

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 June 2011

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

Summary

The complainant asked for information about whether a high profile individual had committed offences or breached the terms of his licence since being released from prison. The Ministry of Justice refused to confirm or deny whether it held information falling within the scope of the request, citing the exemptions in sections 31(3) and 40(5). The Commissioner accepted that the information was exempt under section 40(5) but found that there had been procedural breaches in the issuing of the refusal notice.

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. On 2 August 2010 the complainant submitted a request for the following information to the Ministry of Justice (the MoJ):

"Please let me know if [name and offence for which imprisoned, redacted] has:

- *Breached any of his licence conditions*
- *Caught taking drugs or suspected of taking drugs*
- *Caught drinking excessive amounts of alcohol or suspected of doing so*

- *Committed any offence that could lead to a prison sentence*

Since he was released".

3. The MoJ acknowledged receipt of the request on 4 August 2010, promising to reply by 31 August 2010. It explained that if it required additional time to consider public interest issues it would contact the complainant to inform him.
4. On 1 September 2010 the complainant contacted the MoJ three times by email to ask for a response. In his final email he requested that the handling of the request be reviewed.
5. On 4 September 2010, the complainant emailed the MoJ to ask for confirmation that his request was being reviewed.
6. On 10 September 2010 the MoJ issued a refusal notice, stating that under sections 31(3) (law enforcement) and 40(5) (personal information) it could neither confirm nor deny whether the MoJ held the requested information. It acknowledged that section 31 is a qualified exemption and set out the arguments it had taken account of when considering the public interest.
7. The complainant responded the same day, querying the MoJ's interpretation of section 31. The MoJ treated this as a request for an internal review. On 24 September 2010 it wrote to the complainant, upholding its application of section 31(3). It did not add anything further with regard to the thinking behind its decision and it made no further reference to the application of section 40(5). It advised the complainant to complain to the Information Commissioner if he was dissatisfied with the outcome.

The Investigation

Scope of the case

8. On 24 September 2010 the complainant contacted the Commissioner to ask him to review the MoJ's decision.

Chronology

9. On 12 October 2010 the Commissioner informed the MoJ of the complaint and asked to be sent a copy of the requested information (if held) and an explanation of the exemptions applied.

10. On 3 November 2010 the MoJ wrote to the Commissioner explaining that it could neither confirm nor deny whether it held any information covered by the request, citing sections 31(3) and 40(5). It referred him to its refusal notice to the complainant for more information.
11. On 1 February 2011 the Commissioner wrote to the MoJ asking it to fully explain and justify the exemptions cited.
12. The MoJ replied on 23 March 2011, setting out its arguments for applying sections 31(3) and 40(5). It explained that it was entitled to neither confirm nor deny that it held the requested information by virtue of the exemptions in sections 31(1)(a), 31(1)(c) and 40(5).

Analysis

Exemptions

Section 40(5)(b)(i) - Personal Information

13. The full text of the relevant provisions of the Act referred to in this section is contained within the Legal Annex. Section 40(5)(b)(i) provides that a public authority is not obliged to confirm or deny whether requested information is held if to do so would:

constitute a disclosure of personal data, and

this disclosure would breach any of the data protection principles or section 10 of the Data Protection Act (DPA).

Would confirming or denying that the requested information is held constitute a disclosure of personal data?

14. The DPA defines personal data as

"...data which relate to a living individual who can be identified

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the data controller or any person in respect of the individual."

15. In his guidance on the section 40 exemption¹, the Commissioner expanded on what constitutes personal data:

“The two main elements of personal data are that information must ‘relate to’ a living person, and that 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.”

16. 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. He considers that to comply with section 1(1)(a) of the Act (i.e. to either confirm or deny holding the information) would inevitably put into the public domain information about the conduct of the named individual (henceforth referred to as ‘D’) while on licence, which would constitute the disclosure of information that would relate to him.
17. 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 disclosure of this personal data breach a data protection principle?

18. The first data protection principle requires that personal data is processed fairly and lawfully and that at least one of the conditions in Schedule 2 is met. The Commissioner’s considerations here focus on the general issue of whether disclosure would be fair to the data subject, D.

Fairness

19. In establishing whether disclosure is fair, the Commissioner looks to balance the consequences of any release of personal data together with the reasonable expectations of the data subject, with general principles of accountability and transparency.

Consequences of disclosure

¹http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/personal_information.pdf

Harassment & personal safety

20. The MoJ argued that due to D's high profile, confirming or denying whether it holds any information regarding breach of licence (or activities that might result in a licence breach) by him would increase public curiosity about his present circumstances and whereabouts.
21. Although the Commissioner recognises that the Act is applicant blind, he accepts that because of D's high public profile any information released into the public domain about him is likely to be subject to intense media and public scrutiny. He accepts that even a denial that such information is held is, of itself, likely to be of interest to the media. An internet search on D's name reveals that the media continues to report on him, despite the time that has elapsed since his conviction.
22. The Commissioner therefore considers that a consequence of the disclosure could be that D would be the subject of significant media discussion and speculation about his whereabouts and conduct, and that this would increase the likelihood of him being identified in his local area.
23. The Commissioner considers that such is the strength of public feeling that surrounds D, if his identity and whereabouts were known he would be vulnerable to harassment and there would be real concerns for his personal safety.

