

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 May 2018

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

Decision (including any steps ordered)

1. The complainant requested information about a named individual's passport application and associated correspondence, submitting that this person is deceased. In the absence of any firm evidence or authoritative official confirmation that the named individual is deceased, the Home Office refused to confirm or deny that it held the requested information, citing section 40(5), the 'neither confirm nor deny' ('NCND') provision for personal information.
2. The Commissioner's decision is that the Home Office was correct to neither confirm nor deny holding information within the scope of the request, by virtue of section 40(5)(b)(i) of the FOIA. She requires no steps to be taken as a result of this decision.

Background

3. The request under consideration in this notice concerns a named individual whom it is *'believed'* is deceased.
4. The Commissioner has previously issued two decision notices where requests for information have been made for the same named individual, presumed to be dead, but with no definitive proof. In both cases, the public authority (the University of Westminster) cited section

40(2), personal information, in refusing to provide the requested information¹.

5. In those cases, the Commissioner concluded that the way in which the requests were worded would engage section 40(2) and so included the exact wording of the requests in a confidential annex attached to those notices.
6. In both cases, the Commissioner found that the requested information was personal data and that the public authority was still bound by the requirements of the Data Protection Act 1998 ('DPA').
7. The Commissioner also determined that, without any firm and definite evidence or official confirmation that the deceased individual named in the request is the same individual that may have attended the university, the university is correct to continue to apply the DPA to any information request it receives. Without firm evidence, the Commissioner considers that it is correct for the university to err on the side of caution and continue to apply the DPA.
8. Therefore, having considered all the arguments and submissions in both cases, the Commissioner concluded that, in the absence of definitive proof that the named individual is deceased, the university was entitled to rely on section 40(2).
9. In addition the Commissioner has issued another decision notice² which she considers to be relevant. In that case, the complainant requested access to information which had been withheld from a murder file under section 40(2), personal data. He provided evidence that some of the people he believed this information related to were now no longer living.
10. The public authority (The National Archives) provided some of the requested information where the complainant was able to show proof of death, but withheld the remainder where an individual is still alive, or could be assumed to be alive because they would be under 100 years old. The Commissioner upheld this approach, ie where information can be classed as 'personal data' because it relates to living individuals, a public authority is entitled to rely in section 40(2) to withhold that information.

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624066/fs_50613932.pdf and https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624340/fs_50624782.pdf

² https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1043399/fs_50537628.pdf

11. Whilst decision notices are not legally binding, the Commissioner has taken these decision notices into consideration before finalising her decision in this case.

Request and response

12. On 1 December 2017 the complainant made the following request for information under the FOIA:

"I understand that an individual known as [name redacted] (Born: 1992, d: [date redacted]) was granted a British passport. I would like all application documents and related correspondence concerning his various passport applications."

13. The Home Office responded on 11 January 2018 and refused to confirm or deny that the requested information was held, citing section 40(5)(b)(i), the NCND provision for third party personal information.
14. Following an internal review the Home Office wrote to the complainant on 29 January 2018. It maintained that section 40(5)(b)(i) applies.

Scope of the case

15. The complainant contacted the Commissioner on 29 January 2018 to complain about the way his request for information had been handled. Specifically, the complainant believes the Home Office is no longer bound by the restrictions of the DPA because the individual named in the request is believed to be deceased and therefore section 40(5) of the FOIA does not apply.
16. The Commissioner has considered whether, in this case, the Home Office is entitled to rely on the NCND provision in section 40(5) to refuse to comply with the request.

Reasons for decision

Section 40 – personal information

17. The Home Office has cited section 40(5) of the FOIA. This section provides an exemption from the section 1(1)(a) duty to confirm or deny whether requested information is held where to do so would involve the disclosure of personal data and that disclosure would be in breach of any of the data protection principles.

18. Consideration of this exemption involves two stages. First, confirmation or denial as to whether the requested information is held must involve the disclosure of personal data. Secondly, that disclosure must be in breach of at least one of the data protection principles.

Is the information personal data?

19. The first step for the Commissioner to determine is whether the requested information, if held, constitutes personal data, as defined by the DPA. If it is not personal data, then section 40 cannot apply.
20. The definition of 'personal data' is given in section 1(1) of the DPA which states:

"personal data' means data which relate to a living individual who can be identified:

(a) from those data, or

(b) from those data and any other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

21. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
22. Because the party is named in the request, the view of the Commissioner is that confirmation or denial of whether information falling within the scope of the complainant's request is held would involve the disclosure of his personal data.

Is the individual living or deceased?

23. The Home Office has argued that for it to acknowledge the existence of any passport application, or confirmation as to whether or not an individual holds a British passport, such an acknowledgement would constitute a disclosure of personal data about that individual. In this particular case it has stated that it has had no firm evidence or authoritative official confirmation that the individual named in the request is definitely deceased and so it considers it is still bound by data protection restrictions.

24. The Home Office also stated:

"We are not aware of any case law or guidance on the required level of proof that an individual is deceased for the purposes of the DPA and section 40(2) of the FOIA. Each case is considered on its merits, but as a very general rule we would decide 'on the balance of probabilities'. However, where passport information is concerned HM Passport Office considers that they must apply the higher test of 'beyond reasonable doubt'."

