

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

### **Decision notice**

**Date:** 11 July 2023

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

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

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1. The complainant has requested copies of any viability assessments and related correspondence on reported plans to use two holiday camps to house asylum seekers. The Home Office would neither confirm nor deny holding the information, citing section 38(2) (Health and safety) of FOIA.
2. The Commissioner's decision is that the Home Office was not 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. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
  - Confirm or deny that it holds any information falling within the scope of the request. If it does hold information, either this information should be disclosed in accordance with section 1(1)(b) of FOIA, or the Home Office should explain the exemption(s) being relied upon to withhold it, in accordance with its obligations under section 17 of FOIA.
4. The Home Office must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the

Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 2 February 2023, the complainant wrote to the Home Office and requested information in the following terms:

**"BACKGROUND**

A spokesperson for Sefton Council said: "We can confirm that the Home Office have contacted us about the site and the council and partner agencies have asked for clarification on a number of substantive matters and we will be considering their responses in due course, but we remain very concerned by the Home Office proposals."

Source -

<https://www.liverpoolecho.co.uk/news/liv...>

Pontins Southport plans for asylum accommodation dropped by Home Office

<https://www.lancs.live/news/uk-world-new...>

**REQUESTS**

Please provide the viability assessment (or similar information) commissioned with a view to using Pontins holiday accommodation at Southport and Camber Sands with a view to possibly housing migrants, asylum seekers etc.

Provide all correspondence with Sefton Council regarding the Sefton holiday park site relating to question one above - the housing of asylum seekers."

6. The Home Office responded on 22 February 2023. It would neither confirm nor deny ('NCND') that it held the requested information, citing section 38(2) of FOIA.
7. Following an internal review, the Home Office wrote to the complainant on 8 March 2023. It maintained its reliance on section 38(2) to NCND whether it held the information.

## Scope of the case

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8. The complainant contacted the Commissioner on 9 March 2023 to complain about the way his request for information had been handled. He disputed that confirming or denying whether information was held could lead to any individuals being harmed. He said it was in the public interest to know whether consideration had been given to the impact on the local populations of using holiday camps to house asylum seekers.
9. The analysis below considers whether the Home Office was entitled to rely on section 38(2) of FOIA to NCND that the requested information is held.

## Reasons for decision

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### Neither confirm nor deny

10. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. This is commonly known as “the duty to confirm or deny”. However, there are exemptions to this duty, whereby a public authority may NCND whether it holds the requested information.
11. Section 38(2) excludes a public authority from complying with the duty to confirm or deny, where doing so has the potential to endanger the health or safety of any individual.
12. In this case, the Home Office has said it considers that endangerment ‘would’ occur if it was required to confirm or deny that it held the requested information.
13. The issue for the Commissioner to consider is whether the Home Office was entitled to NCND, by virtue of section 38(2), whether it holds the information requested by the complainant. Put simply, he must decide whether, by confirming or denying that it holds any viability assessments on housing asylum seekers in holiday camps in Southport and Camber Sands, or any correspondence with Sefton Council on that matter, the Home Office would endanger the health or safety of any individual. Whether or not the material that has been requested (if it exists) is suitable for disclosure is a different matter, and not one that is considered in this decision notice.

14. The Commissioner does not know whether the Home Office does, or does not, hold information falling within scope of the request. He does not consider it necessary to know this in order to reach a decision on the application of section 38(2) in this case.

### **Section 38 – Health and safety**

15. Section 38(1) of FOIA states:

“Information is exempt information if its disclosure under this Act would, or would be likely to –

- a) endanger the physical or mental health of any individual, or
- b) endanger the safety of any individual.”

16. As set out above, section 38(2) provides an exemption from the duty to confirm or deny, where doing so would, or would be likely to, result in the effects mentioned in section 38(1).

17. When deciding whether to apply the exemption, the Commissioner’s guidance on section 38<sup>1</sup> states that the degree of endangerment involved must be considered, and whether it is significant enough to engage the exemption. The Home Office’s position is that confirming or denying ‘would’ endanger someone’s physical health or safety. The First-Tier Tribunal<sup>2</sup> has previously described ‘would’ as referring to something more likely to happen than not, or having a greater than 50% probability, and this is the definition the Commissioner has applied here.

