IN THE FIRST-TIER TRIBUNAL **Case No. EA/2014/0051**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50511799
Dated: 17 February 2014

Appellant:	**DOMINIC RAAB MP**
First Respondent:	**THE INFORMATION COMISSIONER**
Second Respondent:	**THE HOME OFFICE**

On the papers

Date of decision: **17th November 2014**

Before
CHRIS RYAN
(Judge)
and
MELANIE HOWARD
STEVE SHAW

Subject matter: Duty to confirm or deny s.1(1)(a)
Personal data s.40
Law enforcement s.31

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DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed, albeit for reasons which differ to some extent to those set out in the decision notice under appeal.

REASONS FOR DECISION

The Request for Information giving rise to this Appeal

1. The Appellant has an interest in the arrest and subsequent death in custody in Russia of Sergei Magnitsky, a lawyer who is said to have exposed a large tax fraud against a British company. On 31 January 2013 the Appellant submitted to the Home Office a request for information ("the Request").

2. Although the Request did not say as much, it constituted an information request under section 1 of the Freedom of Information Act 2000 (FOIA). That provision reads, in relevant part:

> *"(1) Any person making a request for information to a public authority is entitled-*
> *(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
> *(b) if that is the case, to have that information communicated to him.*
> *…*
> *(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as 'the duty to confirm or deny' "*

3. The Request referred to the 2011 Foreign and Commonwealth Office Annual Human Rights Report, which included an explanation of the Government's approach on the denial of entry visas to people who could be proved to have violated human rights and the identification of 60 Russian government officials who it believed had been involved in the false arrest, torture or death of Mr Magnitsky. The Request then set out a list of the names of 60 individuals and proceeded:

> *"In the light of the UK government's stated policy of denying visas to those proven to have violated human rights, I wish to be informed on how many occasions since 1 January 2010 the*

individuals listed above have a) sought and b) been granted an entry visa in the UK, and c) how long they visited the UK for?"

4. The Appellant subsequently modified the Request. He explained that, although he would prefer a response relating to each identified individual, he would accept a cumulative figure for the 60 individuals named in the Request i.e. the total number of applications, rejections and length of each visa.

The Home Office response to the Request

5. The Home Office refused to either confirm or deny whether it held any information falling within the scope of the Request, in either its original or modified form. It based its refusal on two of the exemptions set out in Part II of FOIA.

6. The first exemption relied on arises under FOIA section 31(3), which provides that a public authority is entitled to refuse to confirm or deny whether it held requested information if, or to the extent that, doing so would or would be likely to prejudice the operation of UK immigration controls.

7. Because FOIA section 31 is classified (under FOIA section 2(3)) as a "qualified" exemption the duty to confirm or deny does not arise if, "*in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information…"* (FOIA section 2(1)(b)).

8. The second exemption the Home Office relied on was the absolute exemption arising under FOIA section 40. The Home Office asserted that the requested information, if held, would constitute the personal data of the 60 named individuals (which the Appellant did not challenge) and that FOIA section 40(5) provided that the duty to confirm or deny did not arise if complying with that duty would contravene any of the data protection principles set out in Part 1 of Schedule 1 to the Data Protection Act 1998. For present purposes the relevant data protection principle is principle 1, which reads:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
(a) at least one of the conditions in Schedule 2 is met …"

The condition in Schedule 2 which is relevant in the circumstances of this case is condition 6, which reads:

"(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of

prejudice to the rights and freedoms or legitimate interests of the data subject."

The Information Commissioner's Decision Notice

9. The Appellant complained to the Information Commissioner about the Home Office's refusal of the Request and, having investigated the complaint, the Information Commissioner issued a decision notice ("the Decision Notice") on 17 February 2014. He concluded that the Home Office had been entitled to rely on FOIA section 40(5) as justification for its refusal to either confirm or deny that it held the requested information about the 60 individuals. Having reached that conclusion the Information Commissioner considered that it was not necessary for him to decide whether FOIA section 31(3) would also have provided justification for a "neither confirm nor deny" response.

