

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 21 August 2017

**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 regarding the Home Office interpreter present at an interview at Yarl's Wood Immigration Removal Centre (IRC) on a specific date.
2. The Home Office refused the request, relying on section 40(2) (personal information) of the FOIA.
3. The Commissioner's decision is that the Home Office was not obliged to confirm or deny if the requested information was held by virtue of section 40(5)(b)(i) of the FOIA.
4. The Commissioner requires no steps to be taken as a result of this decision.

#### Background

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5. Yarl's Wood IRC is a fully contained residential centre housing adult women and adult family groups awaiting immigration clearance<sup>1</sup>.

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<sup>1</sup> <http://www.yarlswood.co.uk/>

## Request and response

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6. On 13 October 2016 the complainant made the following request for information under the FOIA:

*"1. The name of the interpreter present at the screening interview of [name redacted] held on [date redacted] in Yarlswood IRC. The Interpreter Code on the screening interview is [code redacted].*

*2. The nationality and linguistic background of this interpreter.*

*3. The languages that this interpreter is officially registered to interpret.*

*4. Whether this interpreter is an official interpreter for the Home Office and/or an employee of the Home Office or was present through a third party contractor/provider of interpreters. Please include the name of the third party contractor/provider if relevant.*

*5. If any complaints have ever been registered involving this interpreter. If so, please include the number of complaints and the dates and nature of these complaints".*

7. The Home Office responded on 9 November 2016 and refused to provide the requested information citing section 40(2) (personal information) of the FOIA.
8. Following an internal review the Home Office wrote to the complainant on 26 January 2017 confirming that position.

## Scope of the case

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9. The complainant contacted the Commissioner on 26 February 2017 to complain about the way her request for information had been handled. Specifically she advised that she was dissatisfied with the Home Office's handling of parts 2, 3 and 4 of her request.
10. During the course of the Commissioner's investigation, the Home Office revisited its handling of the request. It clarified its position with respect to the amount of information it held within the scope of the request and the exemptions it considered applied to the information it held.
11. The Commissioner accepts that the complaint in this case appears to be in relation to information about the interpreter. However, she considers that the first part of the multi-part request in this case specifies a named individual and sets the context for the whole of the request.

12. In light of the above, the Commissioner has exercised her discretion to consider an exemption that was not relied upon by the Home Office. She has considered whether, in the circumstances, it would have been appropriate for the Home Office to have neither confirmed nor denied whether it held the requested information.
13. Accordingly, the analysis below considers section 40(5)(b)(i) of the FOIA. The consequence of section 40(5)(b)(i) is that if a public authority receives a request for information which, if it were held, would be the personal data of a third party (or parties), then it can rely on section 40(5)(b)(i), to refuse to confirm or deny whether or not it holds the requested information.

## Reasons for decision

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14. Under section 1(1)(a) of the FOIA, a public authority is obliged to advise an applicant whether or not it holds the requested information. This is known as the 'duty to confirm or deny'. However, the duty to confirm or deny does not always apply and authorities may refuse to confirm or deny through reliance on certain exemptions under the FOIA.

### *Section 40 Personal information*

15. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of personal data of someone other than the applicant, and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.

### *Is the information personal data?*

16. The first step for the Commissioner to determine is whether the requested information, if held, constitutes personal data, as defined by the DPA). If it is not personal data, then section 40 cannot apply.
17. Section 1 of the DPA defines personal data as:

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

*a) from these 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 intention of the data controller or any other person in respect of the individual."*

18. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable.
19. 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 or has them as its main focus.
20. In her guidance 'Determining what is personal data'<sup>2</sup> the Commissioner acknowledges that there are circumstances where the same information is personal data about two or more individuals. One of the examples she cites is where the content of the information is about one individual but it is processed in order to learn/record/decide something about another individual.
21. In this case, the complainant requested details about the interpreter present at the interview of the individual who is named in the request. However, by confirming or denying that an interpreter attended a named party who was held at the immigration centre on a specific date, the Home Office is necessarily saying something about the interviewee rather than just about the interpreter. The Commissioner has therefore considered whether the requested information is the personal information of the named interviewee rather than just that of the interpreter.
22. The interviewee is named in the request. Therefore, if the Home Office confirms or denies whether this party was attended by an interpreter, this would place information about that named party into the public domain, ie it would confirm, or deny, whether or not they were held at the immigration centre. Clearly this information would relate to that individual and so would be their 'personal data'.
23. The Commissioner considers that context is important here. She considers it inescapable that confirmation or denial in response to any part of the request would disclose whether the Home Office holds personal data relating to the interviewee as well as the interpreter.
24. The Commissioner is satisfied that complying with section 1(1)(a) in this case would effectively confirm or deny whether the requested information is held in connection with the individual named in the request, ie the interviewee. It would not be possible to confirm or deny the attendance of the interpreter without revealing whether or not the named party was present at the immigration centre.

