

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 December 2016

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 conviction and punishment of a named individual.
2. The Ministry of Justice (MoJ) refused to confirm or deny whether it held the requested information citing section 40(5) of the FOIA (personal information).
3. The Commissioner's decision is that the MoJ cited section 40(5) correctly and so was not obliged to confirm or deny whether it held the requested information.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 30 April 2016, the complainant wrote to the MoJ and requested information in the following terms:

"I therefore formally request that as the victim of [name redacted]'s crimes, I am informed of what he was convicted of and what punishment he received".

6. The MoJ responded on 6 June 2016. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:
 - section 32(1) court records

- section 40(2) personal information
7. Following an internal review, the MoJ wrote to the complainant on 12 July 2016. It revised its position with regard to the subsections of the exemptions it considered applied in this case. It refused to confirm or deny that it held the requested information, citing sections 32(3) and 40(5) of the FOIA.

Scope of the case

8. Following earlier correspondence, the complainant contacted the Commissioner on 25 July 2016 to complain about the way his request for information had been handled.
9. He disputed that he cannot be told what the individual named in his request was punished for and what punishment they received.
10. The analysis below considers the MoJ's application of section 40(5) of the FOIA to the requested information.
11. Specifically, the Commissioner's analysis considers section 40(5)(b)(i) of the FOIA. The consequence of section 40(5)(b)(i) is that if a public authority receives a request for information which, if it were held, would be the personal data of a third party, then it can rely on section 40(5)(b)(i), to refuse to confirm or deny whether or not it holds the requested information.

Reasons for decision

Section 40(5)

12. Section 40(5) of the FOIA states 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 that 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)."

13. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of personal data, and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.

Would confirmation or denial involve the disclosure of personal data?

14. On the issue of whether confirmation or denial in response to the complainant's request would involve the disclosure of personal data, the definition of personal data is given in section 1(1) of the Data Protection Act 1998 (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".

15. 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.
16. The request in this case is for information relating to a specified and named individual.
17. The MoJ told the complainant that, if any information were held, confirming this would reveal, to the world at large, that the individual named in the request was involved in the criminal justice system. It told him:

"...this would constitute the personal data of that individual".

18. The Commissioner is satisfied that the way in which the request is worded indicates that the complainant is seeking personal information which can be linked to an identifiable individual. Clearly this information

would both identify and relate to that individual and so would be their personal data according to the definition in section 1(1) of the DPA.

Is the information sensitive personal data?

19. Sensitive personal data is personal data which falls into one of the categories set out in section 2 of the DPA. The Commissioner considers the relevant categories in this instance are:

"(g) the commission or alleged commission by him of any offence,

or

(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".

20. In this case, given that the request relates to information about criminal matters, the Commissioner is satisfied that the requested information falls under sub-sections 2(g) and 2(h) in relation to the named individual.
21. Having accepted that the request is for the personal data, including the sensitive personal data, of a living individual other than the applicant, the Commissioner must go on to consider whether confirming or denying if the information is held would contravene any of the data protection principles.

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

22. The data protection principles are set out in Schedule 1 of the DPA. The Commissioner considers that the first data protection principle is relevant in the circumstances of this case.

23. The first data protection principle 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."

24. 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.

25. The Commissioner has first considered whether disclosure would be fair.
26. 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
 - any legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the individuals who are the data subjects.
27. The Commissioner recognises that people have an instinctive expectation that the MoJ, in its role as a responsible data controller, will not disclose certain information about them and that it will respect their confidentiality.
28. The Commissioner has noted above that the information, if held, falls under sections 2(g) and (h) of the DPA. As such, this has been deemed to be information that individuals regard as the most private information about themselves.
29. The Commissioner considers that, in most cases, the very nature of sensitive personal data means it is more likely that disclosing it will be unfair. The reasonable expectation of the data subject is that such information would not be disclosed and that the consequences of any disclosure could be damaging or distressing to them.
30. As to the consequences of disclosure upon a data subject, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
31. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. She will also take into account the fact that disclosure under the FOIA is effectively an unlimited disclosure to the public at large, without conditions.
32. Given the nature of the request, and the sensitivity of the subject matter, the Commissioner considers that disclosure in this case could lead to an intrusion into the private life of the individual concerned. She is also satisfied that the consequences of any disclosure could cause damage and distress to the party concerned.
33. Notwithstanding a data subject's reasonable expectations or any damage or distress caused, it may still be fair to disclose information, or

in this case confirm or deny if information is held, if there is a more compelling public interest in doing so. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in confirming or denying if the information is held.

34. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data, the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest in confirming if information is held must outweigh the public interest in protecting the rights and freedoms of the data subject if providing confirmation or denial is to be considered fair.
35. The Commissioner recognises that the complainant has a personal interest in the requested information. However, the interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.

Conclusion

36. 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.
37. With due regard to the reasonable expectations of the data subject, and the potential impact on them if the existence of their personal data were to be confirmed or denied, the Commissioner is satisfied that confirming or denying if the requested information is held would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the data subject. She considers these arguments outweigh any legitimate interest in disclosure.
38. 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. She considers that the exemption provided by section 40(5)(b)(i) is engaged and that, in this case, the MoJ was not obliged to confirm or deny whether it held the information requested by the complainant.
39. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, it has not been necessary to go on to consider whether this is lawful or whether one of the schedule 2 or schedule 3 DPA conditions is met.

Other exemptions

40. As the Commissioner is satisfied that the MoJ was correct to neither confirm nor deny holding the requested information by virtue of section 40(5) she has not found it necessary to consider its application of section 30(3) to the same information.

Right of appeal

41. 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

42. 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.

43. 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
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