

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 July 2023

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

Decision (including any steps ordered)

1. The complainant requested information about a named hotel used to house migrants. The Home Office neither confirmed nor denied holding the requested information, citing section 38(2) (health and safety) of FOIA.
2. The Commissioner's decision is that the Home Office was entitled to rely on section 38(2) to refuse to confirm or deny whether it holds any information falling within the scope of the request.
3. No steps are required as a result of this decision.

Request and response

4. On 21 April 2023, the complainant wrote to the Home Office and requested information in the following terms:

"In relation to the [name and address of hotel redacted] being used to house asylum seekers/refugees under the freedom of information act could you let me know the following,

1, Initially asylum seekers were to be resident in the [hotel name redacted] for six months and then dispersed to others [sic] places around Northern Ireland but this hasn't happened why is this the case.

2, How many asylum seekers are currently staying in the [hotel name redacted].

- 3, Are all the residents single males.
 - 4, Are all the asylum seekers here [sic] legally or not.
 - 5, Have they been vetted and checked for any criminal activities in their country of origin.
 - 6, Can you name the countries they are from.
 - 7, What recourse of any to they have to public funds and does this change overtime [sic]."
5. The Home Office responded on 15 May 2023. It neither confirmed nor denied holding the requested information, citing section 38(2) (health and safety) of FOIA.
 6. The Home Office maintained its view following an internal review and confirmed this to the complainant on 29 June 2023.

Scope of the case

7. The complainant contacted the Commissioner on 3 July 2023 to complain about the way his request for information had been handled.
8. When considering a 'neither confirm nor deny' ('NCND') response, as in this case, the single issue the Commissioner must determine is whether the public authority was correct neither to confirm nor deny whether it holds the requested information.
9. Therefore, this notice considers whether the Home Office is entitled, on the basis of section 38(2) of FOIA, to NCND whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.

Reasons for decision

Section 38 health and safety

10. Section 38 of FOIA provides an exemption from disclosing information if it would endanger any individual (including the applicant, the supplier of the information or anyone else).
11. Section 38(1)(a) focuses on endangerment to any individual's physical or mental health. Section 38(1)(b) focuses on endangerment to the safety of any individual.

12. Section 38(2), the limb of the exemption cited in this case, provides an exemption from the duty to confirm or deny whether information is held if doing so would, or would be likely to, endanger the physical or mental health or safety of any individual.
13. The Commissioner's guidance on section 38¹ defines 'endanger' and states that it must have a greater impact than simply causing distress or upset.
14. In reaching his decision in this case, the Commissioner has considered the arguments put forward by the Home Office in its response to the request and internal review outcome. He is also aware that he has previously issued decision notices² in asylum seeker accommodation cases. In particular, he has taken into account decision notice IC-208394-G6M7³ issued on 13 June 2023, where information relating to the housing of asylum seekers was requested and he upheld the Home Office's reliance on section 38(2) of FOIA.
15. Whilst previous decision notices are not binding on the Commissioner, and he must consider each case on its individual merits, the Commissioner has reviewed the content of the previous notices and accepts that the issues at stake in this case are similar.
16. In the case under consideration in this notice, the Home Office considers that confirming or denying whether the information is held 'would' or 'would be likely' to, have a detrimental effect. In other words, it considers that confirming or denying that they hold information would, or would be likely to, endanger the physical or mental health or safety of an individual as defined in section 38(1)(a) and (b).
17. In decision notice IC-208394-G6M7, the Commissioner notes that the Home Office stated that confirming or denying whether the requested information is held 'would' have a detrimental effect. The Commissioner is satisfied that the higher threshold of 'would' is met in the case under consideration here.

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

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024963/ic-199652-13v2.pdf> **and** <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022389/ic-155600-d0j5.pdf> **and** <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024963/ic-199652-13v2.pdf>