10. The Information Commissioner decided, first, that the names of the individuals in question, if held, would constitute their personal data, as would information about whether they had applied for or been granted visas to visit the UK and whether they had in fact visited. He then considered whether providing confirmation or denial that such personal data was held would be unfair, and thus breach the first data protection principle. In that context he considered the reasonable expectations of the individuals as to what would happen to any of their personal data held by the Home Office and the likely consequences for them if a confirmation or denial had been issued in response to the Request. He weighed those factors in the balance against any public interest that might exist in a confirmation or denial being provided. He explained, in paragraph 28 of the Decision Notice that:

> *"In considering 'legitimate interests', in order to establish if there is such a compelling reason for providing confirmation or denial, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the individual in question, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only providing a limited confirmation or denial about some of the requested information rather than viewing provision of confirmation or denial as an all or nothing matter."*

11. On the facts presented to him the Information Commissioner concluded that the degree of privacy which an individual might normally expect in relation to his or her visa applications had to be considered in the context of a case where the public has a legitimate interest to know whether the stated policy of the UK Government to deny visas to those proven to have violated human rights is being implemented effectively in respect of individuals who have been publicly linked to alleged

human rights violations in a well-known case, such as that of Sergei Magnitsky. The public knowledge included the naming of 16 of the 60 individuals in a decision by the US Government to refuse entry to the USA to those who it believed to have been implicated in the case. He concluded that:

> *"… there is a strong wave of public opinion that the visa policy in question should be engaged in respect of the named individuals. The provision of confirmation or denial would therefore have a two-fold effect. It would test whether the policy has been engaged in a case where there are powerful arguments that it should be. It would also provide detail about visa applications that may have been made by the 60 individuals."*

However, he felt that he was unable to assess whether the allegations against the individuals were true and ultimately concluded that the legitimate interest in policy implementation was not sufficiently compelling to override any individual's legitimate interest in, and reasonable expectation of, confidentiality with regard to visa applications. The Home Office had therefore been entitled to issue a neither confirm nor deny response to the Request.

12. The Information Commissioner also considered whether the Home Office had been entitled to issue a neither confirm nor deny response to the Request in its modified form, under which the Appellant asked only for cumulative figures. He rejected a concession made by the Home Office, which was to the effect that providing confirmation or denial as to a cumulative figure would not provide personal data about any of the 60 named individuals. The correct position, he said, was that denying that relevant information was held in respect of any of the 60 would have the effect of confirming that none of them had applied for a visa to enter the UK. The Decision Notice continued (at paragraph 44):

> *"If* [the Home Office] *were to confirm that it held some information but refused to provide it, the Commissioner accepts that this does not provide information about specific individuals (in the same way that denial would). However, in order to protect the possibility that it holds no information, which, of itself, reveals something about each of the 60 individual, the Home Office must maintain a consistent approach in the use of NCND. If the only occasion it sought to rely on NCND was the occasion when it, in fact, held no information, that would, in effect, provide denial that any information is held and would, in turn, unfairly provide personal data about 60 named individuals."*

On that basis the Information Commissioner was satisfied that the Home Office was entitled to rely on FOIA section 40(5) in claiming that

it was exempt from its obligation to provide confirmation or denial as to whether it held a cumulative figure.

The appeal to this Tribunal

13. The Appellant appealed to this Tribunal from the Decision Notice on 10 March 2014. Such appeals are governed by FOIA section 58 under which we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.

14. The Appellant chose to have his appeal determined on the papers, without a hearing, which we consider to be an appropriate method of disposal in the circumstances. We have therefore reached our decision on the basis of an agreed bundle of documents and the parties' written submissions.

The parties' arguments

15. The Appellant's Grounds of Appeal did not challenge the Information Commissioner's finding that the requested information constituted personal data. He simply asserted as follows:

> *"a.) it cannot be right that the data protection rights of potential torturers should trump the public interest in transparency and b.) without transparency it is impossible to assess whether the government's policy of denying visas to people who can be proved to have violated human rights is working."*

The Appellant relied, in particular, on the fact that on 7 March 2012 the House of Commons had passed a resolution, unanimously, calling for the Government to bring forward legislation to introduce a travel ban on officials linked to the death in detention of Mr Magnitsky.

16. The Information Commissioner contented himself, in his written Response to the Grounds of Appeal, to noting that the Appellant's arguments were the same as those presented to him previously and taken into account in the Decision Notice. He invited us, on that basis, simply to uphold the Decision Notice and dismiss the appeal.

17. Relatively late in the process the Home Office was made party to the Appeal and filed written submissions. These adopted the arguments previously put forward by the Information Commissioner (including his decision that FOIA section 40(5) applied to the cumulative information) and asserted, in particular, that visa restrictions imposed on some individuals by the US Government should not be taken as having any

bearing on the public interests in disclosure to be balanced against the individuals' privacy rights.

