

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 August 2024

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

Decision (including any steps ordered)

1. The complainant requested information from the Ministry of Justice (MoJ) in a multi-part request, including information about authorisations in place for the monitoring/interception of legally privileged telecommunications.
2. The MoJ provided some information within the scope of the request, but refused to confirm or deny whether the remaining information is held, citing sections 31(3) (law enforcement), 38(2) (health and safety) and 40(5) (personal information) of FOIA.
3. The Commissioner's decision is that the MoJ was entitled to rely on section 40(5B)(a)(i) of FOIA.
4. No steps are required as a result of this decision.

Request and response

5. On 2 September 2023, the complainant wrote to the MoJ and requested information in the following terms (numbers added for ease of reference):
 1. Total population of prisoners at HMP Garth
 2. Total amount of Category C prisoners currently being held at HMP Garth

3. Total amount of Category C prisoners currently being held at HMP Garth who have 3 years or less remaining until release.
 4. Disclosure of HMP Garth's local policies in relation to categorisation including confirmation of approval from relevant HMPPS authority.
 5. Total amount of unoccupied cells within the whole Category D estate.
 6. HMPPS current guidance and/ or criteria in relation to "presumptive Category D".
 7. During the period of 01/09/21 to 01/09/22, were there any authorisations in place at HMP Altcourse for the interception of legally privileged telecommunications.
 8. During the period of 01/09/21 to 01/09/22, were there any authorisations in place at HMP Liverpool for the interception of legally privileged telecommunications".
6. The MoJ responded on 14 November 2023, disclosing information in scope of parts 1, 2, 3 and 5 of the request. However, it refused to provide the information requested at parts 4 and 6 of the request, citing section 21 (information accessible to applicant by other means) of FOIA. It also refused to provide the information in scope of parts 7 and 8 of the request, citing section 31(1)(f) (law enforcement) of FOIA.
 7. The complainant requested an internal review of parts 7 and 8 of the request. They told the MoJ:

"It is clearly in the public interest to know if authorisation was in place prior to the bugging of my legal calls".
 8. Having conducted an internal review of its handling of parts 7 and 8 of the request, the MoJ revised its position. It wrote to the complainant on 30 January 2024, explaining that it did not consider that those parts of the request were for information specific to the complainant or any other individual prisoner. Rather, it considered that those parts of the request are for the policy on authorisations.
 9. While it maintained that the information was exempt from disclosure, it cited section 21 of FOIA, rather than section 31(1)(f).

Scope of the case

10. The complainant contacted the Commissioner to complain about the way parts 7 and 8 of their request for information had been handled.

11. During the course of the Commissioner's investigation, the MoJ revisited its handling of parts 7 and 8 of the request. It told the complainant it was no longer relying on section 21. Instead, it cited sections 31(3) (law enforcement), 38(2) (health and safety) and 40(5)(personal data) of FOIA. In other words, it neither confirmed nor denied whether it holds information in scope of those parts of the request.
12. Following further correspondence, the MoJ maintained that position.
13. The complainant remained dissatisfied. In correspondence with the MoJ, which they copied to the Commissioner, they gave consent for disclosure of their personal information for public release. In the course of that correspondence, they also referred to '**my** legal calls' [Commissioner's emphasis].
14. The Commissioner has considered the MoJ's application of section 40(5) to the information in scope of parts 7 and 8 of the request.

Reasons for decision

Section 40 – personal information

15. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
16. The wording of parts 7 and 8 of the request refers to authorisations in place at two specific prison establishments during a specified timeframe.
17. The MoJ explained to the complainant that the monitoring of prisoner communications is governed by the Authorised Communications Controls and Interception Policy Framework. The Commissioner understands that the framework provides rules and guidance for prison staff to manage communications controls and interception across prisons and Young Offenders Institutions.
18. He also understands that the Investigatory Powers Commissioner's Office (IPCO) provides oversight of interception and restriction arrangements in prisons and conducts inspections of prisons, ensuring these powers are used in accordance with the law.
19. In its submission to the Commissioner, the MoJ acknowledged that, while it was not clear from the wording of the initial request that the complainant was requesting their own personal information, they had

clarified that they were asking for information specifically regarding any monitoring of their own legal calls.

20. The Commissioner's guidance¹ states:

"If the requested information is (or would be, if you held it) the personal data of someone who is not the requester, it is **third-party personal data**.

You should also treat the requested information as third-party personal data if:

- it is (or it would be, if you held it) mixed personal information, ie the requester's personal data combined with someone else's personal data, and
- you cannot separate the two.

