1 above were found guilty in the adjudication?"*
4. The MOJ responded on 22 March 2016 and said there were no IS1 adjudication notices issued for using 0808 numbers during the specified period and therefore no adjudication hearings that would provide a 'guilty' outcome.
  5. Following an internal review the MOJ wrote to the complainant on 18 April 2016 and revised its position. It now confirmed that there had been ten 0808 usage offences. In addition, the MOJ relied on section 40(2) for the second part of the request because the total figure found guilty amounted to five people or less, which it said would risk the identification of the individuals concerned.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 1 August 2016 to complain about the way his request for information had been handled.
7. The Commissioner understands that the complainant was one of the individuals allegedly involved in using '0808' numbers. Because she is aware that the request relates in part to the complainant personally, the Commissioner has considered whether the MOJ was entitled to rely on the 'neither confirm nor deny' provision in sections 40(5)(a) in relation to this request. This subsection provides that it is not necessary to tell the requester whether the information requested is held if this information would be exempt under section 40(1).
8. Furthermore, because the request concerns other individuals who may be identifiable due to the low number involved, and because disclosure under FOIA is in effect to the world at large, the Commissioner has also considered whether the MOJ was entitled to rely on section 40(5)(b)(i).
9. In this case the Commissioner must decide whether confirmation or denial that the requested information is held should be in the public domain. The Commissioner recognises that the complainant may have personal reasons for making his request. However, neither the identity of the applicant nor any personal reasons or private interests for wanting the requested information are relevant to the consideration of an FOIA request.

## Reasons for decision

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10. In this case, the MOJ has confirmed that there were ten instances of use of '0808' numbers by prisoners in response to the request. By relying on section 40(2) in relation to the second part of the request, the MOJ has inadvertently confirmed that at least one individual was found guilty. However, the Commissioner is mindful of her guidance<sup>1</sup> on the application of the 'neither confirm nor deny' provision in section 40 of FOIA which states:

*"Information in the public domain*

*In some cases, it may be already known or obvious that information must be held, and in those circumstances confirming that information is held may not cause any harm (although, technically, it may still be possible to neither confirm nor deny if a relevant exclusion applies). When considering what a confirmation or denial would reveal, a public authority isn't limited to considering what the public may learn from such a response; if it can demonstrate that a confirmation or denial would be revealing to someone with more specialist knowledge, this is enough to engage the exclusion to confirm or deny."*

11. This means that even if it is already obvious that information must be held, *"technically, it may still be possible to neither confirm nor deny if a relevant exclusion applies"*. By extension, it is possible to change to 'neither confirm nor deny' if that would have been the correct response originally.

## Section 40(5) neither confirm nor deny in relation to personal information

12. Section 1 of FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1166/when\\_to\\_refuse\\_to\\_confirm\\_or\\_deny\\_section\\_1\\_foia.pdf](https://ico.org.uk/media/for-organisations/documents/1166/when_to_refuse_to_confirm_or_deny_section_1_foia.pdf)

- (a) the duty to inform the applicant whether or not requested information is held and, if so,
  - (b) the duty to communicate that information to the applicant.
13. Generally, the provisions in section 40 subsections 1 to 4 FOIA exempt personal data from disclosure. Section 40(5) of FOIA states that the duty to confirm or deny whether information is held does not arise if providing the public with that confirmation or denial would contravene any of the data protection principles set out in the Data Protection Act (the 'DPA').
14. Section 40(5)(a) of FOIA excludes a public authority from complying with the duty imposed by section 1(1)(a) of FOIA - confirming whether or not the requested information is held - in relation to information which, if held by the public authority, would be exempt information by virtue of subsection (1). In other words, if someone requests their own personal data, there is an exemption from the duty to confirm or deny.
15. In addition, section 40(5)(b)(i) would apply where confirmation of whether or not the requested information is held would breach the data protection rights of the other individuals concerned in the request, as here it would reveal under FOIA whether they had been subject to an adjudication process and potentially whether they had been found guilty. Such an argument is relevant to the exemption contained at section 40(5)(b)(i).
16. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of personal data, and second, whether disclosure of that personal data would be in breach of any of the data protection principles.