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4025570/ic-208394-g6m7.pdf>

18. In IC-208394-G6M7, the Home Office explained that, if it confirmed or denied it holds the requested information, it will identify whether or not the named property is one that is used to house asylum seekers. It recognised that asylum seekers, and immigration more broadly, "is a highly contentious issue which elicits strong views". It argued that some asylum seekers have been, and continue to be, targeted for abuse and intimidation.
19. In addition, in support of its position in IC-208394-G6M7, the Home Office provided evidence whereby the speculation of asylum accommodation has led to the targeting of properties by individuals. It therefore argued that there is clearly a real, evidenced, risk to the physical and mental health and safety of individuals in these types of accommodation.
20. As illustrated by the wording of the request in this case, the complainant believes that the named hotel has been used to accommodate asylum seekers. The Home Office has previously argued in IC-208394-G6M7 that it is often speculated as to which properties are, or are not, used to provide accommodation for asylum seekers and that speculation is not the same thing as an official confirmation, or denial, from the Home Office. The same argument applies in the current case.
21. The Commissioner is also mindful of the Home Office's stance in IC-208394-G6M7 where it argued that it must maintain an appropriate and consistent position so as to not identify whether the named accommodation is used to house asylum seekers.
22. A confirmation or denial would reveal whether the hotel specified in the request was used to house asylum seekers.
23. The Commissioner recognises the sensitive subject matter that this request refers to. He also considers that it is important that a public authority uses NCND responses consistently, as not doing so could undermine the effectiveness of the exclusion to confirm or deny whether information is held.
24. He is therefore prepared to accept the Home Office's reasoning, and has decided that the exemption from the duty to confirm or deny provided by section 38(2) is engaged. He has next gone on to consider the associated public interest test.

The public interest test

25. Section 38 is subject to the public interest test, as set out in section 2 of FOIA. This means that although section 38 is engaged, confirmation or denial must still be provided unless, in all the circumstances of the case,

the public interest in maintaining the exemption outweighs the public interest in confirming or denying.

Public interest arguments in favour of confirming or denying whether information is held

26. The complainant told the Commissioner that the subject matter of his request is a matter of public interest.
27. The Home Office recognised that, if held, there will be a public interest in disclosing the information to ensure there is full transparency in the Home Office's approach to accommodating and supporting asylum seekers. It said that disclosure of this information would also enable the public to have confidence in the Home Office's approach to the welfare of asylum seekers.

Public interest arguments in favour of maintaining the exemption

28. In favour of maintaining the exemption, the Home Office told the complainant the following:

"If held, there is a public interest in government departments being able to accommodate asylum seekers by representing their best interests. Anything that would undermine this is not in the public interest.

To disclose the addresses and facilities used to accommodate asylum seekers would weaken the Home Office's stance on protecting the health and safety of individuals as it could lead them to being exposed to threats and harassment. One of the main provisions under this exemption refers to any plans or policies relating to the accommodation of individuals, or groups of individuals, where disclosure could lead them to being threatened or harassed."
29. Having considered the previous arguments in decision notice IC-208394-G6M7, the Commissioner notes that, in this similar case, the Home Office stated that it has a duty of care and responsibility to provide safety and protection to asylum seekers. It also argued that it is well known that vulnerable asylum seekers are targets of reprisals or reactions, and individuals or groups of individuals have been threatened and harassed.
30. Further, the Home Office argued that there is a very great public interest in not exposing individuals to threats of harassment, intimidation and/or physical violence. It contended that disclosing information, by way of confirmation or denial, would undermine its ability to protect the health and safety of individuals and would not be in the public interest.

31. In that same decision notice, the Home Office highlighted that confirming or denying whether specific properties are used to accommodate asylum seekers and other vulnerable people presents a very real risk of harm to them and others who may be at the property. It went on to say: "We believe there is therefore a very clear public interest in protecting against this risk, and neither confirming nor denying whether the information is held, as to do so would, in effect, confirm or deny whether the property is used for such purposes".

The balance of the public interest

32. 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, by way of confirmation or denial, will only be justified where a compelling reason can be provided to support the decision.
33. Clearly in any such situation where disclosure would lead to endangerment to health or safety, there is a public interest in avoiding that outcome.
34. In reaching a decision in this case the Commissioner must take into account the fact that confirmation or denial 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 it is suitable to confirm or deny whether the requested information is held.
35. The Commissioner has also consulted his guidance on the use of NCND.⁴ This guidance explains that public authorities need to have a consistent approach to NCND exemptions in order for such provisions to be effective.
36. In the case under consideration here, in weighing up the risks to the health or safety of an individual or group, against the public interest in disclosure by way of confirmation or denial, the Commissioner has given greatest weight to those factors which he considers support the maintenance of the exemption.
37. In the Commissioner's view, there is a very clear and weighty public interest in avoiding endangerment to the health or safety of any individual. While the Commissioner appreciates the public interest in the

⁴ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/when-to-refuse-to-confirm-or-denying-holding-information/#consistent>

use of hotels to accommodate asylum seekers, in his view this is outweighed by the Home Office neither confirming nor denying whether it holds any information falling within the scope of this request.

38. It follows that the Commissioner's decision is that the Home Office was entitled to rely on section 38(2) of FOIA to neither confirm nor deny whether it holds the requested information.

Right of appeal

39. 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

40. 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.
41. 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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