

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 9 March 2011

Public Authority: The Crown Prosecution Service
Address: Rose Court
2 Southwark Bridge
London
SE1 9HS

Summary

The complainant requested, from the Crown Prosecution Service (CPS), prosecution paperwork and all witness statements for a particular case. The CPS confirmed it held the requested information but refused to provide it on the basis that it was exempt from disclosure by virtue of sections 30 (investigations and proceedings), 40(2) (personal information) and 42 (legal professional privilege). The complainant subsequently narrowed the scope of his request to specific witness statements only. As the Commissioner has decided that the information requested is exempt from disclosure under section 40(2) of the Act he has not considered the other exemptions. He requires no remedial steps to be taken in this case.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant wrote to the Crown Prosecution Service (CPS) on 12 June 2010 about a fraud case involving a named defendant. At the time of the request, the defendant had recently been sentenced for fraud. The complainant requested:

"Prosecution paperwork and all witness statements for this case."

3. The CPS responded on 1 July 2010, confirming that it held information within the scope of the request. However it refused to provide it on the basis that it was exempt from disclosure by virtue of sections 30(2)(a)(ii) (investigations and proceedings), 40(2) (personal information) and 42(1) (legal professional privilege).
4. The complainant requested an internal review on 6 July 2010.
5. The CPS varied its decision in an internal review which was sent to the complainant on 16 August 2010. It revised the subsection it was relying on with respect to section 30, citing section 30(1)(c), and upheld its citing of sections 40(2) and 42(1).
6. Having received the outcome of its internal review the complainant wrote to the CPS on 1 September 2010 narrowing the scope of the information he was requesting. He confirmed that:

"the only documents I wish to view are the witness statements taken from the [social club] committee and staff...".
7. The CPS acknowledged his correspondence, reminding him that, in line with its earlier advice, he should contact the Commissioner if he wished to appeal the CPS decision.

The Investigation

Scope of the case

8. The complainant contacted the Commissioner on 21 September 2010 to complain about the way his request for information had been handled. He confirmed that the scope of his request was now limited to the witness statements of the social club's committee and staff.
9. Accordingly, the Commissioner has investigated on the basis of the narrowed scope and has only considered the CPS's application of the exemptions in sections 30 and 40.

Chronology

10. The Commissioner wrote to the CPS on 4 January 2011 asking it for further explanation of its reasons for citing section 30 and 40 in relation to the request, including its reasons for concluding that the public interest in maintaining the section 30 exemption outweighs the public interest in disclosure of the information requested.
11. The CPS provided its response on 21 January 2011.

Analysis

Exemptions

Section 40 Personal information

12. Section 40(2) of the Act is an absolute exemption which relates to the personal information of persons other than the requestor.
13. Section 40(2) together with the condition in section 40(3)(a)(i) or 40(3)(b) provides an absolute exemption if disclosure of information falling within the definition of personal data contained in section 1(1) of the Data Protection Act 1998 (the DPA) would breach any of the data protection principles. A full copy of the section can be found in the Legal Annex at the end of this Decision Notice.
14. In order to reach a view on the CPS's arguments in relation to this exemption, the Commissioner has first considered whether the withheld information is the personal data of one or more third parties.

Is the information personal data?

15. The two main elements of personal data, as defined in section 1(1) of the DPA, are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way. The information can be in any form, including electronic data, images and paper files or documents.
16. In this case, the complainant has requested specific witness statements in relation to the case of a named individual.
17. Having considered the nature of the withheld information, the Commissioner is satisfied it constitutes information that falls within the definition of 'personal data' as set out in section 1(1) of the Data Protection Act 1998. He has reached this conclusion on the basis that the information comprises personal data relating to an individual and their alleged involvement in an offence, as well as to the personal data of other individuals involved in the investigation and proceedings.
18. The Commissioner is therefore satisfied that section 40(2) is engaged.

Is the information sensitive personal data?

19. Sensitive personal data is defined in section 2 of the DPA. It is personal data which falls into one of the categories set out in section 2 of the DPA. In this case, the Commissioner considers the relevant category is:

(g) *“the commission or alleged commission by him of any offence”.*

20. The CPS told the complainant that the information within its casefile:

“is held by the CPS for the sole purpose of conducting a criminal prosecution and not for any other purpose.”

21. The Commissioner is satisfied that the withheld information in its entirety can be considered to be the sensitive personal data of the individual alleged to have committed an offence as the reason for its very existence is the investigation which led to their conviction.