*Is the information personal data?*

17. The definition of personal data is given in section 1(1) of the DPA:
- "'personal data' means data which relate to a living individual who can be identified:*
- (a) from those data, or*
  - (b) from those data and any other information which is in the possession of, or is likely to come into the possession of, the data controller".*

*The MOJ's view*

19. The MOJ has argued that the information is personal data because

disclosure of the requested information broken down by a 'guilty' outcome for the prison's population could lead to the identification of individuals where that figure equates to five or less.

20. Further, the MOJ said that it considers the information in question to be sensitive personal data in line with section 2(g) of the DPA which covers the "*commission or alleged commission by him of any offence.*"
21. The MOJ also argued that it should be considered that the complainant knows who the other prisoners are and that disclosing the outcomes of the adjudication hearings would provide him with information about the other prisoners' cases which, whether they were found guilty or not, is still considered their sensitive personal data.
22. The MOJ said therefore it would be unlawful to disclose the accurate figure of those found guilty because those concerned would not be aware of the disclosure or that their sensitive personal data was to be disclosed in this way. All individuals have a clear and strong expectation that their personal data will be held in accordance with the DPA and not disclosed to the public under FOIA. The MOJ concluded that disclosure would breach the first data protection principle.

#### *The Commissioner's view*

23. 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 the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual, or individuals, from information which, on the face of it, appears truly anonymised.
24. The ICO's Code of Practice on Anonymisation<sup>2</sup> 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".*

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>

25. In summary, the motivated intruder test is that if the risk of identification is "*reasonably likely*" the information should be regarded as personal data.
26. Although it does not automatically follow that a low number (less than five) means that the requested information is personal data, in this case the complainant's request is for information about the usage of '0808' numbers which involves both himself and a small number of other prisoners which the Commissioner considers are very likely to be known to the complainant.
27. The Commissioner considers that to comply with section 1(1)(a) of FOIA (ie to either confirm or deny holding the information) would inevitably put into the public domain the existence or otherwise of information about the individuals, including the complainant himself, which in turn would constitute disclosure of information that would relate to them. For example, if the response were a confirmation and the number had been one, presuming the complainant may himself have been found guilty then he would know that he was the only party concerned. This would therefore reveal something about the other nine parties who had been investigated regarding the offence, ie that they had been found not guilty of the offence. Furthermore, if the answer were any other number then it is highly likely that, in his own situation, the low numbers concerned mean that it is highly likely that the complainant would be able to ascertain those who had been found guilty of the offence using the 'motivated intruder' principle considered above.
28. Therefore, the Commissioner considers that to confirm or deny whether the requested information is held would in itself constitute a disclosure of personal data. Furthermore, she agrees that the requested information constitutes 'sensitive personal data' because it involves the commission or alleged commission of an offence.
29. It follows from this that to comply with section 1(1)(a) of FOIA (that is, to either confirm or deny holding the requested information) would put into the public domain information about the existence, or otherwise, of an offence or offences which may have been committed by a small number of prisoners, the complainant being personally included in those figures.

### *Conclusion*

30. Therefore, in this case, the Commissioner is satisfied that confirming or denying whether it holds any information under the terms of the FOIA means that the MOJ would be confirming, to the world at large, whether it holds information relating to '0808' offences in relation to this complainant, and to those other identifiable individuals involved. She

therefore considers that the MOJ should instead have relied on section 40(5)(a) and 40(5)(b)(i) and should have neither confirmed nor denied whether it holds the requested information in its entirety.

**Procedural issues – section 17(1) breach – late refusal notice**

31. Section 1(1) of FOIA states:

*(1) 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.*

32. Section 10 of FOIA states:

*(1) 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.*

...

*(3) If, and to the extent that –*

*(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or*

*(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,*

*the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.*

33. Section 17(1) of FOIA states:

*(1) 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.*

34. If, as in this case, the MOJ decides that information should be withheld, it has an obligation to provide a requester with a refusal notice within 20 working days of receipt of the request. The MOJ failed to issue its refusal notice within the statutory timeframe, thereby breaching section 17(1) of FOIA.

### **Other matters**

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35. The Commissioner notes that as the request concerns the complainant himself, he could consider making a 'subject access request' under the provisions of the DPA as a way of obtaining his own personal data.



## Right of appeal

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36. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

37. 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.
38. 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**  
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**SK9 5AF**