

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 September 2021

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

Decision (including any steps ordered)

1. The complainant requested information relating to the Desistance and Disengagement Programme.
2. The Home Office refused to provide the requested information citing section 36(2)(c) (prejudice to effective conduct of public affairs), section 40(2) (personal information) and section 24(1) (national security) of the FOIA.
3. The Commissioner's decision is that the Home Office was entitled to rely on sections 36(2) and 40(2) to withhold the requested information.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 21 September 2020, the complainant wrote to the Home Office and requested information in the following terms:

"How many people are currently subject to the Home Office Desistance and Disengagement Programme?"

How many are on the programme because you consider them to hold extreme Islamic beliefs - 'Islamism'?"

How many are non British citizens?"

How many are male/female?"

6. The request was made using the 'whatdotheyknow' website.
7. On 24 September 2020, he requested further information via the same website:

"What is the age, in years and months, of the youngest person [who] is or was part of the programme? Were they identified as being a Muslim? What was their sex?"
8. The Home Office responded on 5 October 2020. It confirmed it held the number of people currently subject to the programme, but refused to provide it, citing section 36(2)(c) (prejudice to effective conduct of public affairs) of FOIA by virtue of section 36(4) as its basis for doing so.
9. It refused to provide the remaining requested information, citing section 40(2) (personal information) as its basis for doing so.
10. Following an internal review the Home Office wrote to the complainant on 10 November 2020. It maintained its original position.

Scope of the case

11. The complainant contacted the Commissioner on 10 November 2020 to complain about the way his request for information had been handled.
12. He argued both that the exemptions do not apply and that the public interest favours disclosure.
13. In order to progress her investigation, the Commissioner found it necessary to issue the Home Office with an Information Notice (IN) to obtain the information she required.
14. In its submission to the Commissioner, the Home Office explained that the Desistance and Disengagement Programme (DDP) focuses on rehabilitating individuals who have been involved in terrorism, or terrorism-related activity, and reducing the risk they pose to the UK.
15. In its submission the Home Office also confirmed how it had interpreted the first part of the request. It told the Commissioner:

"This question was interpreted as the number of people on the DDP as of 21 September 2020 i.e. an in-year figure".
16. With regard to its handling of the request for information, the Home Office confirmed its application of section 36 to the first part of the

request and section 40 to the remaining questions. It additionally cited section 24 (national security) of the FOIA, confirming that it considered that section 24(1) applied to the requested information in its entirety. The Home Office wrote to the complainant, advising him accordingly.

17. In its correspondence, with regard to the information requested in the first part of the request, the Home Office confirmed that it was unable to provide information to that level of detail. However, it told the complainant that, while it was withholding the actual number of individuals who were on the DDP at the time of the request, it was able to disclose the number of individuals on the DDP from April 2020 to March 2021. It duly provided him with that annual figure.
18. The complainant remained dissatisfied with the Home Office's revised response and asked the Commissioner to continue with her investigation.
19. The Commissioner considers that the Home Office's interpretation of the wording of part (1) of the request is a valid interpretation and has progressed her investigation on that basis.
20. The analysis below considers the Home Office's application of exemptions to the requested information.

Reasons for decision

Section 36 prejudice to effective conduct of public affairs

21. The Commissioner has first considered the Home Office's application of section 36(2)(c) by virtue of section 36(4) to the information within the scope of the first part of the request. That information comprises the number of people who were subject to the programme at the date of the request.
22. Section 36 requires that, other than for statistical information, the qualified person for the public authority must give their reasonable opinion that the exemption is engaged.
23. The Commissioner's guidance¹ on section 36 explains:

¹ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

"Under section 36(4), a qualified person's opinion is not required if the information in question is statistical. If the public authority is withholding information on this basis they must still, in accordance with section 17(1), explain to the requestor (and to the ICO if there is a complaint to us) why s36(2) applies, but they can make this decision without seeking a qualified person's opinion".

24. It also explains:

"The term 'statistical information' has a wider meaning than 'statistics'. It includes the raw data that is used for statistical analysis, the mathematical model or methodology used to analyse the data and the product or outcome of that analysis".