18. The guidance includes examples of the types of information that might pose a risk to an individual’s health and safety if disclosed, or, as in this case, if confirmation or denial is given. The list includes the following:

“any plans or policies relating to the accommodation of individuals, or groups of individuals where disclosure could lead to them being threatened or harassed (eg asylum seekers, ex offenders)”.

19. When considering the application of section 38, the Commissioner has previously accepted arguments that revealing the locations of asylum

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<sup>1</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-38-health-and-safety/>

<sup>2</sup> [https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2252/EA-2017-0087\\_Decision\\_2018-07-11.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2252/EA-2017-0087_Decision_2018-07-11.pdf)

seeker housing may lead to the targeting of properties by those prepared to break the law, intimidate, abuse and cause criminal damage<sup>3</sup>.

20. Those cases have involved requests for information which indicated whether asylum seekers were currently housed at particular locations. In those cases, the Home Office was able to demonstrate that a clear causal relationship existed between confirming (or denying) the location of current asylum seeker housing, and the risk of attacks on that housing. The Commissioner has examined whether the circumstances of this case are sufficiently similar that the same considerations should apply.
21. In this case, the Home Office has told the Commissioner that it has an established policy of issuing NCND responses to questions about the location of asylum seeker accommodation. It argued that confirming or denying in one case might lead to inferences being drawn in other cases when an NCND response was issued, as to whether information was held:

“The Home Office does not comment on speculation in relation to specific locations whether or not asylum seekers are currently housed there. To do otherwise would be counterproductive and negate the purpose of NCND as an NCND response only used in such a scenario would essentially mean that information was held when NCND was engaged. The point of the NCND provisions and as reflected in the ICO guidance is to take a consistent approach whether information is held or not. As the ICO guidance reflects “When you rely on NCND provisions to respond to a request for information of a certain type, you should take a consistent approach on how you deal with these requests.”

The Home Office must be consistent when it receives a request for information about the location of asylum accommodation or those under consideration for asylum accommodation. If it only engages NCND when there is a likelihood that a location will be or is being used to accommodate asylum seekers, then it is tantamount to confirming that a location is being used, or is being considered to be used for such a purpose. Such a stance would be counterproductive and would put at risk those locations. This would have the affect of

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<sup>3</sup> For example, <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024963/ic-199652-l3v2.pdf>

prejudicing the health and safety of asylum seekers at those locations, or those housed at such locations in the future.”

22. As regards the media reports referred to in the request, it said:

“The articles provided by the complainant in the initial request and in your letter makes clear that the Home Office has not commented on the speculation in the media and we contend that the speculation remains just that, speculation.

As the ICO itself has noted in its own guidance<sup>4</sup> ‘When citing an NCND exemption, there is an important distinction between information in the public domain and official confirmation of that information. Therefore, the fact that some unconfirmed information is known to the public does not prejudice your ability to give an NCND response. If you can demonstrate what an **official** confirmation or denial would reveal and its consequences, this is enough to engage the exclusion from the duty to confirm or deny.’

...

Confirming or denying whether we hold information related to these sites would in effect be confirming or denying that these sites are being considered, or were being considered, to accommodate asylum seekers. Although the requester may not want this information for the intention of attracting adverse attention, disclosure under the FOIA is in effect to the world at large. Although the requester claims information about these sites is already in the public domain, it has not been confirmed by the Home Office. Confirming whether the sites were under consideration would likely attract attention from individuals or groups who are opposed to the provision of asylum accommodation or the asylum process in general.”

23. The Commissioner’s guidance on section 38 confirms that its application may be affected if information about a matter is already available in the public domain. The phrase “public domain” means that the information is available to the public. Where there is already information in the public domain about a matter, this may mean that applying section 38 is inappropriate. When reaching a decision on this, it will be necessary to

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<sup>4</sup> <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/#public-domain>

consider how **official** confirmation or denial on a matter would increase the likelihood of endangerment.

