

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 5 April 2023

**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 information about an individual whose arrest in an immigration raid was blocked by protesters. The Home Office refused the request on the grounds that the information was exempt under section 31(1)(e) (Law enforcement), 38 (Health and Safety) and 40(2) (Personal information) of FOIA.
2. The Commissioner's decision is that the Home Office was entitled to apply section 40(2) to refuse the request.
3. The Commissioner does not require steps as a result of this decision.

#### Request and response

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4. On 5 July 2022, the complainant wrote to the Home Office and requested information in the following terms:

"Please see this news report:

[link to news report about raid and protest redacted]

Please can you confirm if since the man in question was released on bail as a result of the protest, whether he has been re-arrested and if

so when this was and what was the outcome and if he has not been arrested since why not and what is the current status of the case. Are his whereabouts known or is he now an immigration absconder please.

The man was not identified in the report so there should be no section 40 issues and the issue of unlawful immigration into the UK is currently a huge matter of public interest so the public interest balancing exercise should be in favour of disclosure.”

5. The Home Office responded on 26 July 2022. It stated that the information was exempt from disclosure under section 31(1)(e) of FOIA on the grounds that disclosure would be likely to jeopardise the UK’s immigration controls.
6. Following an internal review, the Home Office wrote to the complainant on 8 September 2022. It maintained that the information was exempt under section 31(1)(e) of FOIA. In addition, it applied sections 40(2) and 38(1) to withhold the information.

## **Reasons for decision**

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7. The analysis below considers whether the Home Office was entitled to apply section 40(2) of FOIA to refuse the request.

## **Section 40 – personal information**

8. 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.
9. 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 General Data Protection Regulation (‘GDPR’).
10. 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.

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

**Is the withheld information personal data?**

12. Section 3(2) of the DPA defines personal data as:

“any information relating to an identified or identifiable living individual”.

13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

14. 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.

15. 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.

16. The complainant has argued that the information he has asked for does not constitute personal data:

“...the individual is not identifiable from the limited information requested - which is the standard level of information always released by law enforcement agencies including the police and Home Office as it does not breach data protection.”

17. As precedent, he referred the Commissioner to his decision in a previous complaint he had submitted, whereby the Commissioner found that information about firearms incidents in specific locations on specific dates was not personal data and should be disclosed<sup>2</sup>.

18. The Home Office argued that the information was the personal data of the individual referred to in the request. It said that the significant media coverage of the incident meant that it may be possible for somebody to identify him.

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<sup>2</sup> The Commissioner’s finding in that case was that the withheld information did not identify any individual, directly or indirectly, and so was not personal data.

19. The Commissioner is satisfied that the request does not ask for information which would directly identify the individual. However, even though they are not named in the information being withheld, the individual may still be identifiable indirectly, by other means. This will be the case where a third party could use the information and combine it with other information available to them<sup>3</sup>.
20. Disclosure under FOIA is to be regarded as placing information into the public domain; it is not a private matter between requester and public authority.
21. Having considered both parties' arguments, and the media reports about the incident that he has found in the public domain, the Commissioner is satisfied that the individual can be identified, indirectly, from the withheld information. This is because the incident happened in the presence of family, neighbours and local people, many of whom would know the individual. He is therefore identifiable to them as being the individual referred to in the media report cited in the request and they would know that any information disclosed in response to the request was about him.
22. The Commissioner is, therefore, satisfied that the withheld information relates to an identifiable individual and that it is his personal data.
23. 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.
24. The most relevant DP principle in this case is principle (a).

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

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

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

26. 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.

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<sup>3</sup> <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/what-is-personal-data/can-we-identify-an-individual-indirectly/>

27. 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.
28. In addition, if the requested personal data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the GDPR.

**Is the information criminal offence data?**

29. Information relating to criminal convictions and offences, including alleged offences, is given special status in the GDPR.
30. Article 10 of the GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA, 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 or the disposal of such proceedings including sentencing.
31. Having considered the wording of the request, the Commissioner finds that the requested information does include criminal offence data. He has reached this conclusion on the basis that the request asks to know specific information about the alleged commission of offences by the individual, and any related proceedings.
32. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.
33. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under FOIA are the conditions at Part 3, paragraph 29 (consent from the data subject) or Part 3, paragraph 32 (data made manifestly public by the data subject).
34. The Commissioner has seen no evidence or indication that the individual concerned has specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
35. As none of the conditions required for processing criminal offence data are satisfied, there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and so this information is exempt under section 40(2) of FOIA.

## **Other matters**

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36. In his grounds of complaint, the complainant asked the Commissioner to give him a further opportunity to provide his views following the Home Office's response to his investigation enquiries.
37. As the Commissioner's complaints process is not an adversarial one, this is not something which is generally offered by the Commissioner, unless there is a particular point to clarify or where there is the potential to informally resolve a case (ie without the need for a decision notice). This has not been necessary on this occasion.

## Right of appeal

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38. 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)

39. 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.

40. 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 .....**

**Samantha Bracegirdle**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**