

Freedom of Information Act 2000 (FOIA)

Date: 6 April 2017

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 recommendation to grant compensation in the case of a man wrongly convicted of murder.
2. The MoJ withheld the requested information citing sections 40(2) (personal information) and 21(1) (information accessible to applicant by other means) of the FOIA.
3. The Commissioner has investigated the MoJ's application of section 40(2). Her decision is that the MoJ was entitled to withhold the information withheld by virtue of that exemption. She requires no steps to be taken as a result of this decision.

Background

4. Timothy Evans was hanged in 1950 for the murder of his wife and baby daughter. Mr Evans was given a posthumous royal pardon in 1966.
5. Lord Brennan of Bibury QC was the independent Assessor for miscarriages of justice compensation¹. He held that position between July 2001 and July 2011.

¹ <http://www.wired-gov.net/wg/wg-news-1.nsf/54e6de9e0c383719802572b9005141ed/84258dd79606cd1f802572ab004b44c0?OpenDocument>

6. The Assessor's role is to assess the amount of compensation to be paid under section 133 of the Criminal Justice Act 1988 once ministers have decided that the eligibility criteria are met.

Request and response

7. On 20 September 2016, the complainant wrote to the MoJ and requested information in the following terms:

"In 2003, a Home Office assessor, Lord Brennan QC, recommended the payment of £250,000 compensation to the family of Timothy Evans, who was wrongfully executed in 1950 for a murder he did not commit.

Excerpts from Lord Brennan's report are reproduced in the judgment Westlake v Criminal Cases Review Commission [2004] EWHC 2779 (Admin).

Please provide me with an electronic copy of Lord Brennan's decision(s) and report(s) in this matter...."

8. The MoJ responded on 18 October 2016. It confirmed it held information within the scope of the request. However, it refused to provide the requested information citing section 40(2) (personal information) of the FOIA.
9. Following an internal review the MoJ wrote to the complainant on 14 November 2016. In that correspondence it confirmed its application of section 40(2) and additionally cited section 21 of the FOIA (information accessible to applicant by other means).

Scope of the case

10. The complainant provided the Commissioner with the relevant documentation on 20 January 2017 to complain about the way his request for information had been handled.
11. It is not in dispute that Mr Evans is deceased. The Commissioner acknowledges that both parties are satisfied that the withheld information cannot be the personal data of Mr Evans.
12. The complainant maintains that section 40(2) cannot apply to the withheld information.

13. He disagrees that the entire assessment consists of personal data. He also maintains that the MoJ failed to consider the option of redacting specific elements "*such as the precise sum of compensation paid to the applicants*".
14. During the course of her investigation the MoJ provided the Commissioner with a copy of the withheld information together with its substantive arguments in support of its application of section 40(2).
15. The analysis below considers the MoJ's application of section 40(2) of the FOIA to the information withheld by virtue of that exemption.

Reasons for decision

Section 40 personal information

16. 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 one of the conditions listed in section 40(3) or 40(4) is satisfied.
17. In this case the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (DPA).
18. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 cannot apply.
19. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

Is the information personal data?

20. Section 1 of the DPA defines personal data as:

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

a) from these 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."

21. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable.
22. 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.
23. In correspondence with the complainant, the MoJ explained that it considers that the requested information constitutes the personal information of the applicants for compensation and their legal representatives.
24. In that respect it told him:

"All of the information contained in the documents "relates" to and identifies the applicants and their legal representatives because the sole reason for the preparation of the documents was either to set out the factors relevant to determining the appropriate amount of compensation awarded to the applicants or the legal fees payable to their legal representatives".
25. Acknowledging that time has passed since the assessment was made, the MoJ told the complainant:

"Applying the '100 year rule' (whereby a lifetime of 100 years should be assumed) we have concluded that it should be assumed for the purposes of this request that it is likely that these individuals are alive and that the department's legal obligations under the DPA continue to apply".
26. In the absence of other officially verified information, the Commissioner considers that a life expectancy of 100 years is a reasonable basis on which to proceed.
27. In correspondence with the Commissioner the MoJ confirmed its view that the information withheld by virtue of section 40(2) relates to, and identifies, living individuals.
28. During the course of her investigation, the MoJ told the Commissioner that it also considered that the requested assessments comprise the personal data of the Independent Assessor, Lord Brennan QC:

"... because they were prepared by him, indicate his authorship and contain his opinions regarding the amount that should be awarded in compensation for the miscarriage of justice suffered by Timothy Evans".

29. For the purposes of this decision notice, the Commissioner will refer to those living individuals as "the applicants", "the legal representatives" and "the Independent Assessor".
30. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to a number of individuals who were involved in the case of Mr Evans. She is satisfied that this information both relates to and identifies the parties concerned. This information therefore falls within the definition of 'personal data' in section 1(1) of the DPA.
31. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the data protection principles.
32. The Commissioner notes that the MoJ considers that disclosure would breach the first data protection principle.
33. The Commissioner agrees that the first data protection principle is most relevant in this case.

Would disclosure contravene the first data protection principle?

34. 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."

35. 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 one of the Schedule 3 conditions if relevant). If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

Would disclosure be fair?

36. 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.
37. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:

- the data subject(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(s) concerned); and
- the balance between the rights and freedoms of the data subject(s) and the legitimate interests of the public.

38. The Commissioner has first considered fairness with respect to the applicants.

Reasonable expectations

39. In the Commissioner's view, a key issue to consider in assessing fairness is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals and the purpose for which they provided their personal data.

