

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 November 2016

Public Authority: Crown Prosecution Service
Address: Rose Court
2 Southwark Bridge
London
SE1 9HS

Decision (including any steps ordered)

1. The complainant requested the text of a letter he believed to have been sent in 2008 by David Cameron MP to the then Attorney General concerning the prosecution of a named individual and which the complainant said had been copied to the Crown Prosecution Service (CPS). During the Commissioner's investigation, CPS disclosed a copy of the letter with parts of the text redacted relying on the section 40(2) FOIA (Personal information) exemption.
2. The Commissioner decided that CPS had applied the section 40(2) FOIA exemption correctly and does not require CPS to take any steps to ensure compliance with the legislation.

Request and response

3. On 23 September 2015, and resubmitted on 20 January 2016, the complainant wrote to CPS and requested information in the following terms:

What is the text of the letter sent by Mr David Cameron MP to HM Attorney General in 2008 regarding the prosecution of [name redacted] for four alleged offences under the [title and date redacted] Act?

(This letter was handed on to the CPS Headquarters from HM Attorney General's Chambers and sent to Gloucester CPS and the Complex case unit at Bristol.)

(I require a copy of the letter in accordance with Independent Parliamentary Standards Authority v. Information Commissioner and anor. [2015] 1 W.L.R. 2879.)

4. CPS refused to confirm or deny holding the requested information ("the Cameron letter") relying on the section 40(5) FOIA exemption. CPS confirmed their decision at internal review.

Scope of the case

5. On 6 July 2016 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
6. During the course of the Commissioner's investigation, CPS decided to no longer rely on the neither confirm nor deny exemption at section 40(5) FOIA and on 15 September 2016 disclosed a redacted version of the Cameron letter. In making the redactions CPS relied upon the section 40(2) FOIA (personal information) exemption.
7. The Commissioner considered the application of the section 40(2) FOIA exemption. During her investigation, she considered representations received from both the complainant and CPS and reviewed the withheld information.

Reasons for decision

Section 40 – personal information

8. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and its disclosure would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (DPA).

The complainant's representations

9. In his representations the complainant told the Commissioner that the existence of the Cameron letter had been widely reported and had given rise to considerable comment. The matter to which it referred had been prosecuted in open court and had therefore been fully in the public domain, as had the subsequent withdrawal of the charges laid.

10. The complainant said that, in the circumstances, he did not consider that DPA considerations should stifle a matter of public importance regarding the accountability of public office holders such as MPs and defendants in a criminal trial held in a public court where the principle of "open justice" was clearly applicable. He did not therefore feel that there were any defences to rights of privacy, and in any event, the public interest in disclosure outweighed any privacy claims there might be under the DPA. He added that, if indeed Mr Cameron had written to the then Attorney General, and if this might have influenced CPS, then that would be a matter of considerable public interest. CPS and HM Attorney General were public office holders. They were meant to be independent and impartial and with responsibility for impartial law enforcement without fear or favour.

Is the information personal data?

11. The definition of personal data is set out in section 1 of the DPA 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."

12. The two main elements of personal data are that the information must 'relate' to a living individual and the individual must be identifiable. Information will relate to an individual 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.
13. In this case, CPS explained that it considered that much of the requested information constituted the personal data of an identifiable individual and that it would be unfair to disclose it.
14. The Commissioner has considered the withheld information. She is satisfied that it constitutes information which falls within the definition of 'personal data' as set out in section 1(1) of the DPA as the information comprises the personal data of an identifiable individual, the defendant in the case referred to in the request.

Is the information sensitive personal data?

15. Sensitive personal data is personal information which falls into one of the categories set out in section 2 of the DPA. Of relevance in this case is that section 2 relates to personal data consisting of information as to:

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

16. The Commissioner is satisfied that the information still being withheld is sensitive personal data in its entirety. This is because it relates to an identifiable individual and an alleged offence.
17. In the light of this finding the Commissioner went on to consider whether disclosure of the personal data would breach one of the data protection principles.

Would disclosure breach one of the data protection principles?

