

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 20 April 2022

**Public Authority:** HM Revenue & Customs  
**Address:** 100 Parliament Street  
London  
SW1A 2BQ

#### **Decision (including any steps ordered)**

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1. The complainant requested copies of messages sent by any mobile phone-based applications between three individuals over a specified period. HMRC relied on section 40(2) of FOIA (third party personal data) to withhold the information.
2. The Commissioner's decision is that all the withheld information engages section 40(2).
3. The Commissioner does not require HMRC to take any steps.

#### **Request and response**

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4. On 21 September 2021 the complainant made the following request for information under the FOIA:

"In FOI request, Ref FOI2021 19606 the following request was made:

"Please provide copies of all the SMS Text or any other mobile phone based applications such as Imessage, WhatsApp etc between Jim Harra, Mary Aiston and Ruth Stanier for the period 1/1/2021 and 31/7/2021".

This identified only a small amount of traffic and that the even these were personal.

I suspect that the query you have run to determine this has been incorrectly constructed.

I'd like to clarify that this request was for communications between Jim Harra , Mary Aiston and Ruth Stanier. It should include traffic where there were only two of the three individuals mentioned. It should also include traffic that might include other than the three individuals mentioned.

So the traffic should include the following combinations:

Jim Harra to/from Mary Aiston and any others on the communications session.

Jim Harra to/from Ruth Stanier and any others on the communication session.

Mary Aiston to/from Ruth Stanier and any others on the communication session.

Thank you for providing the traffic where all three individuals are in the same communication session only in your earlier response."

5. HMRC responded on 27 September 2021 and confirmed that the information provided was an accurate response to the combinations of communications requested.
6. On 3 October 2021 the complainant requested copies of the two SMS messages which had been identified as being covered by the request.
7. On 4 October 2021 HMRC responded to the complainant citing section 40(2) of FOIA (third party personal information) as the reason for withholding the two SMS messages.
8. HMRC provided an internal review response on 6 October 2021 in which it maintained its position regarding section 40(2) of FOIA.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 8 October 2021 to complain about the way their request for information had been handled.
10. The Commissioner considers that the scope of his investigation is to determine the extent to which the withheld information engages the absolute exemption at section 40(2) of FOIA.

## **Reasons for decision**

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### **Section 40 personal information**

11. 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.
12. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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 ("the DP principles"), as set out in Article 5 of the UK General Data Protection Regulation ("UKGDPR").
13. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ("DPA"). If it is not personal data, then section 40 of FOIA cannot apply.
14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

### **Is the information personal data?**

15. Section 3(2) of the DPA defines personal data as:

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

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.
18. 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.
19. In the circumstances of this case, as the request specifically identifies Mr Harra, Ms Aiston and Ms Stanier, the Commissioner is satisfied that all the withheld information both relates to and identifies those three individuals. The withheld information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
20. 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.
21. The most relevant DP principle in this case is principle (a). Article 5(1)(a) of the UKGDPR 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 when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair, and transparent.
23. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UKGDPR must apply to the processing. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the UKGDPR**

24. Article 6(1) of the UKGDPR 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.
25. The Commissioner considers that the lawful basis most applicable is Article 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"<sup>2</sup>.

26. In considering the application of Article 6(1)(f) of the UKGDPR 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;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
27. 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**

28. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. The interests may be public or personal, broad, or narrow, compelling, or trivial. However,

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<sup>2</sup> 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) of 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 UKGDPR would be contravened by the disclosure of information, Article 6(1) of the UKGDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

the narrower and less compelling the interest, the less likely it is that such an interest will outweigh the rights of the data subjects.

29. The complainant believes that the public has the right to see any messages sent between senior civil servants using state-provided work devices. The complainant believes that senior civil servants are aware that their communications will be subject to FOIA requests.
30. Due to the nature of the withheld messages, HMRC cannot identify a legitimate interest in the public or the complainant having access to the withheld information.
31. The Commissioner is aware of the content of the messages and does not consider that disclosure of the withheld information would further public debate or contribute towards the accountability of HMRC. As he does not consider that there is any legitimate interest that would be served by disclosure of the withheld information, it is not necessary to consider whether disclosure was necessary or the balancing test.

#### **The Commissioner's view**

32. In this instance, the Commissioner has decided that HMRC was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

## Right of appeal

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33. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

34. 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.
35. 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 .....**

**Susan Duffy**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**