

Freedom of Information Act 2000 (Section 51)

Information notice

Date: 14 January 2020

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

Section 51

Under section 51 of the Freedom of Information Act 2000 (the "Act"), which is set out below, the Information Commissioner (the "Commissioner") has the power to serve a notice on a public authority requiring it to furnish her with any information she requires to enforce the requirements of the Act.

51. – (1) If the Commissioner –

(a) has received an application under section 50, ...

she may serve the authority with a notice (in this Act referred to as "an information notice") requiring it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to the application, to compliance with Part I or to conformity with the code of practice as is so specified.

Application under section 50

1. The Commissioner has received an application under section 50, reference FS50872907, for a decision whether a request for information made by the complainant to the Home Office on 5 August 2019, has been dealt with in accordance with the requirements of Part I of the Act.

Nature of complaint

2. On 5 August 2019, the complainant made the following request for information under the FOIA:

"Was [redacted] refused entry into the UK on approximately [redacted]? And why was he and/or those with him refused entry into the UK?"

There has been a petition made on change.org, and claims have been made in relation to the British Government that he and/or those with him were refused entry because such an entry "would not be conducive to the public good". Are such claims substantiated? And if so, how?"

3. The Home Office responded on 27 August 2019. It refused to comply with the request, on the grounds that the information was exempt from disclosure under section 40(2) (personal information) of the FOIA.
4. The Home Office provided an internal review on 5 September 2019. It upheld its decision to refuse the request under section 40(2).
5. The complainant wrote to the Commissioner to complain about the response on 6 September 2019.
6. On 12 November 2019, to assist with her investigation, the Commissioner wrote to the Home Office, asking it a series of questions about its handling of the request.
7. At the time of writing this notice, no acknowledgement or response has been received, despite the Commissioner sending a reminder on 12 December 2019, explaining that if no response was received by 6 January 2020, an information notice would be issued.

Information required

8. In view of the matters described above the Commissioner hereby gives notice that in the exercise of her powers under section 51 of the Act she requires that the Home Office shall, within 30 calendar days of the date of this notice, furnish the Commissioner with a copy of the following information.
9. The Home Office is required to respond to the email which the Commissioner sent to it on 12 November 2019, namely:

*"...the **ICO will need a copy of the withheld information** and answers to the following questions from you in order to reach a decision as to whether the FOIA has been complied with. It is important that you provide clear and cogent evidence in support of the Home Office's position, as the matter may be examined by the Information Tribunal, should either the Home Office or the complainant appeal against the Commissioner's decision.*

Section 40(2) (personal information)

The definitions of "personal data", "special category data" and "criminal offence data" can be found in the definitions document, attached.

In order to assist the ICO's consideration of the application of section 40(2) please identify whose personal data the Home Office considers the requested information to be.

Please explain why this information is that individual's/those individuals' personal data.

Is the Home Office's position that all of the withheld information is personal data?

Special category data

Has the Home Office considered whether any of the withheld information also constitutes special category data?

If applicable, please explain why you consider the personal data in question to be special category data.

Please confirm that you have considered the conditions for processing set out in Article 9 of the GDPR (<https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/special-category-data/>) but have been unable to satisfy any of them in order to disclose this personal data. Please note that the Commissioner considers that the only conditions that could be relevant to disclosure under the FOIA are conditions (a) (consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.

Criminal offence data

Has the Home Office considered whether any of the withheld information also constitutes criminal offence data?

If applicable, please explain why you consider the personal data in question to be criminal offence data.

Please confirm that you have considered the conditions for processing as set out in Schedule 1, Parts 1-3 of the DPA 2018 (http://www.legislation.gov.uk/ukpga/2018/12/pdfs/ukpga_20180012_en.pdf) but have been unable to satisfy any of them in order to disclose this personal data. Please note that the Commissioner considers that it is unlikely that one of these conditions will be satisfied in relation to a disclosure under the FOIA. The conditions that could be relevant are Part 3 paragraph 29 – consent from the data subject and Part 3 paragraph 32 – data made manifestly public by the data subject.

First data protection principle

The first data protection principle under Article 5(1)(a) GDPR states that personal data shall be:

"processed lawfully, fairly and in a transparent manner in relation to the data subject".

To determine whether or not disclosure is lawful, the Home Office should consider whether there is a lawful basis for processing in Article 6(1) of the GDPR:

"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".

The Commissioner considers that the lawful basis most likely to be relevant in relation to a request for information under the FOIA is Article 6(1)(f) - legitimate interests. In considering the application of Article 6(1)(f) in the context of a request for information under FOIA it is necessary to consider the following three-part test:-

- 1. **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;*
- 2. **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;*
- 3. **Balancing test:** Whether the above interests override the interests, fundamental rights and freedoms of the data subject.*

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

In considering any legitimate interest(s) in the disclosure of the requested information, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.

Has the Home Office identified any legitimate interests in disclosure?

Is disclosure necessary?

'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and therefore disclosure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

Please set out why you concluded that disclosure is not necessary in this case. How else could the legitimate interests be met in this case?

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

It is necessary to balance the legitimate interests in disclosure against the data subject(s)' interests, fundamental rights or freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA, and/or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

Does the information relate to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life)?

What reasonable expectations does the individual have about what will happen to their personal data?

Has the individual named been asked whether they are willing to consent to the disclosure of their personal data?

Please describe the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual(s) concerned);

Please set out your conclusions as to the balance between the rights and freedoms of the data subject(s) in this case and the legitimate interests of the public in accessing this information.

Please ensure you refer to the specific circumstances of this case.

If not already addressed in the legitimate interest test above, has the Home Office considered whether disclosure would be more generally unlawful, for example, by breaching a contractual or other legal obligation or breaching the right to privacy in Article 8 of the Human Rights Act?

Fairness

Please set out why you believe disclosure would not be fair if different to the considerations of the data subject(s)' interests, fundamental rights or freedoms above.

Transparency

Has the data been processed in a transparent manner? What information has the Home Office provided to the data subject(s) concerning the request?"

Failure to comply

10. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act, and may be dealt with as a contempt of court.

Right of appeal

11. There is a right of appeal against this information notice to the First-tier Tribunal (Information Rights). Information about the appeals process can be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: grc@Justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

12. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this information notice is sent. If Notice of Appeal is served late the Tribunal will not accept it unless it is of the opinion that it is just and right to do so by reason of special circumstances.

Signed

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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