25. The Commissioner is satisfied that the requested information is statistical information. It follows that she is satisfied that the qualified person's opinion is not needed to engage the exemption in this case.
26. However, in order to engage the exemption, there must be a likelihood that disclosure would cause prejudice to the interest that the exemption protects.
27. Section 36(2) provides an exemption if disclosure would or would be likely to:
- (a) prejudice collective responsibility or the equivalent in Wales and Northern Ireland;
 - (b) inhibit the free and frank provision of advice or exchange of views; or
 - (c) otherwise prejudice the effective conduct of public affairs.
28. In this case, the Commissioner is considering the application of section 36(2)(c). That section provides that information is exempt if its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. In other words, section 36(2)(c) provides an exemption where disclosure would, or would be likely to, prejudice the effective conduct of public affairs in a manner other than that specified elsewhere in section 36.
29. The Commissioner's guidance on section 36(2)(c) explains:

"Prejudice to the effective conduct of public affairs could refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose, but the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may refer to

the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure”.

30. The Commissioner’s approach to the prejudice test is based on that adopted by the Information Tribunal in *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* (EA/2005/0026 and 0030, 17 October 2006) (*Hogan*). This involves the following steps:
- identify the ‘applicable interests’ within the relevant exemption;
 - identify the ‘nature of the prejudice’; and
 - decide on the ‘likelihood of the occurrence of prejudice’.
31. The Commissioner recognises that the prejudice test relates to circumstances at the time when the authority received the request or within the statutory time for compliance.

The applicable interests

32. The Commissioner accepts that the Home Office told the complainant:

“The information for the period since April 2020 forms part of a subset of data – the total figures of which we intend to publish”.

33. She also accepts that it told him, albeit with respect to the public interest test:

“Premature disclosure of statistics without adhering to established pre-publication procedures (which include internal consultation about the final statistics being published) would undermine the effective conduct of public affairs; specifically the Department’s ability to use its staff resources effectively in a planned way, so that reasonable publication timetables are not affected”.

34. The Commissioner accepts that the functions that the Home Office argues would be prejudiced can be classed as ‘the conduct of public affairs’ in that they are proper and legitimate functions of the public authority.
35. She is also satisfied that, as the arguments do not relate to matters within subsection (a) or (b) of section 36, they are arguments that relate to the specific subsection of section 36(2) that is being claimed, namely 36(2)(c).
36. The Commissioner is satisfied that the prejudice the Home Office is envisaging in this case is relevant to the particular interests which section 36(2)(c) is designed to protect. Accordingly, the first limb of the three part test outlined above is met.

The nature of the prejudice

37. The Commissioner next considered whether the Home Office demonstrated a causal relationship between the disclosure of the information at issue and the prejudice that section 36(2)(c) is designed to protect. In her view, disclosure must at least be capable of harming the interests in some way, ie have a damaging or detrimental effect on them.
38. With regard to harm being caused by disclosure, having considered the withheld information, the Commissioner is satisfied that it comprises statistical information which, if disclosed, could not only impact on the planned publication of statistics in a managed way but could also result in staff resources being diverted to manage the effects of disclosure. This could have a detrimental effect on the effective conduct of public affairs.
39. The Commissioner therefore agrees that the public authority has established a valid link between the disclosure of the requested information and prejudice to the conduct of public affairs which it has described.
40. The Commissioner is satisfied that the resultant prejudice can be correctly categorised as real and of substance. She is also satisfied that there is a causal relationship between the disclosure of the requested information and the prejudice which the exemption is designed to protect.

Likelihood of prejudice

41. The Commissioner notes that the Home Office variously used the terms 'would' and 'would be likely to' in its correspondence.
42. In the circumstances, the Commissioner has proceeded on the basis of 'would be likely'.

Is the exemption engaged? Would disclosure be likely otherwise to prejudice the effective conduct of public affairs?

43. The Commissioner considers that the prejudice test is not a weak test, and a public authority must be able to point to prejudice which is 'real, actual or of substance'.
44. Having duly considered the arguments put forward by the Home Office, and having viewed the withheld information, the Commissioner is satisfied that the arguments are relevant to section 36(2)(c) by virtue of section 36(4).

