

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 June 2022

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

Decision (including any steps ordered)

1. The complainant has requested, from the Home Office, information about three cases concerning the deprivation of British Citizenship pursuant to section 40 of the British Nationality Act 1981. The Home Office refused to confirm or deny holding the requested information, citing section 40(5) (Personal information) of FOIA.
2. The Commissioner's decision is that section 40(5) of FOIA was properly engaged. No steps are required.

Background

3. Section 40 of the British Nationality Act 1981¹ concerns the deprivation of British Citizenship. It says that:

"The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good". [para 2]
 4. The complainant includes reference to a judgment with his request² which concerns the consideration of deprivation of British citizenship for
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¹ <https://www.legislation.gov.uk/ukpga/1981/61/section/40>

² <https://www.bailii.org/ew/cases/EWCA/Civ/2018/1884.html>

three offenders who had been released from prison. That judgment, dated 8 August 2018, includes the following background:

"1. The appellants are naturalised British citizens. At the time of the relevant decisions of the Secretary of State, the First-tier Tribunal ("FTT") and the Upper Tribunal, the appellants had dual nationality, being citizens of Pakistan. This appeal concerns the proposal of the Secretary of State to make an order to deprive the appellants of their British citizenship pursuant to section 40 of the British Nationality Act 1981.

2. The appellants are part of a group of men convicted in 2012 of a range of offences involving the grooming, sexual abuse and trafficking of girls in Rochdale in a case which attracted national attention and notoriety. The steps to deprive the appellants of British nationality are a prelude to possible deportation to Pakistan. Each of the appellants has children in the UK and an established private life in the UK. They maintain that deportation to Pakistan would violate their right to respect for family and private life as set out in Article 8 of the European Convention on Human Rights, as given effect in domestic law by the Human Rights Act 1998. They also maintain that deportation would be in breach of the obligation of the Secretary of State and the tribunals to have regard to the interests of their children as a primary consideration, pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009 ("section 55")."

Request and response

5. On 7 April 2021, the complainant wrote to the Home Office and requested information in the following terms:

"Provide the dates that the SoS [Secretary of State] made orders to deprive the above [named in the judgment] of their British citizenship pursuant to section 40 of the British Nationality Act 1981. See Neutral Citation Number: [2018] EWCA Civ 1884".

6. On 21 April 2021, the Home Office responded. It refused to provide the requested information, citing section 40(2) of FOIA.
7. The complainant requested an internal review on 21 April 2021.
8. The Home Office provided an internal review on 2 September 2021. It revised its position, instead relying on the neither confirm nor deny ("NCND") provision in section 40(5) of FOIA.

9. Although this was not the position at the time of the request, further information about the subject matter has been very recently placed in the public domain. However, as required by the legislation, the Commissioner must consider the circumstances at the time of the initial refusal of the request.

Scope of the case

10. The complainant contacted the Commissioner on 6 September 2021 to complain about the way his request for information had been handled. His grounds of complaint were: "I apply for a DN. ...There is a legitimate interest involved due to the nature of the information. NCND should not have been used".
11. The Commissioner will consider the application of section 40(5) of FOIA to the request below.

Reasons for decision

Section 40 - personal information

12. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
13. Therefore, for the Home Office to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request, the following two criteria must be met:
 - (a) Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - (b) Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

14. Section 3(2) of the DPA 2018 defines personal data as:-

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. The information requested relates to three individuals who are named in the judgment provided by the complainant in his information request. Therefore, disclosing whether or not any information is held would reveal something about those individuals, ie it would reveal whether or not the Secretary of State had issued notices against them under section 40 of the British Nationality Act 1981.
18. For the reasons set out above, the Commissioner is satisfied that, if the Home Office confirmed whether or not it held the requested information, this would result in the disclosure of third party personal data. The first criterion set out above is therefore met.
19. Although not argued by the Home Office, the Commissioner finds it appropriate to consider whether confirming or denying whether it holds the requested information would result in the disclosure of information relating to criminal convictions and offences of any third party.

Is the information criminal offence data?

20. Information relating to criminal convictions and offences is given special status in the UK GDPR.
21. Article 10 of UK GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA 2018 personal data relating to criminal convictions and offences includes personal data relating to-:
 - (a) The alleged commission of offences by the data subject; or
 - (b) Proceedings for an offence committed or alleged to have been committed by the data subject of the disposal of such proceedings including sentencing.
22. The requested information in this case relates to whether or not the Secretary of State has issued notices to deprive the three individuals of British Citizenship following their release from prison for various offences.
23. The Commissioner considers that the requested information, if held, would concern conditions or restrictions placed on individuals as part of the criminal justice process. As such, he finds that it falls within the remit of criminal offence data.

24. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes confirming or denying whether the information is held in response to a FOI request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA 2018 can be met.
25. Having considered the type of information which has been requested, the Commissioner found it to be criminal offence data and did not ask the Home Office for its representations; he did not consider this to be necessary in light of his role as regulator for data protection matters. Having regard for the restrictive nature of the Schedule 1, Parts 1 to 3 conditions, the Commissioner does not consider that any of the conditions for processing can be met.
26. As none of the conditions required for processing criminal offence data are satisfied there can be no legal basis for confirming whether or not the requested information is held; providing such a confirmation or denial would breach data principle (a) and therefore the second criterion of the test set out above is met. It follows that the Home Office is entitled to refuse to confirm or deny whether it holds the requested information on the basis of section 40(5)(B) of FOIA.

Right of appeal

27. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

28. 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.
29. 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
Cheshire
SK9 5AF