

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 January 2016

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information about a named councillor who is also a Justice of the Peace/Magistrate. The Ministry of Justice (the 'MOJ') refused to confirm or deny whether it held the requested information, citing section 40(5)(b)(i) (personal information).
2. The Commissioner's decision is that the MOJ has properly relied on section 40(5) to refuse this request. He does not require the MOJ to take any steps to ensure compliance with the legislation.

Background

3. The complainant had previously submitted a request for assessment to the Commissioner under the terms of the Data Protection Act 1998 (the 'DPA') relating to the Councillor, where the Commissioner found partly in the complainant's favour. It appears from the correspondence and the subsequent FOIA request that the complainant thinks this proves an actual criminal breach of the DPA, which it does not.
4. Section 42 of the DPA entitles complainants to apply to the Commissioner for an assessment of a DPA issue. The Commissioner will consider the concern and will form an opinion as to whether it is 'likely' or 'unlikely' that a data controller has complied with the DPA. The decision reached by the Commissioner is only an opinion and not proof of a criminal breach which could only be properly ascertained in a court of law.

Request and response

5. On 7 July 2015 the complainant wrote to the MOJ and requested information in the following terms:

"As the Information Commissioner's Office, had made this Decision, of this Breach, of the Data Protection Act, During March 2012, Against Councillor, [name redacted] (JP). Had Councillor, [name redacted] (JP, A magistrate, for the Portsmouth Court's) Formally notified, the Office's of the Justice, and the Magistrate Courts. That she had been Found Guilty, under the Data Protection Act, (A Decision made in March 2012).

For unlawfully, using, and taking, myself and my colleague's, Personal Data, Without our Permission, or Acknowledgement.

Could you Please, be kind Enough, to provide me with this information, I have requested for. And please let me know, if you may, also require, a Fee."

6. The MOJ responded on 5 August 2015 and refused to confirm or deny whether it held the requested information.
7. Following an internal review the MOJ wrote to the complainant on 11 September 2015. It maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner on 23 September 2015 to complain about the way his request for information had been handled. As part of his grounds for complaint he explained that he wanted to know whether or not the Magistrate concerned had reported a breach of the DPA to the MOJ. He specifically asked if he could have copy of any such notification letter and, if not, the date on which the breach was reported.
9. The Commissioner has considered whether the MOJ properly relied on section 40(5)(b)(i) in relation to this request. He has commented on the other aspects of the complaint in the 'Other matters' section of this notice.

Reasons for decision

Section 40(5) neither confirm nor deny in relation to personal information

10. Section 1 of FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:
 - (a) the duty to inform the applicant whether or not requested information is held and, if so,
 - (b) the duty to communicate that information to the applicant.
11. Generally, the provisions in section 40 subsections 1 to 4 FOIA exempt personal data from disclosure. Section 40(5) of FOIA states that the duty to confirm or deny whether information is held does not arise if providing the public with that confirmation or denial would contravene any of the data protection principles set out in the Data Protection Act (the 'DPA').
12. In this case, the MOJ has relied on section 40(5)(b)(i) because the request is for information about a named individual other than the complainant.
13. The MOJ explained that Judicial Office holders (including magistrates) have clear expectations on how their personal data is handled and that, while they have a public facing role, they will have the same rights and expectations as any other MOJ staff member in respect of how their personal data is held and processed. It said that the information in scope, if held, would relate to Judges/magistrates' declarations in respect of previous convictions or disciplinary matters.
14. In this case, the data requested relates to whether the individual has declared whether she may have had an ICO assessment made against her for breaching the DPA. The MOJ advised that magistrates would report any issues of conflict to the Judicial Office and, as such, to confirm or deny whether this magistrate had done so would release personal data about her to the world at large. Such an argument is relevant to the exemption contained at section 40(5)(b)(i).

15. In support of its position the MOJ referenced another decision notice *reference FS50591877¹*. Whilst the Commissioner acknowledges that decision notices are not legally binding, he is mindful that this notice upheld the MOJ's decision to refuse to confirm or deny whether a judge was being investigated by the JCIO.
16. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of personal data, and second, whether disclosure of that personal data would be in breach of any of the data protection principles.

