

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

### **Decision notice**

**Date:** 10 April 2019

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

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

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1. The complainant has requested information about prosecutions commenced under the Psychoactive Substances Act 2016 ("PSA") from the Crown Prosecution Service ("CPS"). The CPS disclosed some information and the complainant subsequently disputed the non-disclosure of a small amount of information which was withheld under section 40(2) (personal information) of the FOIA. The Commissioner's decision is that section 40 is not engaged.
2. The Commissioner requires the CPS to take the following steps to ensure compliance with the legislation:
  - disclose the outcome figures at part (2) of the request.
3. The CPS 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.

### **Background**

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4. The Psychoactive Substances Act 2016 came into force on 26 May 2016. It created a blanket ban on the production, distribution, sale and supply of psychoactive substances in the United Kingdom for human consumption.

## Request and response

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5. On 10 October 2018, following an earlier request, the complainant wrote to the CPS and requested information in the following terms:

*"This is a request under the Freedom of Information act ...*

*1. The Number of offences in which a prosecution was commenced by CPS Cymru Wales, under the Psychoactive Substances Act 2016 for the following periods:*

- a. 26/05/2016 to 29/06/2016;*
- b. 30/06/2016 to 01/07/2017*
- c. 30/06/2017 to 01/07/2018.*

*2. Please provide details, per case, of the outcome.*

*3. Please provide details, per case, of the sentence.*

*4. Please provide details, per case, of the age and sex of the alleged offender.*

*5. Please provide details, per case, of the name of the alleged offender.*

*NOTE: I have ranked the above questions in order of importance. If all five questions put the request over the research time limit, drop the fifth question, or the fifth and fourth question or the fifth, fourth and third question etcetera until the request is within the limit".*

6. The CPS responded on 7 November 2018. It provided some information within the scope of the request but refused to provide the remainder, citing section 40(2) of the FOIA as its basis for doing so.
7. The complainant requested an internal review of part (2) of his request only.
8. Following its internal review the CPS wrote to the complainant on 13 December 2018. It maintained its position.

## Scope of the case

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9. The complainant initially contacted the Commissioner on 13 December 2018 to complain about the way his request for information had been handled. The Commissioner required further information from him which was provided on 21 January 2019.
10. The complainant advised the Commissioner that his request relates to a new offence and that he believes the public has a right to know how

many people have been convicted. He further advised that he did not agree that numbers could be considered to be personal data.

11. The Commissioner will consider the application of section 40(2) to part (2) of the request below.

## **Reasons for decision**

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### **Section 40 - personal information**

12. 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(3A)(3B) or 40(4A) is satisfied.
13. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
14. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
15. 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 DP principles.

### **Is the information personal data?**

16. Section 3(2) of the DPA defines personal data as:

*"any information relating to an identified or identifiable living individual".*

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

18. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
19. 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.
20. For the part of the request under consideration here, the complainant has requested the outcomes of cases where a prosecution was commenced under the PSA over a three year period. The Commissioner has viewed the actual figures requested.
21. The "outcome" categories for the relevant cases have been identified by the CPS as follows: convicted, charged with other offence or withdrawn, ie there are three possibilities. It also did not include any figures for the time period at part 1(a) of the request.
22. In responding to the Commissioner's enquiries the CPS advised her as follows:

*"The CPS has reconsidered this matter, these inquiries [sic] have led the CPS Information Management Unit (IMU) to maintain our original response in relation to part (2) of [the complainant]'s request.*

*Due to the specifics details of the request made by [the complainant] i.e. nature of the offence type, time period specified, geographical locations, outcome of the case, sentence of each case, name, age and sex of the alleged offender the CPS believes that by disclosing the definitive number of outcomes of each case could lead to the possible identification of the defendants, victims and witnesses.*

*The data disclosed in relation to question 2 has been anonymised to protect the identity of those it relates to. It is necessary to anonymise this information to ensure individuals who have been prosecuted for offences of Psychoactive Substances Act 2016 cannot be identified. This data is also deemed as personal information of a third party therefore exempt under Section 40(2)".*

### **The Commissioner's view**

23. A test used by both the Commissioner and the First-tier Tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable

steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.

24. The ICO's Code of Practice on Anonymisation<sup>2</sup> notes that:

*"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".*

In summary, the motivated intruder test is that if the risk of identification is "*reasonably likely*" the information should be regarded as personal data.

25. The Commissioner notes that the CPS has advised the complainant that in the period 30 June 2016 to 1 July 2017 less than ten individuals were "convicted", less than ten were "charged with other offence" and less than ten were "withdrawn". For the period 30 June 2017 to 1 July 2018 it has advised that less than ten were "convicted". It has not disclosed the actual figures on the basis that they are the personal data of the parties involved and disclosure would mean that the parties could be identified. However, other than providing the explanation in the paragraph above, it did not further explain how this identification could be achieved. The Commissioner, having had sight of the actual figures herself, has been unable to identify any party from conducting relevant internet searches based on the actual figures and outcome.
26. It is not apparent to the Commissioner how knowing whether, for example, there were two, four or six offenders falling into an outcome category for a year period would be more likely to lead to their identification as opposed to actually just disclosing that there are less than ten. Put simply, either information about the parties associated with that category of outcome for this particular offence is available in the public domain or it isn't. If it isn't then they cannot be identified.
27. In its disclosure to the complainant the Commissioner notes that the CPS has already provided the complainant with details of some defendants whose names and ages are in the public domain as it considered that this information was suitable for disclosure. However, by that same deduction, it follows that the names of the other parties are clearly not considered to be in the public domain or else it is presumed

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<sup>2</sup> <https://ico.org.uk/media/fororganisations/documents/1061/anonymisation-code.pdf>

that their details would have been provided. It is therefore not clear to the Commissioner how any other party could be identified from the disclosure of figures and outcomes for a yearly time period.

28. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information does not relate to any identifiable party. She is therefore not satisfied that this information identifies any data subject and it does not therefore fall within the definition of 'personal data' in section 3(2) of the DPA.

## **Right of appeal**

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29. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

30. 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.
31. 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 .....**

**Carolyn Howes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**