

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 April 2023

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

Decision (including any steps ordered)

1. The complainant requested information relating to the immigration/asylum record for the Liverpool Women's Hospital bomber.
2. The Home Office provided some information but withheld the remainder, citing sections 21(1) (information accessible to applicant by other means), 38(1)(a) and (b) (health and safety), 31(1)(e) (law enforcement), 40(2) (personal information) and 41(1) (information provided in confidence) of FOIA.
3. The Commissioner has investigated its application of sections 31, 38, 40 and 41.
4. The Commissioner's decision is that the Home Office was entitled to withhold the information withheld by virtue of those exemptions.
5. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

6. On 3 December 2021, the complainant wrote to the Home Office and requested information in the following terms:

“Provide the immigration/asylum record for the Liverpool Women's Hospital [sic] bomber, Emad al-Swealmeen (deceased)”.

7. The request was made via the 'whatdotheyknow' website.
8. The Home Office provided its substantive response on 4 May 2022. It confirmed it held information within the scope of the request but refused to provide it, citing section 21(1) (information accessible to applicant by other means). It provided him with a link to some published information.
9. The complainant expressed dissatisfaction, clarifying that the request was for 'the whole asylum/immigration file(s)'.
10. Following an internal review, the Home Office wrote to the complainant on 27 July 2022. It revised its position, finding that, while section 21 did not apply to the whole file, the information in the requested file was nevertheless exempt from disclosure.
11. It cited the following exemptions to withhold those parts of the requested information that were not covered by section 21(1): section 38(1)(a) (health and safety), section 40(2) (personal information) and section 41(1) (information provided in confidence).
12. The complainant disputed the Home Office's application of sections 38(1)(a), 40(2) and 41(1). No reference was made to section 21(1).
13. During the course of the Commissioner's investigation, the Home Office revisited its handling of the request and provided the complainant with some of the information it had originally withheld.
14. With respect to the remaining withheld information, it confirmed its application of the exemptions previously relied on and additionally cited section 31(1)(e) (law enforcement). It also confirmed that it considers that both limbs of section 38(1) apply in this case.
15. The Commissioner accepts that a public authority has the right to claim an exemption for the first time before the Commissioner or the Tribunal. The Commissioner does not have discretion as to whether or not to consider a late claim.
16. While acknowledging that the Home Office disclosed some of the requested information, the complainant asked the Commissioner to review the withheld information to see if it can be redacted.
17. Accordingly, the Commissioner progressed his investigation.
18. The Home Office is citing multiple exemptions in this case, with the exemptions applied to various parts of the information such that no one exemption covers all the withheld information.

19. In light of the complainant's concerns, the Commissioner considered whether the Home Office was entitled to rely on sections 41(1), 38(1)(a) and (b), 31(1)(e) and 40(2) to withhold information within the requested file.
20. The following analysis explains why the Commissioner is satisfied that the Home Office was entitled to rely on those exemptions.

Reasons for decision

Section 41(1) information provided in confidence

21. Section 41 sets out an exemption from the right to know where the information was provided to the public authority in confidence.
22. Information will be covered by section 41 if:
 - it was obtained by the authority from any other person,
 - its disclosure would constitute a breach of confidence,
 - a legal person could bring a court action for that breach of confidence, and
 - that court action would be likely to succeed.
23. In this case, the Home Office told the Commissioner:

“Information relating to an asylum application is provided to the Home Office as part of the application process in confidence, due to the nature of an asylum claim in general. The fact that in this case the applicant is deceased does not, in our view, affect the fact that information relating to the application was provided in confidence”.
24. It also stated:

“The two files contain much information provided to the Home Office from outside sources That this information was provided in confidence and has the quality of confidence is, we would submit, self-evident from the nature of the information and the nature of the process to which it relates”.
25. Acknowledging that the individual named in the request is deceased, the Home Office argued that, while the duty of confidentiality applies primarily to the providers of the information, a continuing duty of confidentiality to Mr Al-Swealmeen cannot entirely be discounted.

