

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 17 December 2020

**Public Authority:** Department for Work and Pensions  
**Address:** Caxton House  
Tothill Street  
London  
SW1H 9NA

#### Decision (including any steps ordered)

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1. The complainant has requested information about surveillance he alleges was carried out on him. The Department for Work and Pensions ("the DWP") confirmed that it held relevant information, but relied on section 40(1) of the FOIA to withhold it because the information would be his own personal data.
2. The Commissioner's decision is that any information that the DWP held would be the complainant's own personal data. However, she considers that, because the information would have been personal data, the DWP should have relied on section 40(5A) of the FOIA and should not have confirmed or denied holding information.
3. The Commissioner does not require further steps to be taken.

#### Request and response

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4. On 4 March 2020, the complainant wrote to the DWP and made a request in multiple parts. In the interests of brevity, the Commissioner will not repeat the request in its entirety. However, she notes that, whilst the questions the complainant posed ranged across a number of different topics, each individual question was in some way predicated on the assumption that the DWP had put him under surveillance.
5. The DWP responded on 17 March 2020. It confirmed that it held some information but that it considered the information to be the

complainant's own personal data. It therefore relied on section 40(1) to withhold the information. The DWP noted that any personal data it held would be caught by a Subject Access Request (SAR), but that in this particular case it would be likely to rely on a SAR exemption.

6. The complainant sought an internal review on 23 March 2020, he argued that the information was not the personal data of him or anyone else and that the DWP was being obstructive in not providing the information.
7. Following an internal review the DWP wrote to the complainant on 25 March 2020. It upheld its original position.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 30 March 2020 to complain about the way his request for information had been handled. He specifically sought a decision as to whether the DWP had complied with the FOIA.
9. Given her dual role as the regulator of data protection legislation, the Commissioner considers that she has sufficient experience and expertise to reach a decision in this case based on the request and responses. The Commissioner has therefore not sought further submissions from the DWP as to why it handled the request in the way that it did.
10. The Commissioner considers that the scope of her investigation is to determine whether any information the DWP held would be the complainant's own personal data and, if so, what the appropriate response to the request would have been.

### **Reasons for decision**

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11. Section 40(1) of the FOIA states that:

*"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."*

12. Section 40(5A) of the FOIA states that:

*The duty to confirm or deny 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).*

13. Section 2(2) of the Data Protection Act 2018 defines personal data as: -

*"any information relating to an identified or identifiable living individual."*

14. The Commissioner considers that any information that the DWP held within the scope of the request would indisputably be the complainant's own personal data.

15. If surveillance of the complainant did indeed take place, that would be a decision taken about the complainant and with him as its focus. It would therefore be his personal data.

16. Whilst the complainant is seeking a variety of types of information, each individual question links back to the central premise that the DWP had put him under surveillance. For example, one part of the request asks:

*"Did those surveillance officers deployed by the DWP on the 22/7/19 to put me under surveillance receive additional training to undertake such surveillance."*

17. Whilst this particular question is (ostensibly) about training, it is actually about training given to particular officers who are alleged to have carried out surveillance on the complainant. If the surveillance of the complainant had not taken place, no officers would be identifiable and therefore no information would be held.

18. Every part of the request in some way or other links back to the question of whether or not the complainant was in fact placed under surveillance. As such, any information the DWP confirmed it held could only have been created if the complainant had been put under surveillance. Therefore any information relating to the request would be the complainant's own personal data and thus exempt from disclosure under section 40(1) of the FOIA.

19. Section 40(1) is an absolute exemption and there is no requirement for the Commissioner to consider the balance of public interest. As the exemption is engaged in respect of any information which came or would have come within the scope of the request, the DWP was not obliged to supply any information in response.

20. Whilst the Commissioner considers that the DWP was correct to withhold information from disclosure under the FOIA, she also considers that the DWP should never have confirmed holding information in the first place.

21. Responses provided under the FOIA are considered to be provided to the world at large. Because of the way the request was structured, the DWP has, in confirming it held information, confirmed the fact that the

complainant was put under surveillance. That fact is itself the complainant's own personal data and should not have been disclosed under the FOIA.

22. In this case, the correspondence was made by surface mail and therefore the disclosure to the world at large is theoretical rather than actual. However, the DWP should be cautious when responding to such request and should consider the effects of providing a confirmation or a denial as well as whether any information is exempt.
23. In this particular case, as any information it held would have been the complainant's own personal data, the DWP should have neither confirmed nor denied holding information and relied on section 40(5A) of the FOIA to do so.

### **Other matters**

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24. Whilst the Commissioner accepts that the complainant explicitly asked for a response under the FOIA, the DWP should have disregarded this and attempted to deal with the request as a SAR in the first instance – even if it considered that some or all of the information was exempt from disclosure under SAR.
25. The Commissioner recognises that many requestors are unaware of the nuanced differences between the various information access regimes. When a requestor makes an information request, they simply want the information and are (usually) unconcerned about the method by which it reaches them. It is for the public authority to determine, in the first instance, which information access regime(s) is likely to be most generous to the requestor and deal with the request via that route.
26. Where a requestor makes a request for either their own personal data or for environmental information, it will almost certainly not be appropriate to treat such a request under the FOIA – as absolute exemptions prevent disclosure of such information.
27. By attempting to provide a response under FOIA, the DWP has in this case prevented the complainant from challenging any exemption from disclosure under SAR and caused delays to the complaint.
28. Whilst she has no power to compel the DWP to do so in a decision notice issued under the FOIA, the Commissioner would strongly advise the DWP to deal with the request as a SAR and respond accordingly.

## Right of appeal

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29. 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@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)

30. 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.
31. 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

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