

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 8 November 2021

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested from the Home Office all of the telephone numbers used by its Information Rights Team. The Home Office withheld the requested information under section 40(2) of FOIA.
2. The Commissioner's decision is that the Home Office correctly withheld the information under section 40(2) of FOIA.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

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4. On 2 February 2021, the complainant wrote to the Home Office and made a request for information in the following terms:  

*"Please supply all telephone numbers used by the Information Rights Team. I do not require the names of any team members."*
5. The Home Office responded on 16 February 2021 and explained that the information requested was exempt under section 40(2) of FOIA as it was considered to be personal data related to another person or persons, risked the identification of individuals and, as such, was exempt from release.
6. On 4 March 2021 the complainant requested an internal review.

7. In its internal review dated 24 March 2021, the Home Office upheld the application of section 40(2) of FOIA.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 24 March 2021 to complain about the way his request for information had been handled.
9. The Commissioner has to take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public. She must therefore consider the wider public interest issues and fairness to the persons involved when deciding whether or not the information is suitable for disclosure.
10. The Commissioner considers the scope of her investigation to be to establish whether the public authority is entitled to withhold the requested information under section 40(2) of FOIA.

### **Reasons for decision**

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#### **Section 40 personal information**

11. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
12. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UKGDPR').
13. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA

14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

***Is the information personal data?***

15. Section 3(2) of the DPA 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. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
18. 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.
19. The Commissioner is satisfied that the information requested (the telephone numbers of the Information Rights Team at the Home Office), if it were disclosed, could be used to indirectly identify the individuals. Chief factors which informed her view include the fact that once provided with a telephone number, a member of the public may ring and the call would either (i) be answered by the individual who would answer with their name and job title, or (ii) be put through to an answerphone/voicemail function which would similarly identify the name and job title of the individual. The name of an individual clearly constitutes personal data. Therefore, there are occasions whereby providing certain information, such as a work telephone number, may lead indirectly to the identification of somebody's personal data, such as their name.
20. Therefore, the Commissioner accepts that the information requested falls within the definition of 'personal data' in section 3(2) of the DPA.
21. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
22. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

23. Article 5(1)(a) of the UK GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

24. In the case of an 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 lawful, fair and transparent.

25. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

**Lawful processing: Article 6(1)(f) of the UK GDPR**

26. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

27. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"<sup>2</sup>.*

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<sup>2</sup> Article 6(1) goes on to state that:-

*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

28. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

29. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

#### *Legitimate interests*

30. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sake, as well as case specific interests.

31. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

32. In this case, the complainant indicated that the requested information was needed so that he could contact the Information Rights Team at the Home Office by telephone to clarify in advance any questions he wanted to raise with them pursuant to his information requests. This preference to make contact with the Home Office via telephone may be shared by other requesters.

33. The Commissioner has to take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public. She must therefore consider the wider public interest issues and fairness to the persons involved when deciding whether or not the information is suitable for disclosure.

34. The Commissioner recognises that there is a legitimate interest in the disclosure of the telephone numbers of the Information Rights Team at the Home Office. This centres primarily on the complainant's own preference for the means of communication, something which may be shared by other requesters who contact the Home Office.

*Is disclosure necessary?*

35. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
36. The Commissioner notes that she is only able to consider the disclosure of the telephone numbers of the Information Rights Team at the Home Office to the world at large. Disclosure under FOIA must be the least intrusive means of achieving the legitimate aim in question at that time.
37. In this particular case, the Commissioner is satisfied that there are alternative and less intrusive measures which make the disclosure of the telephone numbers unnecessary under FOIA. For example, the complainant could email or write to the Information Rights Team at the Home Office as email and postal addresses are provided. Whilst it is the complainant's preference to be able to telephone the Information Rights Team at the Home Office, there is no obligation under FOIA for individual telephone numbers to be provided to the public in order to exercise their information rights. Furthermore the Home Office provides a central number for the public on its website so telephone contact is already possible, albeit not directly with members of the Information Rights Team.
38. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
39. The Commissioner has therefore decided that the Home Office was entitled to withhold the information under section 40(2) FOIA.

## Right of appeal

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40. 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)

41. 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.
42. 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**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**Cheshire**  
**SK9 5AF**