26. The Commissioner is satisfied that the information meets the criteria set out above. He has reached that conclusion on the basis that the information was obtained from another person, has the necessary quality of confidence, was imparted in circumstances importing an obligation of confidence, and that disclosure would be an unauthorised use of the information to the detriment of the confider.
27. He also accepts that the duty of confidence continues to apply after the death of the person concerned. This is in accordance with the Information Tribunal hearing of *Pauline Bluck v Information Commissioner and Epsom & St Helier University Hospitals NHS Trust* (EA/2006/0090).
28. Having considered the arguments put forward by the Home Office, and consulted his guidance on section 41, the Commissioner is satisfied that the four parts of the test for engaging section 41 are made out.
29. Section 41 is an absolute exemption, so there is no public interest test to be carried out under FOIA.
30. However the common law duty of confidence contains an inherent public interest test. With regard to section 41(1), this test is whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence.
31. The complainant put forward a generic public interest argument in favour of disclosure, namely that terrorism is a matter of public interest.
32. The Home Office told the Commissioner it sees little, or no, public interest in disclosure of the information provided in confidence, arguing that it does not further public understanding or accountability.
33. In contrast, in the circumstances of the case, it considered there were strong arguments in favour of maintaining the confidence, in terms of the wider public interest in preserving the principle of confidentiality and the impact of disclosure on the interests of the confider.
34. The role of the Commissioner is to regulate access to recorded information under FOIA. His role in this case is simply to consider if, at the time of the request, the public interest in disclosure outweighs the competing public interest in maintaining a confidence.
35. In weighing the above public interest arguments for and against disclosure, the Commissioner has taken account of the wider public interest in preserving the principle of confidentiality. He is mindful of the need to protect the relationship of trust between confider and confidant and not to discourage, or otherwise hamper, a degree of public certainty that such confidences will be respected by a public authority.

36. Having considered all the circumstances of this case, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information.
37. Therefore the Commissioner finds that the information was correctly withheld under section 41(1) of FOIA.
38. He has next considered the Home Office's application of section 38 to the information withheld by virtue of that exemption.

Section 38 health and safety

39. The Commissioner's guidance 'Section 38 - Health and Safety'¹ recognises that section 38(1)(a) focuses on endangerment to any individual's physical or mental health while section 38(1)(b) focuses on endangerment to the safety of any individual.
40. The Home Office told the complainant that release of the information withheld by virtue of section 38 would be likely to endanger the physical or mental health of relatives of the deceased.
41. It put forward similar arguments about endangerment to various individuals in its submission to the Commissioner.
42. Citing both limbs of the exemption, the Home Office told the Commissioner, with respect to endangerment to relatives of the deceased:

"... we consider that we have a duty to err on the side of caution in considering disclosure of personal data of living relatives of someone who committed an act of terrorism and we would maintain the application of section 38(1)(a) and add section 38(1)(b) on the ground that any risk to living relatives would be not only to their physical or mental health but also to their safety".
43. The Commissioner recognises that a public authority will not necessarily be able to provide evidence in support of a causal link, because the endangerment relates to events that have not occurred. However, there must be more than a mere assertion or belief that disclosure would lead

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-38-health-and-safety/>

to endangerment: there must be a logical connection between the disclosure and the endangerment in order to engage the exemption.

44. The Commissioner cannot give an expert opinion on whether disclosure of the information would be likely to endanger the physical or mental health, or safety of an individual.
45. He recognises that the question of the degree of endangerment is not a straightforward one. However, he acknowledges that, in the context of the request in this case, the withheld information relates to a sensitive issue.
46. Taking all the above into account, the Commissioner accepts that the exemptions at sections 38(1)(a) and (b) are engaged with regard to the withheld information. He is satisfied that there is a causal relationship between the disclosure of that information and the harm that sections 38(1)(a) and (b) are designed to protect.

The public interest test

47. Section 38 is a qualified exemption. This means that, even if the exemption is engaged, the public authority must go on to consider whether the public interest in maintaining the exemption outweighs the public interest in its disclosure.
48. The complainant's argument in favour of disclosure is that terrorism is a matter of public interest.
49. The Home Office told the Commissioner that, while it saw no public interest in disclosure, there is a strong public interest in avoiding any risk of harm to individuals.

Balance of the public interest

50. The Commissioner will invariably place significant weight on protecting individuals from risk to their physical and mental wellbeing and their safety. The natural consequence of this is that disclosure under FOIA will only be justified where a compelling reason can be provided to support the decision.
51. Clearly in any such situation where disclosure would be likely to lead to endangerment to health or safety, there is a public interest in avoiding that outcome.
52. In reaching a decision in this case the Commissioner must take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the world at large, without conditions. The wider public interest issues must therefore be considered when deciding whether or not the information requested is suitable for disclosure.

