

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 August 2019

Public Authority: Department for Transport
Address: Great Minster House
33 Horseferry Road
Westminster
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant has requested information relating to bookings of the Government Car Service for a particular date within a particular area. The Department for Transport (DfT) refused to confirm or deny whether it held the requested information, relying on section 40(5) – personal information, as its basis for doing so.
2. The Commissioner's decision is that the DfT is entitled to rely on section 40(5) to refuse to confirm or deny that it holds the information.
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On 14 November 2018 the complainant requested information of the following description:

"I am looking to submit a FOI request for all Government Car Service bookings carried out which involved transport between Sunday 23rd October 2016 18:00 and 00:00 on Monday 24th October 2016. To be more specific I would like to know if any bookings were made for drop off or final destination to postcode area SW3.

If you could confirm the details of the Minister or person using the service on each booking that exists if possible and the full destination/drop off postcode for each booking.”

5. On 22 November 2018 the DfT responded. It relied on the exemption provided by section 40(5) of the FOIA to refuse to confirm or deny that the DfT held the requested information.
6. The complainant requested an internal review on 24 November 2018. The DfT sent him the outcome of the internal review on 28 December 2018. The DfT upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 1 March 2019 to complain about the way his request for information had been handled. He argued that ministers and officials should only be using the service for official engagements and that therefore the information did not constitute personal data. He also explained that he would be happy for postcodes of any home address and any details of junior officials to be redacted. He did not believe disclosing the information raised any security concerns as the information was over two years old and in any event the period covered by the request was too short to establish the routine of any of the individuals concerned. Finally he argued that disclosing the information was important as it would allow analysis of specific journeys to ensure they were only used for official duties.
8. The Commissioner considers that the matter to be decided is whether the DfT is entitled to rely on section 40(5) to refuse to either confirm or deny it holds the requested information.

Reasons for decision

9. Section 1(1)(a) of the FOIA provides that where a public authority receives a request for information, it is obliged to tell the applicant whether it holds that information. This is commonly known as the duty to confirm or deny.
10. There are however exemptions from the duty to confirm or deny. It should be noted that when applying an exemption from the duty to confirm or deny, a public authority is not restricted to only considering the consequences of the actual response that it would be required to provide under s1(1)(a). For example, if it does not hold the information, the public authority is not limited to only considering what would be revealed by denying the information was held, it can also consider the

consequences if it had to confirm it did hold the information and vice versa.

11. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
12. Therefore, for the DfT to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny it holds information falling within the scope of the request the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data;

and

 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

13. Section 3(2) of the DPA 2018 defines personal data as:-

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

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
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. From an initial reading of the request it is far from obvious how either confirming or denying that the information is held would in itself disclose information which related to one or more identifiable individuals. This is particularly so given that a quick check of the Royal Mail's postcode finder website revealed that the SW3 postcode covered 117 addresses. The Commissioner therefore pressed the DfT for an explanation of how anyone could be identified from a confirmation or denial that the information was held. It is not appropriate however to discuss the explanation that she received in this notice, other than to say that, having considered the arguments presented by the DfT, the Commissioner is satisfied that confirmation or denial would involve the disclosure of personal data.

17. Although the Commissioner is unable to provide any further explanation in this notice she has set out her consideration of the DfT's response in a confidential annex which will be provided exclusively to the department.
18. In summary, the Commissioner is satisfied that if the DfT confirmed whether or not it held the requested information this would result in the disclosure of third party personal data. The first criterion set out above is therefore met.
19. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party (or parties) does not automatically prevent the DfT from refusing to confirm whether it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
20. The Commissioner considers that the most relevant data protection principle is principal (a).

Would confirming whether or not the requested information is held contravene one of the data protection principles?

21. Article 5(1)(a) 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 a 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 – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair, and be transparent.

Lawful processing: Article 6(1)(f) 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" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
24. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

"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”¹.

25. In considering the application of Article 6(1)(f) 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 confirming or denying that the requested information is held 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(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.

(i) Legitimate interests

27. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOI request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sake 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.

¹ 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 2018) 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”.

29. The complainant has argued that there is a legitimate interest in the public being able to analyse whether the Government Car Service is only being used for official business. In its letter advising the complainant of the internal review outcome the DfT said that it was in full agreement with his assertion that the public have a right to know whether the service is being used appropriately. It explained that the Government makes available a range of data on how the service is used, from the number of trips made annually by each minister to the financial charge incurred by each department.
30. The complainant argues that he has grounds for believing that at least one journey did take place using the Government Car Service within the timeframe specified in the request which he suspects was for a private engagement. He therefore contends that there is a legitimate interest in exploring whether other Ministers also used official cars to attend the same engagement.
31. The Commissioner is satisfied that there is a legitimate interest in access to information on the use of the Government Car Service. This interest extends not just to use of the service generally, but whether or not the service was used for specific journeys, if such a journey was undertaken at all.

(ii) Is confirming whether or not the requested information is held necessary?

32. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA that the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
33. From its internal review letter to the complainant, the Commissioner understands that the DfT considers the data which the Government already publishes provides sufficient transparency in respect of how the service was used without the need to disclose details of whether particular journeys were or were not taken.
34. The Commissioner accepts that the information which is already available on the use of the Government Car Service goes some way to meeting the legitimate interest in holding the government to account for the use and cost of the service. However it does not allow the use of the service for a particular journey to be examined, if indeed such a journey did take place. The Commissioner therefore finds that confirmation or denial is necessary to meet the legitimate interest discussed above.

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

35. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if a data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
36. Disclosing whether the requested information was held would reveal whether or not any individual, or individuals, who could be identified had taken a journey, to or from the specified location during the specified time. The DfT acknowledges that as those who have access to the Government Car Service are senior officials or Ministers, they should expect a higher degree of scrutiny than other office holders. However it argues that they would not expect the DfT to reveal full details of all their movements or information about their whereabouts on a particular evening. The DfT also argues that to disclose such details could raise security issues. As a consequence the disclosure would not only be intrusive, but would cause the individual(s) unjustified distress.
37. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.
38. The Commissioner has therefore decided that the DfT was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5B)(a)(i) of FOIA.

Right of appeal

39. 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

40. 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.
41. 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

Rob Mechan
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