

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 1 August 2023

**Public Authority:** Crown Prosecution Service  
**Address:** 102 Petty France  
London  
SW1H 9EA

#### **Decision (including any steps ordered)**

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1. The complainant requested, from the Crown Prosecution Service ('the CPS') information relating to whether any investigation is occurring regarding a missing page in a court document bundle. The CPS applied section 40(5) of FOIA and refused to confirm or deny whether it holds relevant information.
2. The Commissioner's decision is that the CPS was not correct to apply section 40(5) to neither confirm nor deny whether it holds relevant information.
3. The Commissioner requires the CPS to take the following steps to ensure compliance with the legislation.
  - To respond to the request again, without relying upon section 40(5).
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.

## Request and response

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5. On 22 July 2022, the complainant wrote to the CPS and requested information in the following terms:

"This may have to be treated as a new FOI:

Please confirm if the CPS has been made aware of a missing page 3 from a prosecution statement in the trial bundle in the case of Regina V [name redacted by the ICO] from 2016.

When was the CPS made aware of this and by whom?

Can you confirm now that the CPS is aware that the p3 was missing from the statement in this case, is it investigating how that could have happened, given it would have been the CPS responsibility to prepare and check that the bundle was complete as outlined in an earlier FOI response to me about bundle preparation. You have also said in this latest response that it would be expected for all parties to read the documents ahead of the trial and that would include the prosecution. Therefore in this case the missing p3 was missed by the CPS during bundle preparation and during the checking the bundle was complete process and then also at the stage when the prosecution was required to read through all the evidence ahead of the trial.

As none of these situations can be regarded by the public as satisfactory, they would expect now that it has come to light, regardless of how long after, that this situation would be reviewed to see what went wrong and to make sure it could not be repeated.

So can you please confirm if there has been or is going to be a review or investigation into how this page was missing from the trial bundle and not spotted before or during the trial.

[name redacted by the ICO] has already provided consent for his personal details to be disclosed as part of these requests so section 40 should not be an issue in his case, but that can be resent if required."

6. The CPS responded on 27 September 2022. It refused to confirm or deny whether any information is held and applied section 31(3) of FOIA. It said that confirming or denying whether information is held would prejudice the prevention and detection of crime under Regulation 31(1)(a).

7. Following an internal review, the CPS wrote to the complainant on 8 June 2023. It amended its position. It withdrew its reliance upon section 31(3) to refuse to deny whether relevant information is held. However, it refused to confirm or deny whether relevant information is held on the basis that section 40(5) of FOIA applied (personal data to which the data subject would not otherwise be entitled under the Data Protection Act 2018 ('the DPA')).

## Scope of the case

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8. The complainant contacted the Commissioner on 14 March 2023 to complain about the way his request for information had been handled.
9. He argues that the CPS was not correct to refuse to confirm or deny whether any information is held falling within the scope of the request.
10. The following decision notice therefore considers the application of section 40(5) by the CPS.

## Reasons for decision

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### Section 40(5A)

11. In its internal review response to the complainant, issued on 8 June 2023, the CPA argued that: "*Under section 40(5) of the FOI Act we are not obliged to confirm or deny whether we hold information which is, or if it were held would be, exempt on the basis that it relates to you. This exemption is absolute and does not require a public interest test.*"
12. Section 40(5A) of FOIA excludes a public authority from complying with the duty to confirm or deny in relation to information which, if held, would be exempt information by virtue of section 40(1) of FOIA – i.e., the applicant's own personal information.
13. The CPS provided no indication why it considered that the information in question relates to the applicant for the information. The trial which the request refers to relates to a person with a different name to the complainant, and the complainant has identified himself as a professional journalist. If the CPS had significant concerns regarding the complainant's potential use of a pseudonym in order to avoid section 40(1) being applicable it could have requested further clarification from the complainant.

14. The Commissioner has seen no evidence to dispute the complainant's identity in this request. The complainant has previously taken cases to the First-tier Tribunal who also had no reason to dispute his identity.
15. Given that no evidence has been provided to the Commissioner to demonstrate that the requestor is the subject to the information requested, the Commissioner's decision is that the CPS was not correct to apply section 40(5A) to refuse to confirm or deny whether information is held.
16. The Commissioner has therefore gone on to consider whether Section 40(5B) of FOIA applies.

Section 40(5B)

17. Broadly, Section 40(5B) of FOIA provides that if confirming or denying whether relevant information is held would disclose information in relation to a third party in breach of the data protection principles, then the duty to confirm or deny is exempted.
18. The decision to use a 'neither confirm nor deny' response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus for a 'neither confirm nor deny' response in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not particular information is held. The Commissioner's guidance explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds information about an individual can itself reveal something about that individual.
19. The CPS argues that confirming or denying whether information is held would disclose whether it holds information about a named individual, and whether they had been involved with the criminal justice system.
20. It further argues that if any information were held, confirming that that is the case would put sensitive information into the public domain that is not otherwise publicly available information, other than via a story published on the complainant's own website. On the counter side, denying that information is held would also disclose something about the individual to the public which is not presently known.
21. The CPS therefore argues that confirming or denying whether information is held would contravene the data protection principles of the DPA, and therefore section 40(5B) is engaged.

