

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 June 2023

Public Authority: HM Treasury
Address: 1 Horse Guards Road
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant has requested information from the Office of Financial Sanctions Implementation ("OFSI"), a part of HM Treasury ("HMT"), about the granting of a specific license. HMT stated that it could neither confirm nor deny whether the requested information is held, relying on section 40(5B)(a)(i)(personal data) of FOIA. During the course of the Commissioner's investigation HMT also sought to rely on section 41(2)(information provided in confidence) to neither confirm nor deny whether the requested information is held.
2. The Commissioner's decision is that HMT is entitled to rely on section 40(5B)(a)(i) to neither confirm nor deny whether information is held. As the Commissioner has found this exemption to be engaged he has not considered HMT's application of section 41(2) of FOIA.
3. The Commissioner does not require any steps.

Background to the case

4. The events preceding the request have a lengthy and complex history; the Commissioner has attempted to summarise the matters relevant to his decision below.
5. In a letter to the Commissioner the complainant explained that in 2017 they had sought to purchase land owned by the government of a country currently subject to financial sanctions by the UK government, meaning that the land is under asset freezing restrictions. The sale of the land was never completed. Per the complainant's explanation, in order to facilitate the sale of the land, two conveyancing solicitors working at a large legal partnership claimed that they had been

instructed by the government of the designated country to facilitate the sale. In order to act on behalf of the government of the designated country for the purposes of a financial transaction, it is a requirement that solicitors obtain specific licences from the Office of Financial Sanctions Implementation¹. It is the complainant's position that the representatives did not obtain the required licenses and therefore acted in contravention of UK sanctions legislation.

6. The complainant raised complaints with the Solicitors Regulation Authority ("SRA") and appealed to the Solicitors Disciplinary Tribunal ("SDT") on multiple occasions in the years since the aborted sale. The Commissioner understands that the complainant remains involved in a number of legal disputes in relation to the matter.

Request and response

7. On 11 November 2022, the complainant wrote to the public authority and requested information in the following terms:

"I respectfully request you to categorically state whether [redacted] and [redacted] held such Licences during the period they had claimed to have conduct of the purported property transaction and whether [redacted] has ever applied for or held such a licence and if not, what action you propose to take or whether the Government has a policy of failing to implement the law."

8. The public authority responded on 9 December 2022. It stated that it was electing to neither confirm nor deny whether the requested information was held, with reliance on section 40(5B)(a)(i) of FOIA. HMT stated that confirming or denying whether the information was held would contravene the first data principle, which requires the processing of personal data to be lawful, transparent and fair.

¹ On 28 June 2023, HMT contacted the Commissioner and noted that paragraph 5 did not reflect the current position regarding OFSI. HMT explained that the position was as set out in the quote below. The Commissioner has agreed to add this clarification to the website version of the decision notice. The content of the original decision notice itself has not been changed.

"OFSI's current position is that, in most cases, in order to act on behalf of a designated person it is not a requirement that solicitors obtain specific licenses from OFSI. It is however the case that a license is required in order to receive payment for their services."

9. Following an internal review HMT wrote to the complainant on 11 January 2023 maintaining its position.

Scope of the case

10. The complainant contacted the Commissioner on 20 January 2023 to complain about the way their request for information had been handled.
11. The complainant expressed their grounds of complaint in the following terms:

“I do not believe that the solicitors, barristers and insurers have any right to privacy when it is in the public interest that the public knows whether they have the licenses or not.”
12. The Commissioner considers that the scope of his investigation to be to establish whether the public authority is entitled to refuse to confirm or deny whether it holds withhold the requested information on the basis of section 40(5) of FOIA. During the course of the Commissioner’s investigation HMT also sought to apply section 41(2) however, as explained at paragraph 2 above, he will not be considering this exemption as part of this decision.

Reasons for decision

13. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in a request. This is commonly known as ‘the duty to confirm or deny’. However, there may be occasions when complying with the duty to confirm or deny under Section 1(1)(a) would itself disclose sensitive or potentially exempt information. In these circumstances, section 2(1) of FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.
14. The decision to use a neither confirm nor deny (NCND) response will not be affected by whether a public authority does, or does not, in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information

is held. The Commissioner's guidance² explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds information about an individual can itself reveal something about that individual. For example, where a request is made for information about staff disciplinary records in respect of a particular individual, to confirm or deny that that information is held would be likely to indicate that the person was, or was not, the subject of a disciplinary process. This is, of itself, a disclosure of information about that person.

15. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
16. In its response to the Commissioner, HMT has taken the position of neither confirming nor denying whether it holds the requested details of the persons named in the request, citing section 40(5B)(a)(i) of FOIA. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not HMT is entitled to NCND whether it holds the information requested by the complainant.
17. Put simply, the Commissioner must consider whether or not, in this particular case, HMT is entitled to NCND whether it holds any information in relation to the persons that the complainant's information request refers to.

Section 40(5) – Personal data

18. As noted above, under section 1(1) of FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the requested information.
19. However, section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether the authority holds the information 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 GDPR.

² <https://ico.org.uk/media/for-organisations/documents/2021/2619041/s40-neither-confirm-nor-deny-in-relation-to-personal-data-section-40-5-and-regulation-13-5-final-version-21.pdf>

20. For HMT to be entitled to rely on section 40(5B)(a)(i) the following two criteria must be met:
- confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - providing this confirmation or denial would contravene one of the data protection principles.
21. The Commissioner has a well-established position in cases such as this and a full explanation of the exemption can be found in his previous decision notice IC-93789-Q5K5³.

Is the information personal data?

22. Section 3(2) of the Data Protection Act 2018 (DPA) defines personal data as:
- “any information relating to an identified or identifiable living individual”.
23. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
24. 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.
25. 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.
26. The Commissioner is satisfied that confirming or denying whether the information is held would result in the disclosure of a third party's personal data. This is because the request clearly specifies that the information relates to persons who are identifiable living individuals.
27. If HMT confirmed it did hold information falling within scope of the request, that would verify that the persons named in the complainant's request hold, or had previously held, a licence granted by OFSI. If it

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4019942/ic-93789-q5k5.pdf>

denied that it held information falling within scope of the request that would mean that the named persons do not or had not held a licence.

28. The fact that confirmation or denial constitutes the disclosure of 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 confirmation or denial would contravene any of the DP principles.
29. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

30. Article 5(1)(a) of the General Data Protection Regulation (GDPR) states that:

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

31. 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 – or as in this case, the public authority can only confirm or deny whether or not it holds the requested information - if to do so would be lawful, fair and transparent.
32. 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 GDPR

33. 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”⁴.

⁴ 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:-

34. In considering the application of Article 6(1)(f) of the 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 confirmation as to whether the requested information is held (or not) 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.
35. 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

36. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
37. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial but trivial interests may be more easily overridden in the balancing test.
38. From the information presented to him by the complainant the Commissioner understands that their primary reasoning behind the request is to obtain information in order to settle a personal matter of high sensitivity to the complainant. The complainant alleges that the solicitors in question have committed a criminal offence by not holding the required licences and therefore provision of the requested information (if held) for the attention of the regulatory authorities is in the public interest. The Commissioner recognises that there is a

"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".

legitimate interest in understanding whether solicitors have acted in accordance with UK sanctions law.

Is disclosure necessary?

39. '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 and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
40. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

41. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subjects' interests, fundamental rights and freedoms. In doing so, it is necessary to consider the impact of confirmation or denial.
42. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that confirming whether to not the information is held may cause;
 - whether the information (if held) is already in the public domain;
 - whether the information (if held) is already known to some individuals;
 - whether the individual expressed concern as to confirmation being given as to whether HMT held the information or not; and
 - the reasonable expectations of the individual.
43. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that HMT would not confirm whether or not the requested information is held. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

44. The Commissioner considers that the named individuals would have a reasonable expectation that HMT would not confirm or deny whether they held the requested information. As explained by HMT in its submissions, persons submitting licence applications do so with the expectation that the process will be treated with confidence, as the information supplied contains personal and financial information. This duty of confidence also extends to confirmation or denial that the application was made and either granted or refused, which could potentially put the safety of licence applicants at risk by making them targets for malicious acts. It bears repeating that disclosure under FOIA is disclosure to the world "at large", and, due to the context of the request, the Commissioner considers that confirmation or denial that the information was held would cause damage and distress to the named individuals.
45. 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 confirmation or denial as to whether the requested information is held would not be lawful.
46. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether confirmation or denial would be fair or transparent. He finds that the exemption at section 40(5B)(a)(i) is engaged.

Section 41(2) – information provided in confidence

47. As the Commissioner has found that HMT is entitled to rely on section 40(5B)(a)(i), he has not considered HMT's application of section 41(2).

Right of appeal

48. 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

49. 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.
50. 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

Jonathan Slee
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