24. In this case, the Commissioner notes that at the time of the request (and as cited in the request itself) there were numerous media reports in the public domain, stating that the camps mentioned were, in fact, not being taken forward as housing for asylum seekers<sup>5</sup>. None of the reports contained "on the record" statements by the Home Office. However, formal statements were made by other public authorities. One report cited correspondence from the Home Office to Rother District Council (the freehold owners of the Camber Sands site) dated 17 February 2023, reportedly confirming that the plans had been discontinued<sup>6</sup>. Other reports contained statements from Sefton Council, confirming it had had contact with the Home Office about the matter<sup>7</sup>. The reports also stated that the members of parliament for both areas referred to in the request had publicly commented on the proposals. More generally, senior politicians had confirmed that the re-purposing of holiday parks was an option that had been under consideration for housing asylum seekers<sup>8</sup>.
25. While the Commissioner accepts that the Home Office has not issued any public statements on the matters covered by the request, he is satisfied that, at the time of the request, there was considerable, credible information that had been placed in the public domain by other official sources, regarding those matters. Those official sources also confirmed that, at the time of the request, the proposals had been discontinued. Subsequently, multiple media reports have repeated both the claim that the sites were under consideration, and that they were not being taken forward.
26. For the Home Office to rely on section 38(2) in this case, it must be able to explain how confirming or denying that it holds the requested information could endanger the physical health or safety of any individual. The Commissioner is not satisfied that it has done that. Specifically, in view of the amount of information from other official sources that was already in the public domain, it has not identified how,

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<sup>5</sup> <https://www.bbc.co.uk/news/uk-politics-64682667>

<sup>6</sup> <https://www.kentonline.co.uk/kent/news/home-office-drops-plans-to-house-asylum-seekers-at-pontins-282398/>

<sup>7</sup> <https://www.liverpoolecho.co.uk/news/liverpool-news/government-claims-decision-stop-pontins-26177053>

<sup>8</sup> <https://www.telegraph.co.uk/politics/2022/11/12/illegal-immigrants-not-entitled-luxury-hotels/>

by it confirming whether or not information is held, this would result in harm to someone's health or safety.

27. As there is considerable information in the public domain which shows that the sites are not currently housing asylum seekers, it cannot be argued that confirming or denying would cause harm to any current residents. And the existence, or otherwise, of viability assessments and related correspondence is in no way an indicator of whether or not the sites are being earmarked for future use (eg any findings might have concluded that they are not suitable); it therefore cannot be argued with any certainty that confirming or denying would result in harm to future residents.
28. As regards the Home Office's argument that confirming or denying in this case would undermine its NCND responses in other instances, the Commissioner notes that it is not being asked to confirm or deny whether asylum seekers are, or are going to be, housed at the locations mentioned. He therefore does not agree that it would undermine its policy of issuing NCND responses to requests for such information.
29. The Home Office also argued that:

" ...if we weren't applying section 38(2), then we would set a precedent and have to confirm or deny which sites throughout the country were being used or under consideration, to be used to house asylum seekers."
30. On that point, the Commissioner would state that decisions on the application of section 38(2) should be made on a case by case basis, and with specific reference to what would be revealed by a confirmation or denial, and how confirming or denying would, or would be likely to, cause harm. Decisions taken in individual instances may be instructive, but they will not necessarily result in the same decisions being taken in other cases.
31. Taking all the above into account, the Commissioner is not convinced that the health or safety of any individual would be, or would be likely to be, endangered as a result of the Home Office confirming or denying whether it holds viability assessments (or similar) on the use of the holiday camps in question, or any correspondence with Sefton Council on the matter in this particular case. This is based largely on official statements made by other parties making the Home Office's position untenable on this occasion.
32. The Commissioner's decision is therefore that section 38(2) is not engaged. It is not necessary to go on to consider the public interest test.
33. The Home Office must now take the action in paragraph 3, above.



## Right of appeal

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34. 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)

35. 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.
36. 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 .....**

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