

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 September 2024

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

Decision (including any steps ordered)

1. The complainant requested information relating to facilities provided for asylum seekers/refugees at a named accommodation site.
2. The Home Office neither confirmed nor denied holding the requested information, citing section 38(2) (health and safety) of FOIA.
3. 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.
4. No steps are required as a result of this decision.

Request and response

5. On 12 January 2024, the complainant wrote to the Home Office and requested information in the following terms:

"1/ how many flat screen televisions are being supplied to asylum seekers/refugees flats at [location redacted].

2/ as most of the asylum seekers/refugees don't speak English is the home office providing satellite TV at [location redacted].

- 3/ what is the total cost of supplying flat screen televisions at [location redacted].
- 4/ how many apartments are being furnished for asylum seekers/refugees in [location redacted].
- 5/ what is the total cost of furnishing the apartments in [location redacted] for asylum seekers/refugees”.
6. The Home Office responded on 31 January 2024. It neither confirmed nor denied holding information in scope of the request, citing section 38(2) (health and safety) of FOIA.
7. Following an internal review, the Home Office wrote to the complainant on 4 April 2024, maintaining its position.

Scope of the case

8. The complainant disputes the Home Office’s application of section 38(2) in this case. In their view, the public knowing the cost of supplying items, such as flat screen TVs and furniture, will not affect the physical and mental health of unknown individuals.
9. During the course of the Commissioner’s investigation, the Home Office confirmed its reliance on section 38(2), clarifying that it considers that disclosure or denial in this case would, as opposed to would be likely to, have a detrimental effect.
10. 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.
11. Accordingly, this notice considers whether the Home Office is entitled, on the basis of section 38(2) of FOIA, to neither confirm nor deny 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

12. Section 38 of FOIA provides an exemption from disclosing information if it would, or would be likely to, endanger any individual (including the applicant, the supplier of the information or anyone else).
13. 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.
14. 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.
15. In this case, while the request relates to the number, and cost, of items provided, the name of the apartments and their location are included in the request. The Home Office considers that confirming or denying whether the requested information is held would endanger the physical or mental health or safety of an individual as defined in section 38(1)(a and (b).
16. It explained to the complainant that the risk in this case, as a result of disclosure by way of confirmation or denial, was to individuals accommodated at the site and those working there or visiting in any capacity.
17. In support of its position, the Home Office referred the complainant to a previous ICO decision notice, IC-199652-L3V2¹, as an example of where this exemption was upheld.
18. In its submission to the Commissioner, the Home Office referred specifically to paragraph 18 of that notice, where it says:

"In response to the Commissioner, the Home Office stated that to confirm or deny that the requested information is held would identify whether the named property is one that is used to house asylum seekers".
19. The Home Office also recognised, in its submission, that:

"... the issue of asylum accommodation and accommodating asylum seekers in the UK, who would otherwise be destitute, is a highly

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024963/ic-199652-l3v2.pdf>

emotive and sensitive issue which has resulted in public protests and disorder outside sites once they have been identified and located”.

20. In support of its position, the Home Office provided evidence of the targeting of properties believed to house asylum seekers. It told the Commissioner:

“It is common knowledge that vulnerable asylum seekers are targets of reprisals or reactions, and asylum-seeking individuals or groups of asylum seeking individuals have been threatened and harassed in the past...”.

21. The Commissioner acknowledges the examples, cited by the Home Office, of situations where speculation about possible asylum seeker locations has led to the targeting of properties by those prepared to break the law, intimidate, abuse and cause criminal damage.
22. He is also aware of the more recent events of public disorder.
23. As illustrated by the complainant’s belief that the apartments identified in the request are to be used to accommodate asylum seekers, the Commissioner accepts that it is often speculated as to which properties are used for such purposes. He also accepts that speculation is not the same thing as official confirmation, or denial, from the Home Office.
24. Confirmation or denial in this case would reveal whether the apartments are to be used to house asylum seekers.
25. 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.
26. 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 public interest.

Public interest test

27. 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

28. The complainant argued that, if the public is paying, it is in the public interest.
29. The Home Office recognised that there is a public interest in confirming or denying whether the requested information is held to ensure full transparency in its approach to accommodating and supporting asylum seekers.

Public interest arguments in favour of maintaining the exemption

30. The Home Office argued that to disclose, by way of confirmation or denial, facilities and costs at particular accommodation sites would weaken the Home Office's stance on protecting the health and safety of individuals as it could lead to them being threatened or harassed.
31. The Home Office told the complainant:

"The Home Office has a duty of care and responsibility to provide safety and protection to asylum seekers. [...] it is in the public interest to accommodate asylum seekers and accommodation site staff by representing their best interests. Anything that would undermine this is not in the public interest".
32. Similarly, it told the Commissioner that it is common knowledge that vulnerable asylum seekers are targets of reprisals or reactions, and that individuals or groups have been threatened and harassed in the past. It argued that it would not be in the public interest if confirmation or denial resulted in public disorder.

The balance of the public interest

33. 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.
34. Clearly in any such situation where disclosure would lead to endangerment to health or safety, there is a public interest in avoiding that outcome.
35. 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.

36. He has also consulted his guidance on the use of NCND². This guidance explains that public authorities need to have a consistent approach to NCND exemptions in order for such provisions to be effective.
37. In this case, 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.
38. 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 cost of providing accommodation used 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.
39. 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.

² <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/when-to-refuse-to-confirm-or-deny-holding-information/>

Right of appeal

40. 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

41. 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.
42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Michael Lea
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