

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 October 2011

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

Decision (including any steps ordered)

1. The complainant requested information about a trial. The Ministry of Justice (the "MOJ") responded and refused to answer a number of parts of the request on the basis that it did not consider them to be requests for recorded information. It also applied section 14(1) (vexatious request) but failed to specify which aspects of the request it was applying this to. It confirmed that it did not hold some of the information and advised the complainant to contact the Legal Services Commission for these aspects of the request.
2. The subject matter of the case prompted the Information Commissioner to consider whether the MOJ should have considered section 40 of the Freedom of Information Act 2000 ("FOIA") and given a 'neither confirm nor deny' response. He finds that confirmation or denial would disclose personal data and that the disclosure of this personal data would be in breach of the first data protection principle. The exemption provided by section 40(5)(b)(i) of the FOIA should therefore have been applied. The MOJ is not required to take any steps.
3. The MOJ did, however, breach FOIA by responding to the request late. The MOJ must ensure that this delay is not repeated in future.

Background

4. The complainant made his request to Her Majesty's Court Service ("HMCS") in London, which provided the initial response. The internal review was provided by Her Majesty's Courts & Tribunals Service. Both are executive agencies falling under the remit of the MOJ. The MOJ responded to the Information Commissioner's investigation.

5. The complainant was convicted of a criminal offence and imprisoned. He maintains that he was falsely charged and imprisoned.
6. The complainant's request was made with reference to both the FOIA and sections 7-9 of the Data Protection Act 1998 ("DPA"). On receipt of the complaint, and prior to the start of his investigation, the Information Commissioner told the complainant how to make a subject access request ("SAR") under the DPA. At this stage the Information Commissioner is not aware whether the complainant has acted upon his advice.

Request and response

7. On 21 February 2011, the complainant wrote to the MOJ and requested information about the judge, noting counsel and legal aid costs paid to solicitors with reference to a trial, making reference to both the Act and the Data Protection Act 1998. His request consisted of some 29 parts, with some broken down further into sub-points. The complete version of the request can be found at Annex A attached to this decision notice.
8. The MOJ responded late on 5 April 2011 as follows.
 - It considered a number of the parts (which it specified) in the request to be invalid under the terms of the Act because they did not ask for a copy of recorded information, but instead were more general questions about, for example, decisions made.
 - It considered some of the request to be vexatious under the exclusion in section 14(1) of the Act, although it did not specify to which aspects it was applying the exclusion.
 - It did not hold information in relation to some of the listed questions about legal aid and instead referred the complainant to the Legal Services Commission.
9. Following an internal review the MOJ wrote to the complainant on 5 May 2011. It apologised for not answering questions 8 and 12 of the request, confirming that the former was not a valid request for recorded information, and that the latter had already been answered in previous correspondence with the crown court. The MOJ explained that the complainant how to make a SAR.

Scope of the case

10. On 21 March 2011 the complainant contacted the Information Commissioner to complain about the way his request for information

had been handled. He wrote further on 9 May 2011 submitting more details about his complaint. The complainant indicated at this stage that he was dissatisfied with the delay in the MOJ's response, that some of the questions were not responded to because the MOJ considered they were not requests for recorded information, and that he did not view any part of his request as being vexatious.

11. However, the subject matter of the case prompted the Information Commissioner to consider whether the MOJ should instead have given a 'neither confirm or deny' response as detailed in the next section of this notice.

Reasons for decision

12. The Information Commissioner will not proactively seek to consider all exemptions or exclusions in every case before him, but in cases where personal data is involved the Commissioner believes he has a duty to consider the rights of data subjects. These rights, set out in the DPA, are closely linked to article 8 of the Human Rights Act (the "HRA") and the Commissioner would be in breach of his obligations under the HRA if he ordered disclosure of information or confirmation or denial without having considered these rights, even where the exemption has not been cited. Therefore, although the MOJ has cited section 14(1), and stated that parts of the request are not requests for recorded information, the Information Commissioner has first considered section 40(5)(b)(i) in this particular case.

Exemptions

Section 40 – personal information

13. 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 DPA.
14. The Information Commissioner's analysis of whether the above criteria would be satisfied follows.

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

15. The DPA defines personal information 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."*

16. In his guidance on the section 40 exemption, the Information Commissioner expanded on what constituted 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."

17. The Information Commissioner considers that the way in which the request is worded clearly indicates that the complainant is seeking information which can be linked with named individuals. He considers that to comply with section 1(1)(a) of the FOIA (i.e. to either confirm or deny holding the information) would inevitably put into the public domain information about the existence or otherwise of a trial relating to a criminal conviction which would constitute the disclosure of information that would relate to those individuals.