53. In this case, in weighing up the risks to the health or safety of an individual or group, against the public interest in disclosure, the Commissioner has given greatest weight to those factors which he considers support the maintenance of the exemption.
54. In other words, he gives greater weight to avoiding endangerment to any individual's physical or mental health or safety which, in all the circumstances of this case, he considers release of the information would be likely to cause. It follows that the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in favour of disclosure.

Section 31 law enforcement

55. Section 31 of FOIA provides a prejudice based exemption which protects a variety of law enforcement interests. In this case, the Home Office is citing section 31(1)(e), on the basis that disclosure would be likely to prejudice the operation of the immigration controls.
56. Consideration of section 31(1)(e) is a two-stage process: even if the exemption is engaged, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
57. The Commissioner acknowledges that the Home Office told the complainant that the originally withheld information consists of two paper files. It told him:

"The two files contain information about the way in which asylum claims are handled by the Home Office and the way in which the grounds of a claim are investigated".
58. The Home Office explained that disclosure would provide anyone who might wish to make a false claim with valuable information "which could be used to 'play' the system and circumvent the controls which are in place".
59. The Commissioner accepts that this is an interest protected by section 31(1)(e) and is satisfied that the Home Office has demonstrated that disclosure would be likely to prejudice that interest.

The public interest test

60. The Home Office argued that there is limited public interest in disclosing detailed information about the way in which asylum claims are processed. However, in favour of maintaining the exemption, it argued that there is a strong public interest in avoiding any disclosure which would make it easier for someone to make a false claim and thereby evade immigration controls.

61. In reaching a view in this case, the Commissioner accepts that it is important for the general public to have confidence in the UK's law enforcement capabilities in connection with its immigration control systems. Accordingly, there is a general public interest in disclosing information that promotes accountability and transparency in order to maintain that confidence and trust.
62. However, he also recognises that there is a very strong public interest in protecting the law enforcement capabilities of public authorities. The Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption – that is, the public interest in avoiding prejudice to the operation of the immigration controls.
63. In the context of this case, the Commissioner recognises the public interest in preventing individuals intending to circumvent immigration controls – and those who wish to assist them – from having access to information which could assist them in building a picture of how they can best achieve their aims.
64. Clearly, the disclosure of any information that would assist people to circumvent immigration controls would not be in the public interest.
65. Having given due consideration to the opposing public interest factors in this case, the Commissioner has concluded that the factors in favour of disclosure do not equal or outweigh those in favour of maintaining the exemption. Accordingly, the Commissioner is satisfied that section 31(1)(e) of FOIA was appropriately applied in this case.

Section 40 personal information

66. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
67. Section 3(2) of the Data Protection Act 2018 defines personal data as:
“any information relating to an identified or identifiable living individual.”
68. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
69. It is accepted that, as the individual named in the request is deceased, section 40 does not apply to his information.
70. The Home Office told the complainant that information was withheld under section 40(2) because of the condition at section 40(3A)(a).

71. Having seen a copy of the withheld information, the Commissioner accepts that the information withheld by virtue of section 40 includes details of individuals other than the individual named in the request, including Home Office officials. That information includes names, contact details and photographs.
72. The Commissioner is satisfied that the requested information is personal data as the information relates to and identifies living individuals.
73. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
74. 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.
75. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.
76. The Commissioner considers that the complainant is pursuing a legitimate interest and that disclosure of the requested information is necessary to meet that legitimate interest.
77. However, the Commissioner is satisfied that the grounds for withholding names and other personal details of officials below Senior Civil Servant level are well established. He accepts that those details have been correctly withheld.
78. With regard to the remaining information withheld by virtue of section 40, the Home Office explained that it does not have consent from the individuals concerned for their information to be disclosed; nor has it sought consent. It argued that the individuals concerned would have a strong and reasonable expectation that their information would not be disclosed under FOIA.
79. It also told the Commissioner that the legitimate expectations with regard to privacy derive from established Home Office policy and practice. Referring to the relevant privacy information notice, it told him that the privacy notice gives no indication that personal information provided to the Home Office about an asylum application could be disclosed under FOIA.

80. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
81. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
82. The Commissioner has therefore decided that the Home Office was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

83. 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

84. 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.

85. 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

Laura Tomkinson
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