### The Commissioner's analysis

#### Is the information personal data?

22. The requested information relates to whether the CPS holds information in a missing page from a trial bundle relating to a named individual. The information relates to a criminal trial relating to a named individual, and therefore any information which is held would fall within the definition of criminal offence data under the provisions of the UK GDPR.
23. The Commissioner accepts that confirming or denying whether information is held would provide details that a specific trial did, or did not, take place involving an identifiable individual.
24. Therefore, the Commissioner is satisfied that confirming or denying whether relevant information is held would disclose personal data relating to the named individual.

#### Would confirming or denying that information is held breach any of the data protection principles?

25. Confirming or denying whether the requested information is held would reveal the personal data of a third party, but this does not automatically prevent the CPS from doing so. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles. The Commissioner considers that the most relevant data protection principle is set out at Article 5(1)(a) of the GDPR (principal (a)).
26. Article 5(1)(a) GDPR states that: "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
27. In the case of an 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 lawful, fair, and transparent.
28. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the UK GDPR**

29. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.

30. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”<sup>1</sup>.

31. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

32. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

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<sup>1</sup> Article 6(1) goes on to state that:-

*“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

*“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.*

*Legitimate interests*

33. The Commissioner is a journalist investigating whether a trial which occurred a number of years ago was conducted appropriately. As such he has a legitimate interest in the CPS confirming or denying whether it holds the requested information.
34. The wider public also has a legitimate interest in understanding more about administration of justice, and what might happen if issues arose with evidence presented to a court.

*Is disclosure necessary?*

35. The Commissioner considers that it is necessary for the CPS to confirm or deny whether or not relevant information is held in order to meet the legitimate interests identified. It would inform the public whether there has been an investigation into a page missing from a trial bundle.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

36. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
37. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
38. In the Commissioner's view, a key issue 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.
39. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

40. While the Commissioner accepts that the complainant may have specific reasons for wanting to access the requested information the Commissioner has to take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public. He must therefore consider the wider public interest issues and fairness to the individual when deciding whether or not the information is suitable for disclosure.
41. The CPS has refused to confirm or deny whether it holds relevant information on the basis that doing so would disclose information about the individual, i.e., whether there had been a trial which he was involved in to the wider public. The CPS noted that the individual's personal information is already in the public domain on a website which relates to the complainant, but it does not know whether the complainant has the individual's consent to publish that information. It also argued that the public would be unlikely to find any information on the individual without specific information with which to carry out relevant searches. It therefore questioned whether it would otherwise be known by the public.
42. The Commissioner notes that the complainant informed the CPS that he had the individual's consent for information relating to him to be disclosed to him as part of a previous request he had made. The complainant told the CPS that he could provide it again if the CPS felt this was necessary. The complainant provided the Commissioner with evidence that he had sent a copy of the individual's consent to the CPS on 14 June 2022. This is strong evidence suggesting that the individual would not be distressed by the confirmation or denial, and that this would fall within his expectations.
43. The Commissioner also notes that the story published on the complainant's website is largely supportive of the individual. It alleges that the investigation and the subsequent trial failed to take into account relevant information, and therefore that the courts may have based their decision on incomplete evidence. The Commissioner notes, therefore, that confirming or denying whether relevant information is held could be argued to be in the individual's interests.
44. The trial which the case refers to is a trial before a public court. The CPS also noted that the complainant has published an article about the individual's trial on his website. Information relating to the trial of the individual is therefore already within the public domain.
45. The Commissioner also notes that there have been previous First-tier Tribunal decisions against other authorities relating to an investigation which the complainant argues is associated with his request in this case.



46. The Tribunal's decision in association with that case has been published on its website, however the individual was not named in the published decision notice. Whilst he was named in other associated Tribunal decisions, these have not been published, or are no longer available, on the Tribunal's website. The complainant provided copies of the relevant Tribunal decisions to the Commissioner.
47. The Commissioner is therefore satisfied that some information is already within the public domain about an investigation, and about a subsequent prosecution. He is also satisfied that the individual has provided his consent to the disclosure of the information, and that he would have an expectation that his information may therefore be disclosed publicly. It is also largely in the individual's interests for the information to be disclosed in response to the complainant's investigation.
48. Given the above, the Commissioner has not been persuaded by the CPS' arguments for neither confirming nor denying whether the requested information is held in this instance.
49. As the Commissioner has decided that the CPS has failed to demonstrate that the exemption at sections 40(5A) or 40(5B) are applicable, he therefore requires the CPS to respond to the request again, as required by section 1 of FOIA, and without relying upon section 40(5).

**Right of appeal**

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50. 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: 0203 936 8963  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

51. 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.

52. 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 .....**

**Ian Walley**  
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**Information Commissioner's Office**  
**Wycliffe House**  
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