18. Therefore, the Information 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?

19. 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, and
- in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

20. The Information Commissioner's considerations here focus on the general issue of whether disclosure would be fair to the relevant individuals.

Fairness

21. In establishing whether disclosure is fair, the Information Commissioner will look to balance the consequences of any release of personal data

and the reasonable expectation of the data subjects, with general principles of accountability and transparency.

22. The personal data that would potentially be disclosed here would relate to the individuals in a private capacity. This is significant in that previous decisions issued by the Information 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.
23. The Information Commissioner would therefore consider in the circumstances of this case, that the individuals would have a legitimate expectation that information which may or may not confirm whether they had been part of an investigation and/or court proceedings would not be released. To disclose this information would be an unwarranted intrusion into the rights and freedoms of the data subjects, given the distress that the release of the information could potentially cause.
24. In considering whether the exemption contained within section 40(5)(b)(i) should have been applied to the request the Information 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. A confirmation or denial in the circumstances of this case would reveal to the public some information which is not already in the public domain and is not reasonably accessible to the general public, and would further publicise the existence or otherwise of an investigation and court proceedings involving those named parties.
25. In reaching a decision as to whether the information in this case would constitute personal data, the Information Commissioner has taken into account the wording of the request and what this suggests about the nature of the information requested. He is satisfied that, if it were held, the information requested would be the 'personal data' of any parties involved. Furthermore, as the request specifically asks for information about a criminal trial, it would also be 'sensitive personal data'.
26. In order to disclose any 'sensitive personal data' a schedule 3 condition of the DPA must be met. Having considered all the conditions the Information Commissioner has concluded that, on this occasion, there is no relevant condition. He therefore finds that the MOJ should have issued a 'neither confirm or deny' response. The Information Commissioner has therefore not been obliged to consider the various other responses of the MOJ (the application of the vexatious request exclusion in section 14(1), that some of the information was not held, and that some parts of the request did not constitute requests for recorded information).

27. Separately to the above, the Information Commissioner also finds that the MOJ breached the requirement of the FOIA that an information request should be responded to within twenty working days of receipt.

Right of appeal

28. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

29. 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.

30. 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

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

Annex A

The complainant's complete request made on 21 February 2011 is detailed below:

"Under the Freedom of Information Act and sections 7-9 of the Data Protection Act 1998, with reference to the case of [complainant court case details redacted] I formally ask you to provide me with the information I request in the numbered paragraphs below: -

1. What criterion Judge [name redacted] followed to appoint a noting counsel on 30 June 2009 to prepare notes as opposed to providing me transcripts of the proceedings whilst transcripts under any circumstances would have been more accurate [sic] record of the proceedings compared with the notes of a junior counsel? Please disclose a copy of the policy document/rules that the judges must follow and Judge [name redacted] followed in relation to appointment of noting counsel than providing transcripts to a lay defendant compelled to defend in person when critically ill.
2. Does Judge [name redacted] have any personal and/or professional relationship with the noting counsel he appointed? If yes, please provide full details.
3. Please disclose the name of the chamber/s to which the judge and the noting counsel belonged at the time?
4. What experience noting counsel had to act as a noting counsel at the time in particular confirm if she was a qualified shorthand writer and if yes, please disclose from where and when she qualified as a shorthand writer?
5. How much payment was made to the noting counsel for her work?
6. If the judge considered that the noting counsel's notes were correct and accurate record of the proceedings why the court allowed a transcript of the summing-up which is materially different from and lacking compared with the notes prepared by the noting counsel?
7. **How much payment for legal aid and for what work the court authorised to:-**
 1. [Company name redacted]. Please disclose separately the payment made to the counsel and police station attendant appointed and disbursements made by the firm;

2. [Company name redacted]. Please disclose separately the payment made to the counsel appointed and disbursement made by the firm;
3. [Company name redacted] appointed for me by the Judge when I had mentioned at least three firms to him with whom I had been in contact but he chose [company name redacted] for his personal connections with the firm. Please disclose what professional and/or personal relationship he had with the firm in particular if he had ever been briefed by the firm while working at the Bar and/or he has any interest in the firm.
4. [Company name redacted]. Please disclose separately the payment made to the counsel appointed and disbursement made by the firm;
5. [Company name redacted]. Please disclose separately the payment made to the counsel appointed and disbursement made by the firm;
8. Whom did [name redacted] represent on 6 April 2009 (transcript of 6 April 2009) and why the judge is seen asking him, **"I think it is very unlikely that he would speak to you in any event."** (Para C at page 1 of the transcript). Please disclose in detail the basis of such an assumption.
9. What is the basis of the judge finding, **"as much as I would like him to be represented I think he will refuse? He does not like solicitors, or barristers or judges."** [Para G-H at page 1 of the transcript].
10. How much payment from legal aid funds has been made to [name redacted] and for what work? Please provide full details.
11. What has been left out of the transcripts paragraph G-H at page 3 continuing at start of page 5 where the words, **"because he"** follow [sic] by...?
12. Please disclose a copy of the court order referred to in paragraph G-H at page 3 of the transcript pursuant to which judge [sic] is shown stating **'Yes, it was meant to be here by 9.30 today.'** And explain why a copy of it was not sent to me on 14 January 2011 when the court sent me a variety of so-called court orders.
13. Why the judge wanted [name redacted] to make enquiries, **'as to whether or not the defendant's partner is about.'** (paragraph A at page 5 of the transcript)