45. She is satisfied that the prejudice alleged by the Home Office is real and of substance, and there is a causal relationship between the disclosure of the requested information and the prejudice which the exemption is designed to protect.
46. Consequently, she is satisfied that its disclosure would be likely otherwise to prejudice the effective conduct of public affairs.
47. As the Commissioner accepts that the outcome of disclosure predicted by the public authority would be likely to occur, she is therefore satisfied that the exemption provided by section 36(2)(c) by virtue of section 36(4) is engaged.
48. She has therefore carried the lower level of prejudice through to the public interest test.

The public interest test

49. Section 36 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

50. While the complainant stated that the PIT favoured disclosure, he did not put forward any substantive arguments in support of this view.
51. The Home Office acknowledged the general public interest in disclosure and the fact that openness in government increases public trust in, and engagement with, the government.
52. More specifically, it also told the complainant:

"In relation to the Desistance and Disengagement Programme, the disclosure of some information could enhance the openness of government and help the public understand, in greater depth, how the government is responding to those who have engaged in terrorist related activity".

Public interest arguments in favour of maintaining the exemption

53. In favour of withholding the requested information, the Home Office told the complainant:

"... to release a subset of information prior to the release of the full publication would pre-empt the full planned publication and this would not be in the public interest".

54. It argued:

"... the public interest is better served by withholding this information at this point, to ensure that the Home Office is able to publish DDP information coherently and in context".

55. The Home Office put forward similar arguments in its correspondence with the Commissioner.

56. Furthermore, the Home Office argued that releasing a 'snap-shot' or subset of information on an ad-hoc basis, prior to publication of the published figures, would not only undermine this interest, but would also provide information out of context, and before a full analysis of the data for that period can be completed.

57. The Commissioner acknowledges that argument, noting, however, that where a public authority considers disclosure can lead to misleading information entering the public domain, this should not, in itself be used to justify non-disclosure. Rather, she considers that a public authority should normally be able to explain to the requester the nature of the information, or provide extra information to help put the information into context.

58. In correspondence with the Commissioner, the Home Office also referred to the mosaic effect, arguing that it would not be in the public interest:

"... if a series of requests were received for different subsets of this information, whereby, it might be possible to identify the full picture over the course of a year from a series of releases, before the totality of the information had been published as planned".

Balance of the public interest arguments

59. In reaching a view on where the public interest lies in this case, the Commissioner has taken into account the nature of the withheld information as well as the views of both the complainant and the Home Office.

60. The Commissioner has weighed the public interest in avoiding otherwise prejudicing the effective conduct of public affairs against the public interest in openness and transparency.

61. The Commissioner accepts that, on its own, the information in scope of the first part of the request, appears to be a simple statistic. However, she acknowledges the nature of the DDP and has also taken into account the Home Office's argument regarding the public interest in avoiding disruption to its publication schedules.

62. Moreover, the Commissioner has seen no evidence to suggest that there is a particular public interest in the number of individuals on the programme on the specific day of the request. She has also taken into account that the Home Office has previously published annual figures relating to the DDP, and has confirmed its intention to publish the annual figure that encompasses the date of the request.
63. In the circumstances of this case, the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. It follows that the Home Office was entitled to rely on section 36(2)(c) by virtue of section 36(4) of the FOIA to refuse to disclose the requested information within the scope of the first part of the request.
64. The Commissioner has next considered the Home Office's application of section 40 to the remaining withheld information – information within the scope of the remaining parts of the multi-part request.

Section 40 personal information

65. 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.
66. 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 ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
67. 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 the FOIA cannot apply.
68. 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 DP principles.

Is the information personal data?

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

² As amended by Schedule 19 Paragraph 58(3) DPA.

