

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 June 2023

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

Decision (including any steps ordered)

1. The complainant requested information about a named hotel used to house migrants. The Home Office neither confirmed nor denied holding the requested information, citing section 38(2) (health and safety) of FOIA.
2. 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.
3. No steps are required as a result of this decision.

Request and response

4. On 26 October 2022, the complainant wrote to the Home Office and requested information in the following terms:

"Please provide the contract for housing migrants at the [name and address redacted]. The hotel is no longer occupied by migrants.

As regards this hotel, please provide the scheme that was in place for providing taxis for migrant[s]. Provide a schedule of taxi use. This should include the total number of fares and total cost."

5. The request was made using the 'whatdotheyknow' website.

6. The Home Office responded on 10 November 2022. It neither confirmed nor denied holding the requested information, citing section 38(2) (health and safety) of FOIA.
7. The Home Office maintained its view following an internal review.

Scope of the case

8. The complainant disputes the Home Office's application of section 38(2) in this case. He considers that:
 - confirming the information was held would not have endangered the health or safety of any individual;
 - confirming the information was **not** held would not have endangered the health or safety of any individual.
9. He told the Commissioner that, at the time of the request, the hotel was no longer a 'migrant hotel' and had returned to normal, general use. However, the Commissioner has found no confirmation of this from an official source.
10. During the course of the Commissioner's investigation, the Home Office confirmed its reliance on section 38(2).
11. 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.
12. 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

13. Section 38 of FOIA provides an exemption from disclosing information if it would endanger any individual (including the applicant, the supplier of the information or anyone else).

14. 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.
15. 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.
16. In this case, the Home Office considers that confirming or denying whether the information is held 'would' have a detrimental effect. In other words, it considers that confirming or denying that they hold information would endanger the physical or mental health or safety of an individual as defined in section 38(1)(a) and (b).
17. In its submission to the Commissioner, the Home Office explained that, if it confirms or denies it holds the requested information, it will identify whether or not the named property is one that is used to house asylum seekers. It recognised that asylum seekers, and immigration more broadly, "is a highly contentious issue which elicits strong views". It argued that some asylum seekers have been, and continue to be, targeted for abuse and intimidation.
18. In support of its position, the Home Office provided evidence whereby the speculation of asylum accommodation has led to the targeting of properties by individuals. It therefore argued that there is clearly a real, evidenced, risk to the physical and mental health and safety of individuals in these types of accommodation.
19. As illustrated by the complainant's belief that the named hotel has been used to accommodate migrants, the Home Office argued that it is often speculated as to which properties are, or are not, used to provide accommodation for asylum seekers and that speculation is not the same thing as an official confirmation, or denial, from the Home Office.
20. It told the Commissioner that it must maintain an appropriate, and consistent, position so as to not identify whether the named accommodation is used to house asylum seekers.
21. It also said that similar matters involving asylum seeker related requests had been considered by the Commissioner in previous published decision notices¹, in which the Home Office had relied on

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022389/ico-155600-d0j5.pdf>, <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4024963/ico-199652-l3v2.pdf>

section 38(2), a position which was upheld. The Home Office argued that the current case poses a similar risk.

22. Acknowledging that the request comprises multiple parts, and with reference to its argument of the need to be consistent in the use of NCND, the Home Office told the Commissioner:

“..., it also follows that we cannot confirm or deny whether we hold details on taxi fares connected to the hotel”.

23. While previous decision notices are not binding on the Commissioner, and he considers each case on its individual merits, the Commissioner has reviewed the content of the previous notices and accepts that the issues at stake in this case are similar.
24. A confirmation or denial would reveal whether the hotel specified in the request was 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 exemption 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.

The 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 told the Commissioner that the subject matter of his request is a matter of public interest.

29. Explaining that it works with a presumption to openness and transparency, the Home Office recognised that there is significant public interest in enabling access to information about accommodation used to house asylum seekers. In that respect, it told the Commissioner that it proactively publishes some data on asylum and resettlement, including asylum costs.

Public interest arguments in favour of maintaining the exemption

30. In favour of maintaining the exemption, the Home Office told the complainant that it has a duty of care and responsibility to provide safety and protection to asylum seekers. It also argued that it is well known that vulnerable asylum seekers are targets of reprisals or reactions, and individuals or groups of individuals have been threatened and harassed.
31. It argued that there is a very great public interest in not exposing individuals to threats of harassment, intimidation and/or physical violence.
32. The Home Office argued that confirming or denying if any information is held in relation to the request would itself provide information on general matters relating to asylum seekers being housed in hotels i.e whether or not this was the case of individuals housed in the hotel specified in the request. It argued that disclosing information, by way of confirmation or denial, would undermine its ability to protect the health and safety of individuals and would not be in the public interest.
33. Similarly, it told the Commissioner that confirming or denying whether specific properties are used to accommodate asylum seekers and other vulnerable people presents a very real risk of harm to them and others who may be at the property. It went on to say:

“We believe there is therefore a very clear public interest in protecting against this risk, and neither confirming nor denying whether the information is held, as to do so would, in effect, confirm or deny whether the property is used for such purposes”.

The balance of the public interest

34. 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.

35. Clearly in any such situation where disclosure would lead to endangerment to health or safety, there is a public interest in avoiding that outcome.
36. 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.
37. 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.
38. 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.
39. 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 use of hotels 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.
40. 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.

Other matters

41. The Commissioner is mindful that the wording of the request refers to migrants while the Home Office correspondence refers to both migrants and asylum seekers.
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² <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/when-to-refuse-to-confirm-or-deny-holding-information/#consistent>

42. He acknowledges that the Home Office told the complainant:

“For clarity, please note the Home Office does not accommodate illegal migrants, but does have a statutory obligation to provide accommodation and other support to asylum seekers who would otherwise be destitute while their application for asylum is being considered”.

43. The Commissioner has previously accepted³ that the Home Office’s use of the term ‘asylum seekers’ does not disturb the argument that section 38(2) applies.

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022389/ic-155600-d0j5.pdf>

Right of appeal

44. 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

45. 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.
46. 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

Laura Tomkinson
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SK9 5AF