

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 3 December 2019

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

Decision (including any steps ordered)

1. The complainant requested information about grievances and the associated investigation reports relating to the Dublin Cessation Team, (formerly known as the Third Country Unit), from the Home Office. The request was refused by the Home Office on the basis of section 40(2) of FOIA, the exemption for personal information.
2. The Commissioner's decision is that the Home Office has correctly cited section 40(2) in refusing to provide the requested information. No steps are required as a result of this notice.

Request and response

3. On 28 April 2019 the complainant wrote to the Home Office via the *WhatDoTheyKnow.com* website¹ and requested information in the following terms:

"this [sic] request refers to the "Dublin Cessation Team" (DCT) and (for the time in which this name was applicable) its predecessor unit, the "Third Country Unit" (TCU) within the Home Office.

¹ https://www.whatdotheyknow.com/request/dublin_cessation_team_third_coun

For the period of 1 January 2018 to date, please provide all formal grievance investigation reports which relate to the DCT or the TCU. "Relate to" means that the grievance investigation reports and the underlying grievance were mainly or exclusively concerned with or targeted at

- 1) the Team / Unit as a whole*
- 2) the Team / Unit's management*
- 3) individual employees / managers within [sic] the DCT or TCU.*

The Team / Unit management and/or the relevant Human Resources teams should easily be able to ascertain which grievance investigation reports are within the scope of my request.

Where grievance investigation reports included appendices or annexes, please also provide them.

For the avoidance of doubt, "grievance" and "grievance investigation report" here means a grievance submitted by one or several employees. It does not refer to complaints by non-employees / third parties / members of the public."

4. The Home Office responded on 23 May 2019. It refused to provide the requested information citing section 40(2) of FOIA, the exemption for personal information.
5. The complainant requested an internal review on 23 May 2019 seeking more detail on which data protection principle would be breached if the requested information was to be disclosed; he also raised the issue of anonymising the data. The Home Office provided an internal review, late, on 10 July 2019 in which, having considered these points, it maintained its original position.

Scope of the case

6. The complainant contacted the Commissioner on 10 July 2019 to complain about the way his request for information had been handled. He asked the Commissioner to consider the following points:
 - That the requested information could be sufficiently anonymised and disclosed.
 - That if it were not possible to anonymise the information completely, then disclosure would be "*lawful and fair*". He argued that the Home Office had not outlined which particular statute or

common law duty would be breached by disclosure of the information held.

- That in relation to 'fairness': "*...the Home Office has not argued that sensitive personal data is in play. It has also not particularized any assertion that disclosure would have an adverse effect on the employees in question. I also note that the disclosure would relate to the employees' public rather than private role. In sum, the Home Office has failed to carry out a detailed balancing exercise to determine whether disclosure would be fair in this instance.*"
7. The Commissioner has considered whether the Home Office has correctly relied on section 40(2) in relation to this request.

Reasons for decision

Section 40 - personal information

8. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
9. In this case the relevant condition is contained in section 40(3A)(a)². This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data set out in Article 5 of the GDPR ('the DP principles').
10. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (the 'DPA'). If it is not personal data then section 40 FOIA cannot apply.
11. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

Is the information personal data?

12. Section 3(2) of the DPA defines personal data as:-
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² As amended by Schedule 19 Paragraph 58(3) of the Data Protection Act 2018

"any information relating to an identified or identifiable living individual".

13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. 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.
15. 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.
16. For the request under consideration here, the complainant has requested grievance investigation reports from 1 January 2018 to the date of his request, relating to the Dublin Cessation Team or 'DCT'. The Home Office has advised that there are two reports in scope about grievances submitted by named members of staff and that they provide detailed information about the grievance, the individual against whom the grievance is made and other staff members including interviewees.
17. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the actions and views of those individuals interviewed as part of the grievance investigations. She is satisfied that this information would identify the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
18. The fact that information constitutes the 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 disclosure would contravene any of the DP principles.
19. It is worth stating here that consideration of what follows below is the relevant statutory framework for FOIA requests where section 40(2) has been cited. This point addresses the complainant's point set out in the Scope section of this notice as to *"which particular statute or common law duty would be breached by disclosure of the information held"*.
20. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

21. Article 5(1)(a) of the GDPR states that:

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

22. In the case of an FOIA request, the personal data is processed if it is disclosed in response to the request. This means that the information can only be disclosed if doing so would be lawful, fair and transparent.