Is the information personal data?

17. The definition of personal data is given in section 1(1) of the DPA:

"personal data' means data which relate to a living individual who can be identified:

(a) from those data, or

(b) from those data and any other information which is in the possession of, or is likely to come into the possession of, the data controller".

18. Following its internal review the MOJ told the complainant:

"Section 40(5) was applied to your request as confirmation on whether this type of information is held or not about a specific individual would itself be a release of information about an individual and therefore the Department [ie the MOJ] would be in breach of the Data Protection Principles."

19. The Commissioner considers that the way in which the request is worded clearly indicates that the complainant is seeking information which can be linked with a named individual.
20. The Commissioner also considers that to comply with section 1(1)(a) of the FOIA (ie to either confirm or deny holding the information) would inevitably put into the public domain the existence or otherwise of information about the named individual, which in turn would constitute disclosure of information that would relate to her.

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560057/fs_50591877.pdf

21. Therefore, the Commissioner considers that to confirm or deny whether the requested information is held would in itself constitute a disclosure of personal data.

Would confirmation or denial breach one of the data protection principles?

22. In the case under consideration here, the MOJ told the Commissioner that confirmation or denial of whether it holds the requested information would breach the first principle as personal data must be processed "fairly and lawfully". It said that in terms of the fairness principle, the magistrate would have expectations that her personal data would not be disclosed under FOIA to the world at large.
23. When considering the first principle the Commissioner will generally look to balance the reasonable expectations of the data subject(s) with the consequences of compliance with the request, and general principles of accountability and transparency.
24. The first data protection principle requires that personal data is processed fairly and lawfully and that one of the conditions in schedule 2 of the DPA is met in order to disclose personal data.
25. When considering this it is important to note that when a request is received under the FOIA, a public authority must consider the request as if it has been received from any member of the public; it is not able to take into account any private or personal reasons which the requester may have for requesting the information. Nor can the MOJ take into account any prior knowledge that the requestor has about the issues that lie behind the request. Further to this, disclosures under the FOIA are intended to be global in nature and so the MOJ must consider a disclosure to the whole world rather than to a specific requester.
26. It is clear in this case that the individual concerned would have a reasonable expectation that information relating to a possible breach of the DPA, if held, would not be disclosed to the world in response to an information request.
25. The Commissioner has also considered the public's legitimate interests in knowing if the requested information is held against any prejudice to the rights, freedoms and legitimate interests of the data subject concerned. He has considered whether there is a legitimate interest in confirming whether the requested information is held. He has determined that there is no legitimate interest in confirming to the public whether the requested information is held.
26. Due to the matters considered above, and in all of the circumstances of this case, the Commissioner is satisfied that it would be unfair to confirm or deny whether the requested information is held. To do so

would disclose information about the data subject which would represent an unwarranted infringement by the MOJ on the Magistrate's privacy. The absolute exemption provided by section 40(5)(b)(i) is therefore engaged.

27. The MOJ also argued that disclosure of the requested information would breach principle two of the DPA. However, as the Commissioner is satisfied that the first principle would be breached he has not found it necessary to consider this further.

Conclusion

28. In considering whether the exemption contained within section 40(5)(b)(i) was correctly applied, the Commissioner has taken into account that disclosure under the FOIA should be considered in its widest sense – which is to the public at large.
29. With due regard to the reasonable expectations of the data subject, and the potential impact on her if the existence of her personal data were to be confirmed or denied, the Commissioner considers that it would be unfair to do so.
30. The Commissioner has therefore concluded that confirmation or denial as to whether the requested personal data is held would be in breach of the first data protection principle. He considers that the exemption provided by section 40(5)(b)(i) is engaged and that, in this case, the MOJ was therefore not obliged to confirm or deny whether it held the information requested by the complainant.

Other matters

31. As the Commissioner has found section 40(5)(b)(i) to be engaged, he has not considered further the complainant's other concerns raised in the 'Scope' section of this notice. Further, neither issue was specifically part of the original request.

Right of appeal

32. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

33. 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.
34. 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

Carolyn Howes
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