14. What are the reasons for my submissions not being fully transcribed in the following paragraphs **whilst the judge appears to be understanding what I was saying and is seen responding to my submissions:-**

[List of various references to particular paragraphs and pages in the transcript]

Since the judge was able to understand what I was saying and was responding I feel my submissions have been wilfully distorted to keep evidence off my records. I therefore, ask that I am provided accurate and full transcripts and copy of the tape.

15. What are the reasons for the judge's comments not being fully transcribed in the following paragraphs:

Paragraph E at page 7, Paragraph B at page 15
Paragraph A at page 20, Paragraph C at page 34

Please provide complete and accurate transcript.

16. Having found, ***"I can understand they may not be hat keen on representing you,"*** (paragraph C at page 7) why did he fund [company name redacted] from legal aid and abused public funds when he knew they were not keen on representing me?
17. Why on 6 April 2009 the judge found [company name redacted] representing me [Paragraph G page 9] when he knew I had sacked them on 20 March 2009?
18. Who was responsible to grant legal aid to [company name redacted] for an independent medical report?
19. Please give detailed reasons as to why legal aid was not granted to [company name redacted] for an independent medical report when on 27 February 2009 they were directed to pursue bail application with full medical evidence at the next hearing which [name redacted], counsel appointed by [company name redacted] had agreed to pursue within 14 days?
20. What reason the judge had to be concerned about my mental health? [Para A page 17]. Please disclose full details and evidence stating then how he found me fit to conduct a 3 week trial in person.
21. Having been concerned about my physical health what genuine action the judge was taking to ensure that my physical health did

not suffer? Please disclose full details of the action/s he took in this matter and how he considered my physical health was looked after in the prison about which I was complaining operates in a manner worse than a Nazi Concentration Camp?

22. In what capacity [name redacted] was asked by the judge, ***“Can you think of something else that the court could do to keep an eye on his mental and physical health,”*** when he appears to be representing a biased and corrupt firm of solicitors whom I had sacked on 20 March 2009, knew nothing about me, was not instructed by me, could not be expected to have my interest at heart and indeed was **arming a corrupt and biased judge with a biased medical report from a crook in whom I had recorded my lack of trust as he was giving such scandalous opinions that I shall die within few days [sic] without dialysis [letter dated 12 December 2008 from [company name redacted] to prison] but I remained alive for more than 16 months not only without dialysis but also without any medicine and suitable renal diet.**
23. Reason/s for which the judge wanted my partner to be at the hearing. And why he was interested in her job [Paragraph F at page 26, page 27, paragraph E at page 31 and paragraph B at page 34]
24. Please disclose the note of my said telephone conversation with the list office referred to in paragraphs A-H at page 30 **specifically disclosing duration of the telephone call and what was in that conversation which frightened the list clerk.**
25. Please disclose a copy of the court policy which bars the defendants; who are compelled to act in person, from speaking to the list office and court staff.
26. Reason/s for which the court has not drawn and sent me a copy of the court order made on my 'Unless Order Application' referred to in paragraph G at page 35.
27. What basis the judge on 6 April 2009 had to find, **“Certainly the Crown have a case.”** [Paragraph F at page 36]
28. What authority the Judge had to access my private and confidential medical records when I had refused to let him have those from biased and corrupt people? [Paragraph A at page 37] Please also provide me a copy of the said medical report that was provided to him in response to his order to the prison.

29. Was [name redacted] sitting as regularly as Southwark Crown Court judge at the relevant time?

Please note it is my understanding that I am entitled to information requested within 20 working days and I do not have to explain source of information [sic]. Also, for being in wrongful, false and malicious incarceration planned with active collusion of an anti-Indians and a racist judge. I do not have access to any published information. I will therefore require copies of any published information on which you may propose to rely

Please acknowledge receipt of my correspondence indicating when I am likely to have response [sic] to my request."