18. The Home Office also invited the Tribunal, in the event that it did not support the Information Commissioner's conclusion under FOIA section 40(5), to rule that the Home Office had, in the alternative, been entitled under FOIA section 31(3) to refuse to confirm or deny that it held the requested information in respect of both identified individuals and the 60 named individuals as a whole. In that respect it asserted as follows:

> *"…routine disclosure of information as to whether or not named individual or anonymised individuals from a particular cohort have sought and/or gained entry into the UK would enable individuals to gain insights into operational aspects of immigration control. This would allow individuals (including other interested parties), to build up a picture of border and immigration controls generally if used with other information. This in turn would or could likely prejudice the operation of immigration controls in place to protect the UK."*

The Home Office argued that the exemption was therefore engaged and, acknowledging that the exemption was a qualified one, added:

> *"The balance of the public interest is clearly that transparency should not be at the cost of undermining the security of border and immigration controls."*

19. The Appellant submitted a final written response on 22 July 2014 in which he challenged the Home Office's arguments in respect of FOIA section 31(3) and asserted that no evidence had been adduced to support what he characterised as a *"flimsy assertion".* He added:

> *"It is difficult to see how providing information about whether a certain cohort of potential reported or alleged torturers had sought and/or gained entry into the UK could prejudice the operation of immigration controls in place to protect the UK. Far from it: such disclosures would in all likelihood strengthen UK border controls by deterring unsavoury persons from applying for visas."*

20. The Information Commissioner and the Home Office relied upon information provided to the Information Commissioner during his investigation, which was redacted in the copy made available to the Appellant in the agreed bundle of documents. By a Case Management Note dated 8 May 2014 the Registrar of this Tribunal determined that the redacted information (which provided additional information in support of the section 31(3) exemption claim) should be treated as closed material as its disclosure would undermine the approach of refusing to confirm or deny whether information had been held at the

relevant time and would therefore defeat the purpose of the hearing. We agree with the Registrar's decision and comment on the closed material in the confidential annex to this decision. That annex should remain confidential unless and until any appeal from this decision should succeed and the relevant appeal tribunal shall order its disclosure.

Consideration of the issues before the Tribunal

21. Our decisions, on the issues raised in the appeal, are as follows:
    a. We are unanimous in concluding that a confirmation or denial response by reference to each of the 60 named individuals would involve the disclosure of personal data which would not be fair and lawful. We were not provided with evidence to establish that there is anything more than a suspicion or allegation of human rights abuse in respect of each of those identified in the Request. The selection of 16 of their number by the US Government for the purpose of imposing travel restrictions does not, on its own and without further information about the evidence that led to the decision, establish culpability in respect of those individuals. And the absence of the remainder of the 60 from that list increases the uncertainty as to the strength of the case against them. In those circumstances we do not think that the undoubted public interest in knowing whether or not Parliament's wishes, and the Government's stated intention, as to the denial of visa right have been implemented outweighs the privacy rights of the individuals identified in the Request. What might have been a justified invasion of privacy in respect of any individual about whom there was stronger evidence of involvement in human rights abuse remains an unwarranted intrusion in respect of those against whom nothing has been presented to us beyond suspicion.
    b. The majority of the Tribunal panel accepts that, for the reasons set out in paragraph 12 above, a confirmation or denial in respect of the whole cohort of 60 individuals would also constitute the processing of their personal data. The third member of the panel was not convinced on this point. However, all three were satisfied that the limited intrusion into personal privacy would not be unwarranted, on the facts of this case, and that, given the legitimate interest in the public knowing how effectively the stated intention of denying visas had been implemented, a confirm or denial response at the cumulative level would not result in a breach of the data protection principles.
    c. However, the panel was unanimous, also, in concluding that the section 31 exemption was engaged. For the reasons set out in the Closed Material and summarised in the confidential annex to this decision, a confirmation or denial in respect of either individuals or the cohort as a whole would provide information

which would be likely to prejudice the operation of UK immigration controls.

d. The panel was also unanimous in concluding that, on the facts of this case and for the reasons given in the confidential annex, the public interest in the effective imposition of border controls in respect of those under suspicion outweighed the public interest in knowing whether or not information was held.
e. Although, therefore, we would have found in favour of the Appellant under FOIA section 40(5) in respect of cumulative figures, we find that FOIA section 31(3) is engaged in respect of that information and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Conclusions

22. We have concluded that, for the reasons given, the Decision Notice included an error in respect of the application of FOIA section 40(5) to cumulative information. However, because (unlike the Information Commissioner in the Decision Notice) we have also considered FOIA section 31(3) and concluded that it justified a "neither confirm nor deny" response to the Request, we find ourselves agreeing with the Information Commissioner's conclusion that the Home Office was exempt from the obligation under FOIA section 1(1) to confirm or deny that it held the information sought in both the original and the modified form of the Decision Notice.

Chris Ryan
17th November 2014