Lawful processing: Article 6(1)(f) of the GDPR

23. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.
24. 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"³.

25. 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 disclosure of the information is necessary to meet the legitimate interest in question;

³ 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:-*"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".*

- (iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject(s).

26. 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

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

28. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

The complainant's view

29. From the available correspondence the Commissioner can find no legitimate interest arguments from the complainant in support of disclosure of the contents of the grievance reports, neither on his own behalf nor on behalf of the public at large.

The Home Office's view

30. The Home Office submitted the following legitimate interest arguments to the Commissioner:

"We certainly do not consider that there is any legitimate interest whatsoever on the part of the public at large in these grievance reports. It is possible to imagine circumstances in which a specific grievance report submitted by a member of Home Office staff might have wider implications and sufficient notoriety to give rise to a legitimate public interest, but that would be extremely rare and is not the case here.

Given that we do not consider that there are any legitimate interests, we do not see how disclosure would be necessary to meet any such interest. If [the complainant] himself has a personal and legitimate interest in the content of these reports, there may be some other means (for example through HR processes, if he is a member of staff) whereby some information might be disclosed to him on a one-one basis outside the FOIA. We could not, of course, guarantee that that would be possible."

The Commissioner's view

31. The withheld reports relate to internal staff grievances. A disclosure under FOIA is effectively one to the world at large. The Commissioner cannot identify any legitimate interest arguments as to why the content of these reports should be disclosed to the world at large under FOIA.
32. As there have been no legitimate interest arguments submitted by either party, nor can the Commissioner identify any, she has concluded that part (i) of the three step test set out in paragraph 24 is not met. She therefore does not need to consider parts (ii) or (iii) of that test.
33. Given this, the Commissioner does not find it necessary to comment on the complainant's submissions in relation to fairness as set out under 'Scope'.

Anonymisation issue

34. As set out in the 'Scope' section, the complainant has asked the Commissioner to consider whether the reports can be sufficiently anonymised such that they can be released under FOIA.
35. The Home Office submitted the following arguments against redaction and release of the requested information:

"[The complainant] has suggested that the reports could be disclosed in redacted form, with all personal data removed. We submit that this is impracticable.

I have mentioned that the argument that a grievance report consists in its entirety of the person who made it, since it identifies and relates to them as an individual. Even if that argument is not accepted, it is evident that the reports contain a substantial amount of personal data of individuals identified directly by name and indirectly by some other identifier or reference.

Anyone who has some familiarity with the part of the office in which these grievances originated and to which the reports relate would be able to identify individuals from a description of the circumstances. This would not simply be a case of removing names and initials. The amount of information that would have to be removed to render the reports truly anonymous, as opposed to pseudonymous, would be such that no substantive information would remain. Fully redacted versions would in our view be worthless."

36. Having reviewed the content of the withheld reports, the Commissioner is satisfied that it is not feasible in this case to redact the reports. She

accepts that the extent of the redaction required would render the remainder of the reports meaningless.

Conclusion

37. The Commissioner finds that the Home Office correctly cited section 40(2) in relation to this request.

Other matters

38. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA.
39. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
40. The Commissioner is concerned that it took 33 working days for an internal review to be completed.
41. She is also concerned that the Home Office failed to provide its investigation response to her until almost a month after the initial deadline, despite her several attempts to elicit the response sooner.
42. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft "Openness by Design strategy"⁴ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity

⁴ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

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through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"⁵.

⁵ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

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@justice.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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