22. Having accepted that the information requested constitutes the sensitive personal data of a living individual other than the applicant the Commissioner must next consider whether disclosure would breach one of the data protection principles.

Will disclosure breach one of the Data Protection principles?

23. The Commissioner has considered whether disclosure of the requested information would breach any of the data protection principles as set out in schedule 1 of the Data Protection Act (DPA). He considers the most relevant principle in this case is the first principle, which states that:

“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, and*
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met”.*

Would it be fair to disclose the requested information?

24. In answering the question of fairness, the Commissioner recognises the importance of considering whether the data subject has consented to the disclosure and/or whether the data subject has actively put some or all of the requested information into the public domain.

25. The Commissioner also considers it appropriate to consider the consequences of any disclosure and the reasonable expectations of the data subject.

Has the data subject consented to the disclosure?

26. With respect to the matter of consent, the Commissioner is not aware of anything to suggest that consent has been given for disclosure of the requested information.

Has the data subject actively put some or all of the requested information into the public domain?

27. Where the data subject themselves has put some or all of the requested information into the public domain, the Commissioner considers that this weakens the argument that disclosure would be unfair.
28. In this case the Commissioner has not seen any evidence that the data subject has actively put some or all of the requested information into the public domain.
29. The complainant has argued that if the defendant had not pleaded guilty at the first opportunity, some or all of the evidence in the case would have been read out in court and therefore it would have been in the public domain.
30. However, the Commissioner understands that the matter did not go to trial. Therefore the extent to which any evidence, for example witness statements, may or may not have been presented in open court is not known. In any case, in the Commissioner's view, the disclosure of personal data may still breach the data protection principles even after it has been disclosed in open court.

Reasonable expectations

31. In explaining its reasoning for refusing to disclose the requested information, the CPS told the complainant that witness statements in a prosecution case, such as the requested information under consideration in this Decision Notice, are:

"compiled for the purposes of investigation and prosecution for specific offences, supplied by witnesses in contemplation of such proceedings".

32. The Commissioner recognises that the requested information in this case was obtained as part of an investigation. The fact that it was not presented as prosecution evidence in a trial is, in his view, likely to contribute to the data subject's expectations at the time of the request that, having not been made public in a trial, it would not be made public in the future.

Consequences of disclosure

33. In looking at the consequences of disclosure on the data subject, the Commissioner has considered what those consequences might be. In doing so, he has considered the nature of the information itself and the climate in which the information would be disclosed.

34. Mindful of the fact that disclosure under the Act is disclosure to the world at large, the Commissioner considers that, in this case, the data subject's friends and family are amongst the general public to whom any disclosure would be made.
35. As disclosure of this type of information is likely to have a detrimental or distressing effect on the data subject, the Commissioner considers that it would be unfair to disclose it.

Conclusion

36. The complainant made submissions in relation to his interest in this information being disclosed. However, the Commissioner must take into account the fact that neither the identity of the applicant nor any purely personal reasons for wanting the requested information is relevant to the consideration of a freedom of information request. He must consider whether or not it is appropriate for the requested information to be released to the general public.
37. The Commissioner notes that the information in this case falls under section 2(g) of the Data Protection Act 1998 as it relates to the data subject's commission or alleged commission by him of any offence. As such, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information is likely to have a detrimental or distressing effect on the data subject, the Commissioner considers that it would be unfair to disclose the requested information.
38. As the Commissioner has concluded that it would be unfair to the individual concerned to disclose the withheld information and to do so would contravene the first principle of the DPA, he has not gone on to consider whether disclosure is lawful or whether one of the Schedule 2 DPA conditions is met. However, his initial view is that no Schedule 2 condition would be met.
39. As section 40 is an absolute exemption there is no need to consider the public interest in disclosure.

Other exemptions

40. As the Commissioner has found that it would not be fair to disclose the requested information, he has not gone on to consider the other exemption cited by the CPS in this case.
41. However, he notes that the CPS is also citing section 30(1)(c) (investigations and proceedings) with respect to the withheld information in this case. In order for the exemption in section 30(1) to be applicable the information must be held for a specific or particular

investigation, not for investigations in general, and the exemption continues to be applicable even after an investigation has been completed.

42. In the Commissioner's view, this strengthens the argument that the withheld information in this case is the sensitive personal data of an individual.

The Decision

43. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

44. The Commissioner requires no steps to be taken.

Right of Appeal

45. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

46. 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.

Dated the 9th day of March 2011

Signed

**Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Personal information.

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

(a) it constitutes personal data which do not fall within subsection (1), and

(a) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”