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

25. Having accepted that the request is for the personal data of living individuals other than the applicant, the Commissioner must go on to consider whether confirming or denying if the information is held would contravene any of the data protection principles.
26. The Commissioner considers that the first data protection principle is relevant in the circumstances of this case.

*Would confirmation or denial breach the first data protection principle?*

27. The first data protection principle states:

*"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless*

*(a) at least one of the conditions in Schedule 2 is met, and*

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."*

28. 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 fair, lawful and would meet one of the DPA Schedule 2 conditions - and one of the Schedule 3 conditions if relevant. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.
29. The Commissioner has first considered whether disclosure would be fair.
30. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.
31. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
  - the individual's reasonable expectations of what would happen to their information;
  - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
  - any legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the individuals who are the data subjects.
32. The Commissioner will first consider the interviewee and will then go on to consider the interpreter if she finds it necessary.

*Reasonable expectations*

33. The Commissioner recognises that people have an instinctive expectation that the Home Office, in its role as a responsible data controller, will not disclose certain information and that it will respect their confidentiality.
34. In respect of the interviewee, the Commissioner is satisfied that the data subject would have the reasonable expectation that their personal data, if held, would not be disclosed. She considers that information relating to an interview at a detention centre will carry a strong general expectation of privacy for the party concerned.

*Consequences of disclosure*

35. As to the consequences of disclosure upon a data subject, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
36. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. She will also take into account the fact that disclosure under the FOIA is effectively an unlimited disclosure to the public at large, without conditions.
37. Given the nature of the request, and the sensitivity of the subject matter, the Commissioner considers that disclosure in this case could lead to an intrusion into the private life of the interviewee and the consequences of any disclosure could cause damage and distress to them.

*General principles of accountability, transparency and legitimate public interest in disclosure*

38. Notwithstanding a data subject's reasonable expectations or any damage or distress caused, it may still be fair to disclose information, or in this case confirm or deny if information is held, if there is a more compelling public interest in doing so. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in confirming or denying if the information is held.
39. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest in confirming if information is held must outweigh the public interest in

protecting the rights and freedoms of the data subject if providing confirmation or denial is to be considered fair.

40. The interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.

### *Conclusion*

41. The complainant made submissions in relation to her interest in this information being disclosed. However, these concerns were based on the identity of the interpreter rather than the consequential effect that confirming the interpreter's attendance at the immigration centre would mean placing information into the public domain about the interviewee.
42. While the Commissioner acknowledges the complainant's concern about the ability of the interpreter to speak the interviewee's language fluently, this is not relevant when considering whether or not it is fair to disclose information about the interviewee.
43. The Commissioner recognises that the legitimate public interest must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of any individual who would be affected by confirming or denying that the requested information is held.
44. In this case the Commissioner was satisfied that any information held would not only be the personal data of the interpreter but would also be personal data about the interviewee as the interviewee is necessarily the focus of the request.
45. In light of the nature of the information and the reasonable expectations of the individual named in the request, the Commissioner is satisfied that confirming or denying if the requested information is held would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the interviewee. She considers these arguments outweigh any legitimate interest in disclosure. She has therefore concluded that confirmation or denial in this case would not be fair and would breach the first data protection principle. She therefore finds the exemption at section 40(5) engaged and the duty to confirm or deny did not arise.
46. As the Commissioner is satisfied that it would not be fair to confirm or deny with respect to the interviewee, and as she considers that, in the context of this case, information about the interviewee and the interpreter is inextricably linked, it follows that she concludes that it would not be fair to confirm or deny whether relevant information is held in respect of the interpreter. She therefore finds the exemption at section 40(5) engaged and the duty to confirm or deny did not arise in respect of the interpreter.

47. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, it has not been necessary to go on to consider whether this is lawful or whether one of the schedule 2 or schedule 3 DPA conditions is met. Similarly, she has not found it necessary to consider whether or not confirmation or denial would be fair in respect of the interpreter.

### **Other matters**

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48. In correspondence with the Commissioner, the complainant made submissions in relation to her interest in the requested information. The Commissioner recognises that the complainant has concerns about the quality, and outcome, of the interview referred to in the request.
49. However, the Commissioner does not consider that FOIA is the appropriate regime in which to pursue such matters: disclosure under the FOIA is disclosure to the world at large and not solely to the applicant.



## Right of appeal

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50. 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)

51. 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.
52. 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** .....

**Jon Manners**  
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**Information Commissioner's Office**  
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