

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 September 2014

Public Authority: Ministry of Justice

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information relating to the Court Proceedings Database including the names of offenders found guilty of offences under the Housing Act 2004 held on that database. The Ministry of Justice (MoJ) confirmed it held information within the scope of the request but refused to disclose it citing section 40(2) of FOIA (personal information).
2. The Commissioner has investigated and found that some of the withheld information does not constitute personal data. As section 40(2) cannot therefore apply, he orders disclosure of that information. With respect to the remaining information within the scope of the request, he finds the exemption engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information that does not constitute personal data.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The Commissioner understands that the MoJ Court Proceedings Database holds information on defendants proceeded against for criminal offences in England and Wales. During the course of his investigation the MoJ explained:

"The Court proceedings database contains information about prosecutions, convictions and sentences given in the Magistrates' and Crown Courts of England and Wales. The database contains information about cases that have been completed in the Magistrates or Crown Courts. It does not contain information about ongoing cases".

Request and response

6. Following earlier correspondence, on 22 April 2014 the complainant wrote to the MoJ with the following request for information:

"..... My new request is below:

1. Please can you provide me with a list of the names of offenders found guilty of offences under the Housing Act 2004 held on the MoJ Court Proceedings Database?

2. I would also like to request the column and row headings on MoJ Court Proceedings Database (without any data)?"

7. The MoJ responded on 6 May 2014. It confirmed that it holds the requested information but refused to provide the information within the scope of part (1), citing section 40(2) as its basis for doing so. It provided the information relating to part (2) of the request.
8. The complainant requested an internal review on 12 May 2014. In support of his argument in favour of disclosure he referred to a number of cases in which the decision had been made to disclose personal data.
9. The MoJ sent him the outcome of its internal review on 3 June 2014. It upheld its original position.

Scope of the case

10. The complainant provided the Commissioner with the relevant documentation on 30 July 2014 to complain about the way part (1) of his request for information had been handled.
11. In bringing his complaint to the Commissioner's attention, he explained that, in his view, disclosure would be fair and in accordance with the Data Protection Act 1998 (DPA). Accordingly he asked the Commissioner to consider the MoJ's assertion that it is under no obligation to consider the public interest test in this case. In support of his complaint, he told the Commissioner:

"Also, I would like to draw your attention to the fact that 33 local authorities have disclosed the names of individuals they have successfully prosecuted under the Housing Act 2004..."
12. Although the Commissioner understands from this that a number of local authorities would appear to have complied with similar requests, this does not set an automatic precedent for disclosure under the FOIA: each case must be considered on its merits.
13. The Commissioner considers the scope of his investigation to be the MoJ's application of section 40(2) to the disputed information – the names of offenders found guilty of offences under the Housing Act 2004 held on the MoJ Court Proceedings Database.

Reasons for decision

Section 40 personal information

14. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.

Is the information personal data?

15. The first step for the Commissioner to determine is whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 cannot apply.
16. The definition of personal data is set out in section 1 of the DPA. This provides that, for information to be personal data, it must relate to an individual and that individual must be identifiable from that information.

17. 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 intention of the data controller or any other person in respect of the individual."

18. The two main elements of personal data 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 or has them as its main focus.

19. During the course of his investigation the Commissioner asked the MoJ to provide him with a copy of the withheld information. The MoJ provided the Commissioner with a copy, as requested, together with its substantive arguments in support of its application of section 40(2). It told him:

"I attach a copy of the list of the names of people and companies convicted under the Housing Act. ...This represents all the information in the scope of the FOI and is exempt from release to the defendant under Section 40.

Because it consists of the names of the defendants all the information included is exempt personal information".

20. With respect to the names of companies within the withheld information, the Commissioner does not find that section 40 is engaged. He has reached that conclusion on the basis that the information does not relate to a living person. He orders disclosure of that information.

21. With respect to the remaining withheld information the Commissioner is satisfied that that information is personal data. He has reached that conclusion on the basis that the information relates to private individuals successfully prosecuted under the Housing Act.

Is the requested information sensitive personal data?

22. 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, ie personal data consisting of information as to:

"(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings".

23. The information at issue relates to individuals found guilty of offences under the Housing Act 2004. The Commissioner is satisfied that the information under consideration satisfies the definition of sensitive personal data under section 2(h).
24. Having accepted that the information 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.
25. The Commissioner considers the first data protection principle is most relevant in this case.

Would disclosure contravene the first data protection principle?

26. The first principle deals particularly with the privacy rights of individuals and the balance between those rights and other legitimate interests in processing personal data. It states:

"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".*

27. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions and, in this case, one of the Schedule 3 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

Would it be fair to disclose the requested information?

28. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
 - the individual's reasonable expectations of what would happen to their information;
 - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and

- the balance between the rights and freedoms of the data subject and the legitimate interests of the public.
29. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.
30. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in its disclosure.

Reasonable expectations

Possible consequences of disclosure

31. In correspondence with the Commissioner, the MoJ acknowledged that criminal courts are open to the members of the public and the press. Nevertheless, it expressed the view that the data subjects would still have a reasonable expectation of privacy:

"because in practice, except for the most high-profile of cases, media attention for most criminal cases is likely to be limited or non-existent and public awareness of these cases is likely to be very limited and be forgotten quickly".

32. With respect to the possible consequences of disclosure MoJ told the Commissioner:

"... it is plausible that the release of the data would adversely affect those who were named".

33. In that respect it told the Commissioner:

"Putting their names into the public domain could open them up to wide range of additional unofficial investigations or private actions, which might impact them in a wide variety of negative ways [sic]".