40. In correspondence with the complainant, the MoJ told him that the applicants would have a reasonable expectation of privacy and that the MoJ, in its role as a public authority, would not disclose their information and would respect its confidentiality. In its view, disclosure would not be within their reasonable expectation of confidentiality, and the loss of privacy would likely cause unwarranted distress.

41. With respect to the applicants, the MoJ told the Commissioner that the information relates to their private life as it concerns the processing of an application for compensation for a miscarriage of justice.

42. It confirmed that the information is held for the sole purpose of processing the application for compensation.

43. Explaining its approach to disclosure of information such as this, the MoJ told the Commissioner:

"The Ministry of Justice does not publish the details of the cases where there has been an application or an award, or the specific amount awarded or the reasons for that amount of compensation. Whether to proactively disclose this information is a matter for the applicants".

44. The Commissioner recognises that people have an instinctive expectation that a public authority, in its role as a responsible data controller, will not disclose certain information and that they will respect its confidentiality.

45. The Commissioner accepts that the background to this request is likely to be a sensitive matter for those involved.
46. In the circumstances of this case, the Commissioner is satisfied that the applicants would have a reasonable expectation that the withheld information, which constitutes their personal data, would not be disclosed to the public at large.

Consequences of disclosure

47. 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.
48. The MoJ provided the Commissioner with arguments in support of its withholding of the disputed information. For example, it cited the sensitivity of the content of the withheld information, arguing that this meant that disclosure was likely to cause significant distress to the applicants.
49. 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.
50. Given the nature of the material, and the sensitivity of the subject matter, the Commissioner considers that disclosure in this case would amount to an infringement into the privacy of the applicants and has the potential to cause damage and distress, particularly as she has found that disclosure of the information would not have been within their reasonable expectations.

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

51. 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.
52. 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.
53. 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.

The legitimate public interest

54. As disclosure under the FOIA is considered to be disclosure to the public at large and not to the individual applicant, 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.
55. Arguing in favour of disclosure, the complainant told the MoJ:

"There is quite simply an overwhelming public interest in transparency regarding the process by which miscarriages of justice are addressed. As Stanley Burnton J observed, the Timothy Evans case is "one of the most notorious, if not the most notorious" such episodes in British history. ... The legitimate interests are weighty and the prejudice to others' rights (if it exists at all) is minimal".

56. In correspondence with the complainant, the MoJ stated:

"While transparency around miscarriages of justice remains important in the wider public interest, the right of an individual to have their personal data protected in accordance of the law, and for the department to ensure personal data entrusted to it is held within those rights is of greater public interest".

57. Similarly, in its submission to the Commissioner, the MoJ accepted that the miscarriage of justice in the case of Timothy Evans is of significant public interest. However, it told her that, given the nature of the withheld information - information held for the sole reason of determining the amount of compensation - it serves no wider public interest in understanding the case.

The Commissioner's view

58. The Commissioner is mindful that the request in this case is similar to a request for information from another individual which the Commissioner's predecessor previously considered. The subject matter of the disputed information in that case related to one of the first cases referred to the Court of Appeal by the newly formed Criminal Cases Review Commission (CCRC).
59. The decision notice in that case² (FS50551750) was issued on 25 August 2015 ordering disclosure of some of the withheld information.

² https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432427/fs_50551750.pdf

60. In reaching a decision in that case, the then Commissioner was satisfied that the legitimate interests in disclosure were in relation to the 'test case nature' of the subject matter.
 61. In that case, the then Commissioner's decision was that, in light of the unique aspect of that review case, there was likely to be a significant public interest in the disclosure of any such information within the scope of the request which may add to the understanding of how the assessment for compensation was undertaken. Furthermore, he considered that there was likely to be a significant public interest in the disclosure of any of the withheld information to the extent that it aided transparency and accountability in relation to how legislation was applied to the decision-making process about the level of compensation.
 62. In the particular circumstances of that case - the quashing of the conviction by the Court of Appeal in 1998 - the then Commissioner was of the view that the need for such transparency and accountability should not be underestimated.
 63. In the circumstances of this case, the Commissioner recognises the public interest in transparency and accountability in relation to the decision-making process regarding the methods used in assessing and awarding compensation from public funds. However, in contrast to the above case, the disputed information in this case relates to a claim made several years later. In that respect, the Commissioner recognises that the assessment process had become established.
 64. The Commissioner considers that any public interest in disclosure must be weighed against the potential prejudices to the rights, freedoms and legitimate interests of the data subject whose personal data is contained within the withheld information, including their right to privacy.
 65. In balancing the legitimate interests with the rights of the data subject, she has not seen any evidence to indicate that there is a sufficient wider legitimate public interest in this case which would outweigh the rights and freedoms of the data subject and support disclosure of the withheld information. The Commissioner is satisfied that it would be unfair to the individuals concerned to release that information. Disclosure would not be within their reasonable expectation and the loss of privacy could cause unwarranted distress.
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66. As the Commissioner is satisfied that disclosure would breach the first data protection principle, she upholds the MoJ's application of the exemption provided by section 40(2) of the FOIA.
67. As the Commissioner has concluded that the disclosure of this information would be unfair to the applicants, and therefore in breach of the first principle of the DPA, she has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.
68. Similarly, in light of her findings, she has not found it necessary to consider the question of fairness in respect of the legal representatives or the Independent Assessor.
69. The Commissioner is mindful of the complainant's view that the MoJ had the option of redacting specific elements of the requested information. However, as disclosure in redacted form only applies if the information is disclosable under the FOIA, that issue did not need to be addressed.

Right of appeal

70. 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

71. 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.

72. 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

**Gerrard Tracey
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