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

70. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
71. 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.
72. 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.
73. In this case, the complainant has requested information relating to the age, gender, nationality and religious beliefs of individuals on DDP at the time of the request.
74. The Home Office told the complainant:

"We consider that due to the low numbers involved, and the details requested, disclosure could assist in identifying individuals and that this constitutes personal data. Due to the nature of the information in question, there is an expectation that personal information would not be disclosed under FOIA".
75. Similarly, in its submission to the Commissioner it argued that providing 'snapshots' of data could lead to the identification, or the presumed identification of individuals.
76. The Commissioner is mindful that the issue to be considered, in a case such as this, is whether disclosure to a member of the public would breach the data protection principles, because an individual is capable of being identified from apparently anonymised information.
77. The Commissioner acknowledges that the Home Office told the complainant that it considered that the low numbers involved, and the details requested, could assist in identifying individuals. She also accepts that different members of the public may have different degrees of access to the 'other information' needed for re-identification to take place.
78. A test used by both the Commissioner and the First-tier Tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable

steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.

79. The Commissioner also recognises that some types of data will be more attractive to a motivated intruder than others – and more consequential for individuals. She is mindful of the nature of the requested information in this case, namely information relating to individuals who have been involved in terrorism, or terrorism-related activity.
80. In its submission to the Commissioner, the Home Office argued that some individuals may be motivated to find out who is on the programme for a variety of reasons. It confirmed its view that:
- "... the individuals are identifiable from the information requested, together with all the means reasonably likely to be used by a 'motivated intruder'".*
81. In the circumstances of this case, having considered the withheld information and the wording of the request, the Commissioner is satisfied that the information relates to individuals on the DDP at the time of the request. She is satisfied that the information both relates to, and identifies, the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
82. She has reached that conclusion on the basis that the focus of the information is individuals on the DDP.
83. In the circumstances of this case, the Commissioner is further satisfied that the individuals concerned would be reasonably likely to be identifiable from a combination of the requested information and other information which is likely to be in, or come into, the possession of others.
84. Although restricted in what she is able to say in that regard, the Commissioner is satisfied that the Home Office provided her with further explanation in support of its position that releasing the information could assist in identifying individuals on the programme.
85. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
86. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

87. 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".

88. 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.

89. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

90. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

91. Information relating to special category data is given special status in the GDPR.

92. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

93. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include special category data. She has reached this conclusion on the basis that some of the requested information relates to religious beliefs.

94. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.

95. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.

96. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.

97. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this

special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

98. The Commissioner has next sought to determine whether the remaining personal information within the scope of the request has been correctly withheld.

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

99. 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.

100. 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" .

101. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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.

102. 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

103. 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. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the

requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

104. From the available correspondence, the Commissioner can find no legitimate interest arguments from the complainant in support of disclosure of the requested information, either on his own behalf or on behalf of the public at large.

105. However, the Commissioner accepts that there is a legitimate interest with regard to transparency and accountability in relation to the characteristics of the individuals participating in the DDP at a given time.

Is disclosure necessary?

106. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

107. In this case, the Commissioner is prepared to accept that disclosure of the withheld information is necessary to meet the interests identified above.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

108. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

109. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;
- whether the information is already in the public domain;
- whether the information is already known to some individuals;
- whether the individual expressed concern to the disclosure; and

- the reasonable expectations of the individual.

110. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

111. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.

112. In this case, the Home Office told the Commissioner that to identify any individual on the DDP could place that individual in real jeopardy.

113. Although it did not provide any specific evidence in support of that view, the Commissioner is mindful that the Home Office described the DDP as:

"an important tool employed by the Home Office and its partners to keep the public and UK safe from security threats".

114. She accepts that the individuals on the programme would have no expectation that their personal data would be disclosed under FOIA.

115. Furthermore, having accepted that disclosure of the requested information could lead to the identification of those on the programme, the Commissioner accepts that disclosure of the withheld information risks invading the privacy of the individuals concerned.

116. She has also taken into account the Home Office's argument that it is DDP's policy to release annual DDP figures.

117. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

118. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

Conclusion

The Commissioner's view

119. The Commissioner has therefore decided that the Home Office was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 24 national security

120. As the Commissioner is satisfied that the Home Office was entitled to withhold the information under section 40(2), she has not found it necessary to consider the additional exemption cited by the Home Office in relation to the same information.

Right of appeal

121. 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

122. 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.

123. 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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