Legitimate interests of the public

34. In considering any legitimate interests in the public having access to the information, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
35. In the complainant's view there is a substantial public interest in disclosing the requested information as it is connected with unlawful acts. In correspondence with the MoJ he said:

"The public have a legitimate interest in knowing which individuals have been found guilty of housing offences. Otherwise members of the public may rent homes from unscrupulous or unsuitable landlords exposing them to potential harm from unhealthy and dangerous conditions. Moreover councils may be placing vulnerable homeless people with unscrupulous or unsuitable landlords... Large amounts of public money may also be going to unscrupulous or unsuitable landlords in the form of housing benefit, which continues to increase. It is clearly in the public interest to know if tax-payers are subsidising such individuals".

36. In correspondence with the Commissioner, the complainant said:

"...private renters - who make up a growing part of the housing market - currently have no way of knowing if a prospective landlord would pass a fit and proper person test, which is a test used by local authorities to assess the suitability of landlords for licenses and other purposes".

37. The MoJ acknowledged that disclosure would inform the public.

The balance between the rights and freedoms of the data subjects and the legitimate interests of the public.

38. In forming a view on whether disclosure of the requested names would be fair, the Commissioner has taken into account the reasonable expectations of the data subjects, the consequences of disclosure upon them and any legitimate public interest in the disclosure of the information.

39. The Commissioner recognises that information that falls within the category of sensitive personal data tends to hold a greater expectation of confidentiality than non-sensitive personal data. In most cases, the very nature of sensitive personal data - information that individuals will regard as the most private - means it is more likely that disclosing it will be unfair.

40. In this case, the Commissioner acknowledges that the reasonable expectations of the data subjects are that such information would not be disclosed and that the consequences of any disclosure could be damaging or distressing to them. He notes, however, that the information relates to their business/commercial interests rather than their private life.

41. In assessing fairness in this case, the Commissioner has taken into account that the requested information is recorded on the Court Proceedings database. MoJ told the Commissioner that the Court

Proceedings Database includes people convicted of a wide range of offences. In this case, the information at issue relates to individuals who have been successfully prosecuted under the Housing Act 2004. In the Commissioner's experience, such prosecutions are likely to have been brought by a local authority exercising its functions in the public interest – for example with respect to landlords meeting required standards. In his view, the context in which the information was obtained contributes towards finding fairness in disclosure.

42. In this case, as well as the general need for transparency, the Commissioner is of the view that there is a specific need for transparency in relation to the requested names in order to serve the public interest regarding housing related convictions. Furthermore, in light of the nature of the withheld information in this case, he is of the view that the legitimate public need for transparency and accountability is substantial.
43. The fact that the information would have been publically available in court at the time is, in the Commissioner's view, another factor that contributes towards finding fairness in disclosure, particularly given the public interest nature of the offences committed.
44. In the circumstances of this case, the Commissioner is satisfied that the arguments with respect to the legitimate public interest in disclosure outweigh those relating to the reasonable expectations of the individuals concerned and the possible consequences of disclosure. He has therefore concluded that, despite the privacy rights of the individuals concerned, it would be fair to disclose the withheld information.
45. Personal data can only be disclosed if to do so would be fair, lawful and meet one of the conditions in Schedule 2 of the DPA and in the case of sensitive personal data a condition in Schedule 3. As the Commissioner is satisfied that it would be fair to disclose the sensitive personal data within the scope of the request he will firstly consider whether disclosure would satisfy a condition in Schedule 3 of the DPA.

Is a schedule 3 condition satisfied?

46. The only conditions in Schedule 3 that the Commissioner considers to be potentially relevant in this case are condition 1 (explicit consent) or condition 5 (information already made public by the individual). This is because the other conditions concern disclosure for stated purposes, none of which are applicable here.
47. In this case, the MoJ confirmed that the individuals concerned have not been contacted to ask for their consent. There is no obligation on the MoJ to do so. Nor is the Commissioner aware that the individuals have

deliberately made their sensitive personal data public. The fact that criminal proceedings will have taken place in open court is not relevant for these purposes.

48. In the absence of any evidence or indication that the data subjects concerned have specifically consented to their sensitive personal data being disclosed to the world in response to the FOIA request or that they have deliberately made their sensitive personal data public, the Commissioner cannot find a Schedule 3 condition is met.

Conclusion

49. In this case, the Commissioner disagrees with the MoJ's position on fairness. However, given the strict provisions of the DPA, for which the Commissioner is also the regulator, the Commissioner must uphold the MoJ's application of the exemption at section 40(2) in respect of the sensitive personal data in this case. He does so not on the basis that disclosure would be unfair but on the basis that there is no applicable Schedule 3 condition. The personal data is therefore exempt from disclosure.

Other matters

50. With respect to the possible consequences of disclosure MoJ told the Commissioner:

"In addition, it is not entirely clear what [the requester] would do with the information but it is plausible that the release of the data would adversely affect those who were named".

51. It may well be the case that the MoJ cannot say what the requester may do with the information if it were to be disclosed. However, in reaching a decision about disclosure, a public authority – and the Commissioner – has to 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. The issue to be decided is whether or not it is appropriate for the withheld information to be released to the general public.

52. With respect to the specific nature of the requested information in this case, the MoJ told the Commissioner:

"It should be noted that the Court Proceedings Database includes people convicted of a wide range of offences This means that any decision would which establish a precedent for putting personal

data from the Court Proceedings Database into the public domain should be treated very cautiously”.

53. In response to those concerns, the Commissioner would state that, under section 50 of the FOIA, his 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 same is true for a public authority receiving an information request. Decisions are made on a case by case basis. The issue of precedent does not arise.

Right of appeal

54. 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

55. 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.
56. 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

Graham Smith
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