You do not have to confirm or deny whether you hold the requested personal information to the extent that confirming or denying:

- would contravene one of the data protection principles (**first condition**); or
- would contravene an objection to processing (**second condition**); or
- is exempt from the right of access under data protection legislation (**third condition**)".

21. Therefore, for the MoJ to be entitled to rely on section 40(5B)(a)(i) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of parts 7 and 8 of the request the following two criteria must be met:

- confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
- providing this confirmation or denial would contravene one of the data protection principles.

¹ <https://ico.org.uk/for-organisations/foi/section-40-and-regulation-13-personal-information/part-two-can-you-confirm-or-deny-holding-the-requested-information/#requester>

Would the confirmation or denial that the requested information is held constitute the disclosure of personal data?

22. Section 3(2) of the Data Protection Act 2018 (the "DPA") defines personal data as:-

"any information relating to an identified or identifiable living individual".
23. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
24. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
25. Parts 7 and 8 of the request relate to authorisations for the interception of legally privileged telecommunications. Disclosing whether or not the MoJ holds such information would reveal something about the parties to the calls (ie whether or not their calls had been intercepted).
26. The Commissioner accepts that, while confirmation would reveal that authorisations were in place, it would not necessarily reveal which calls were intercepted or who the parties were as there may have been any number at either establishment. However, if it were the case, denial would disclose that **no** authorisations had been in place which, in turn, would reveal to those parties involved in such calls during the specified timeframe, that their calls were not intercepted. This would result in the disclosure of their personal data, ie if no order was in place then the complainant, and any other prisoners held during the parameters given, would learn that they had not been subject to any such order.
27. The Commissioner considers that it is important that a public authority uses NCND responses consistently, as not doing so could undermine the effectiveness of the exclusion to confirm or deny whether information is held.
28. In the circumstances of this case, the Commissioner is satisfied that, if the MoJ was to confirm or deny whether it holds the requested information, this would result in the disclosure of personal data to the world at large.
29. The first criterion set out above is therefore met.

If held, would the information be criminal offence data?

30. Information relating to criminal convictions and offences is given special status in the UK GDPR. Article 10 of the UK GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and

offences. Under section 11(2) of the DPA 2018, personal data relating to criminal convictions and offences includes personal data relating to-:

- (a) The alleged commission of offences by the data subject; or
- (b) Proceedings for an offence committed or alleged to have been committed by the data subject of the disposal of such proceedings including sentencing.

31. Having considered the wording of the request, the Commissioner finds that the requested information, if held, would include criminal offence data. He has reached this conclusion on the basis that the wording of the request specifies calls that were "legally privileged" at two named prison establishments. He is therefore satisfied that any such calls would relate in some way to communications between someone in the prison community and their professional legal adviser.
32. Therefore, for the MoJ to confirm publicly whether or not it holds any information would result in the disclosure of information relating to the involvement of individuals in the criminal justice system.
33. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes confirming or denying whether the information is held in response to a FOIA request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA 2018 can be met.
34. FOIA does not concern a private or discreet disclosure to an individual for their own purposes. Disclosure under FOIA must be suitable for the world at large, ie anyone would be entitled to be given the information.
35. In that respect, the MoJ explained to the complainant:

"Even if a person were to waive their own Section 40(5) personal information rights under the FOIA, if information were held on any other third person as part of that request, they would not have waived their rights. To disclose the holding or not of information under the FOIA would breach the UK General Data Protection Regulations (GDPR) and/or the Data Protection Act 2018 (DPA) principles".
36. The Commissioner has considered the conditions attached to Schedule 1, Parts 1 to 3 of the DPA 2018. Taking into account the circumstances and having regard to the restrictive nature of the conditions, he has concluded that none can be met.
37. As none of the conditions required for processing criminal offence data are satisfied there can be no legal basis for confirming whether or not the requested information is held; providing such a confirmation or

denial would breach data principle (a) and therefore the second criterion of the test set out above is met.

38. It follows that the MoJ is entitled to refuse to confirm or deny whether it holds the requested information on the basis of section 40(5B)(a)(i) of FOIA.
39. In light of this finding, the Commissioner has not found it necessary to consider the MoJ's application of section 30(3) or 38(2) to the requested information.

Other matters

40. In the Commissioner's view, it is appropriate that any decision as to whether or not a data subject is entitled to be told if personal data about them is being processed should be made in accordance with the subject access provisions of the DPA. In this case, he notes that the MoJ provided the complainant with details of where to send any such correspondence.

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.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.

Carolyn Howes
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Information Commissioner's Office
Wycliffe House
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