Effect on D's rehabilitation

24. The MoJ argued that trust and co-operation between offenders and their managers is fundamental to the success of any rehabilitation programme. The Commissioner accepts that the disclosure of any information about D's circumstances, even just confirmation or denial whether information is held about him, may lead him to lose confidence in the monitoring system which underpins his parole. This might inhibit the candour with which he imparts information about his activities and movements to the authorities.
25. The Commissioner accepts that to affect the relationship in this way would be likely to have a real and serious impact on monitoring authorities' ability to engage with D. He accepts that where relationships between offenders and monitoring authorities are poor this is likely to increase the likelihood of offenders disengaging with the monitoring process, and reduce the likelihood of rehabilitation being successful.

Reasonable expectations of the data subject

26. The personal data that would potentially be disclosed here would relate to D in a private capacity. This is significant, in that previous decisions issued by the Commissioner have been guided by the principle that information about an individual's private life will deserve more protection than information about someone acting in an official or work capacity.
27. As outlined in paragraph 21, in considering whether the exemption contained within section 40(5)(b)(i) should be applied to the request the Commissioner has taken into account that the Act is designed to be applicant blind and that disclosure should be considered in its widest sense – which is to the public at large. If information were to be disclosed it would, in principle, be available to any member of the public and the Commissioner recognises that it would be likely to be of significant interest to the media. A confirmation or denial in the circumstances of this case would reveal to the public information which is not already in the public domain and is not reasonably accessible to the general public, about D's conduct in relation to his licence.
28. The Commissioner considers that, in the circumstances of this case, D would have a legitimate expectation that information which may or may not confirm whether he had complied with his licence conditions or committed any offences would be confidential and would not be released. These rights, set out in the DPA, are closely linked to article 8 of the Human Rights Act and the Commissioner would be in breach of his obligations under the Human Rights Act if he ordered disclosure of information or confirmation/denial without having considered these rights. To disclose this information would be an unwarranted intrusion into his rights and freedoms as a data subject, given the distress and harm that the release of the information could potentially cause him.

General principles of accountability & transparency

29. The complainant argued that it is in the public interest for people to be able to scrutinise D's behaviour while on licence, to be able satisfy themselves that he is being dealt with by the authorities appropriately.

30. The Commissioner recognises that there is significant public curiosity about D's current circumstances, but considers that this does not translate into a right to know what they might be. He understands that D, having completed a prison sentence determined by the Courts and having been released on licence, will be subject to monitoring procedures specifically designed to both support his rehabilitation and to minimise the risk to the public of him re-offending. Whilst the Commissioner accepts that confirming or denying might improve the public's trust and confidence in law enforcement and the criminal justice system, he sets against this the fact that popular sentiment about D's case is such that there may be a gulf in understanding between the criminal justice system and the general public as to what, in his case, constitutes "appropriate" action.
31. The Commissioner does not consider that scrutiny of D's case would do anything to assist public understanding of the work carried out by monitoring authorities, and that it might actually undermine it. The Commissioner is aware that D has been given a new identity and that a banning order prevents the media from reporting details of this new identity. He considers that efforts by the MoJ, using public money, would be undermined if D's identity were to be uncovered as a result of refreshed public interest in his case.

Conclusion

32. Leading on from these considerations, the Commissioner has determined that to confirm or deny whether the requested information is held would be unfair to the data subject, D. As disclosure would therefore breach the first data protection principle, section 40(5)(b)(i) is engaged.

Section 31 – Law Enforcement

33. Since he has determined that a 'neither confirm nor deny' response was justified by reference to section 40(5), the Commissioner has not found it necessary to go on to consider the application of section 31.

Procedural Requirements

34. The MoJ failed to specify the relevant subsection of the section 40 exemption being relied upon in the refusal notice.

35. The MoJ exceeded the 20 working day time limit for issuing a refusal notice.

The Decision

36. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- it correctly identified that it should neither confirm nor deny whether it held the requested information, by reference to section 40(5)(b)(i).

37. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- the public authority breached section 17(1)(b) by failing to specify the relevant subsection of section 40 in its refusal notice;
- it breached section 17(1) by failing to issue a refusal notice within the 20 working day time limit.

Steps Required

38. The Commissioner requires no steps to be taken.

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

Tel: 0300 1234504

Fax: 0116 249 4253

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

Website: www.informationtribunal.gov.uk

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.

Dated the 16th day of June 2011

Signed

**Jon Manners
Group Manager
Information Commissioner's Office
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Cheshire
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Legal Annex

Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that -

"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."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

Refusal of Request

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

Law enforcement

Section 31(1) provides that –

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice

...

Section 31(3) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1)."

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
- (b) 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.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-

- i. the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded, or
- ii. by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

Data Protection Act 1998

Basic interpretative provisions.

(1) In this Act, unless the context otherwise requires—

- “data” means information which—
 - (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
 - (b) is recorded with the intention that it should be processed by means of such equipment,
 - (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system,
 - (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68; or
 - (e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d);

...

- “data subject” means an individual who is the subject of personal data;
- “personal data” means data which relate to a living individual who can be identified—
 - (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;
- “processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—
 - (a) organisation, adaptation or alteration of the information or data,
 - (b) retrieval, consultation or use of the information or data,
 - (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or

(d) alignment, combination, blocking, erasure or destruction of the information or data;