25. The complainant has provided links to newspaper reports suggesting that the named individual was killed, together with the date. The Commissioner has not reproduced these links here as that would lead to identification of the individual named in the request and she also does not consider it necessary to do so in order to consider the principles associated with this complaint. Internet searches produce many similar reports, however, most of these are along the lines that the named individual is 'reported', 'believed' or 'understood' to have been killed. A Daily Telegraph report states that his death has been "*confirmed by several fighters in Syria*", but this is based on hearsay and does not amount to direct evidence. Although there are numerous reports, they appear to be based on the same unverified sources.
26. In addition, the complainant has argued that the named individual's "*silence will have to be further evidence reinforcing the original reports that he now belongs to the ranks of the deceased*". The Home Office said it does not accept that this is conclusive and that it is conceivable that he is 'lying low' or has attempted to 'disappear'.
27. On the balance of probabilities, the Home Office said it would be inclined to conclude that the named individual is deceased. The available evidence, including that cited by the complainant, nevertheless does not enable this conclusion to be reached 'beyond reasonable doubt', which is the test which HM Passport Office would apply in these circumstances. The Home Office has therefore concluded that for the purposes of the DPA and section 40(2), its approach should err on the side of caution and assume until proved otherwise that the named individual is still living. On this assumption, section 40(5) is still applicable.
28. The Commissioner is therefore satisfied that the requested information, should it be held, would constitute personal data and, as a result, the Home Office is still bound by the requirements of the DPA. As it has said, the type of information the complainant has requested is information from which a living individual can be identified and so the type of information the complainant has requested does fall within the definition of personal data.

29. The Commissioner also agrees that, without any firm and definite evidence or official confirmation that the individual named in the request is deceased, the Home Office is correct to continue to apply the DPA to any information request it receives about that individual. Without definitive evidence, the Commissioner considers that it is correct for the Home Office to err on the side of caution and continue to apply the DPA. In reaching this decision, she has taken into account both the subject matter of the request (ie passport application) and her previously issued decision notices referred to in the 'Background' section of this notice.

Would disclosure contravene the first data protection principle?

30. Having accepted that the requested information constitutes the personal data of a living individual other than the applicant, the Commissioner will go on to consider whether disclosure would breach one of the data protection principles. The Commissioner considers the first data protection principle to be relevant here, which states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 of the DPA is met.

31. In its submissions to the Commissioner, the Home Office has argued:

"Any member of the public who applies for or is granted a British passport, or who does not apply for a passport, has a reasonable expectation that the Home Office will not disclose information about the fact. The application for or granting of a passport has implications for citizenship, which may be a sensitive or contentious issue in some cases ('sensitive' in the general meaning of the word, not in the sense of meeting the definition in section 2 of the DPA). Even where it is not, members of the public have a reasonable expectation that the Home Office will protect such information.

There is an additional consideration in that passport information is susceptible to fraudulent use and the Home Office has a responsibility to guard against this by not disclosing information about applications for or the granting of British passports. We do not suggest that this means another exemption is also engaged, but the risk of fraud reinforces the need to protect the rights of the individual."

32. 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 disclosure, ie the confirmation or denial in this case, can only be given if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

33. When considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
- the individual's reasonable expectations of what would happen to their information;
 - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned);
 - any legitimate interest in the public having access to the information; and
 - the balance between these and the rights and freedoms of the individuals who are the data subjects.
34. Disclosure under FOIA is in effect disclosure to the world; the test in section 40(5)(b)(i) is whether giving the confirmation or denial to "a member of the public" would contravene data protection principles.
35. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the information in question. She will also take into account the fact that disclosure under FOIA is as stated effectively an unlimited disclosure to the public at large, without conditions.
36. Given individuals' reasonable expectations that whether or not they hold, or have applied for, a passport should remain private, the Commissioner accepts that the named individual would be likely to feel a degree of distress if the Home Office confirmed whether or not it held the information.
37. Regardless of the reasonable expectations of the data subject and the fact that damage or distress may result from disclosure, it may still be fair to disclose information, or in this case to confirm or deny whether the information is held, when there is a more compelling legitimate public interest to do so. With that in mind, the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in confirming or denying whether the information is held.
38. The Commissioner must highlight that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Taking into account the importance of protecting personal data of individuals, the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest in confirming or denying whether or not information is held must outweigh the public interest in protecting the rights and freedoms of data subjects if providing confirmation or denial is to be considered fair.

39. The interest in disclosure must be a public interest, not the private interest of an individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.
40. The Commissioner appreciates that the complainant has concerns about the named individual and that there would be some interest in being able to hold the Home Office, though its' HM Passport Office, accountable for the passports it issues. However, in the circumstances of this case, the Commissioner considers that confirming or denying whether the individual holds a British passport would be an unwarranted privacy intrusion.
41. In the light of the nature of the information requested and the reasonable expectations of the data subject, the Commissioner is satisfied that confirming or denying whether it holds information could potentially cause unnecessary and unjustified distress to the data subject. Therefore, she considers that these arguments outweigh any legitimate interest in disclosure and has concluded that confirmation or denial in this case would breach the first data protection principle.

Conclusion

42. In conclusion, having fully considered the particular circumstances of this case, the Commissioner considers the exemption provided in section 40(5) is engaged and therefore the duty to confirm or deny does not arise.

Right of appeal

43. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. 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

Carolyn Howes
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