18. CPS told the complainant it considered that disclosure of the requested information would contravene the first data protection principle at Schedule 1 of the DPA. The Commissioner agrees that the first data protection principle is relevant in this case.

Would disclosure contravene the first data protection principle?

19. The first principle deals 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".

20. In the case of a FOIA request, personal data is processed when it is disclosed in response to a 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 DPA Schedule 3 conditions for sensitive personal data. If disclosure would fail to satisfy any of these criteria, then the information is exempt from disclosure.

Would it be fair to disclose the requested information?

21. When 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.
22. Under the first principle, the disclosure of the information must be fair to the data subject. Assessing fairness involves balancing the data subject's rights and freedoms against any legitimate interest in disclosure to the public.
23. Despite the reasonable expectations of individuals and even if damage or distress may result from disclosure, it may still be fair to disclose the requested information if there is a more compelling public interest in disclosure, as the complainant has suggested in this matter.

Has the data subject consented to the disclosure?

24. The Commissioner has seen no evidence that consent has been given for disclosure of the requested information by any party concerned.

Has the data subject actively put some or all of the requested information into the public domain?

25. Where a data subject has put some or all of the requested information into the public domain, the Commissioner considers that weakens the argument that disclosure would be unfair.
26. In this case the Commissioner has seen no evidence that the data subject has actively put any of the requested information into the public domain.

Reasonable expectations

27. In order to decide whether or not disclosure of the requested information would be fair in this case, the Commissioner has placed specific emphasis on the nature of the information itself, which her staff have reviewed.
28. The requested information, if disclosed, would reveal information about an identifiable individual. The Commissioner does not accept that disclosing this information would be within the reasonable expectations of that individual and considers that disclosure would be very likely to cause distress to, or have an unfair impact on, the individual involved.

29. The CPS explained that if an MP has written to a public authority about a constituent's affairs (as in the present case) the presumption should be that the information is not to be disclosed.
30. The CPS also argued that an individual would not expect the fact that he had contacted his MP, or the nature of his enquiry, to be subsequently put in to the public domain without his consent.

Consequences of disclosure

31. In looking at the consequences of disclosure for the data subject, the Commissioner accepted that disclosure of the redacted information could be detrimental or distressing for the data subject, particularly as she found that disclosure of the information would not have been within the individual's reasonable expectations.

Conclusion

32. In the light of the consideration above, the Commissioner decided that disclosure would not be fair to the data subject. However it may still be fair to disclose the requested information if there is a more compelling public interest in disclosure, as the complainant has suggested in this matter. The Commissioner accepted that there was some legitimate public interest in disclosing the redacted information, as it concerned correspondence between David Cameron MP and the then Attorney General. She also had regard for the complainant's concern about whether Mr Cameron might have sought to influence the CPS conduct of the matter.
33. The Commissioner noted that the withheld information is the sensitive personal data of an identifiable individual. Disclosure of sensitive personal data must have justification, whatever the circumstances of the individual. It is possible for the disclosure of sensitive personal data to be fair; individuals who have been charged with, or convicted of, offences will often have to expect disclosure of information about themselves and their actions during the judicial process and occasionally after it. The Commissioner's staff have reviewed the withheld information in full but she has seen no evidence that Mr Cameron acted inappropriately or sought to influence the actions of CPS. The Commissioner therefore decided there was no overriding public interest in disclosure and that it would be unfair to disclose the sensitive personal data of the data subject. To do so would contravene the first data protection principle.
34. Accordingly she did not go on to consider whether disclosure would be lawful or whether one of the Schedule 2 DPA conditions would be met.

35. As the Commissioner is satisfied that disclosure would breach the first data protection principle she decided that the CPS had applied the section 40(2) FOIA exemption correctly to the information still being withheld.

Other matters

36. The Commissioner has noted that CPS was unable to locate the complainant's 23 September 2015 request although it did appear to have been correctly addressed. Following her intervention, the complainant resubmitted his request on 20 January 2016 and CPS handled it appropriately thereafter.

Right of appeal

37. 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

38. 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.
39. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF