

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 September 2021

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

Decision (including any steps ordered)

1. The complainant requested information as to whether specified offences were being investigated. The Crown Prosecution Service (the 'CPS') neither confirmed nor denied whether it held the requested information, citing the exemption at section 40(5) (personal information) of FOIA for the majority of the request; it responded to one part of the request.
2. The Commissioner's decision is that the CPS was entitled to neither confirm nor deny holding information by virtue of section 40(5B) of FOIA for part of the request. However, the Commissioner does not consider that the remaining part of the request constitutes information that is personal data, so she finds that section 40(5B) is not engaged.
3. The Commissioner requires the CPS to take the following steps to ensure compliance with the legislation:
 - Disclose the information requested for parts 1 to 4 of the request in relation to paragraphs 'B' and 'C' of the request).
4. 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.

Request and response

5. On 24 July 2020, the complainant wrote to the CPS and requested information in the following terms; for ease of reference the Commissioner has added labels 'A', 'B' and 'C' to the request :

- "A. *There is increasing concern that the government's own selective compliance with the law (the proroguing of parliament, Dominic Cummings' breaches of lockdown rules, Robert Jenrick's approval of plans for the Westferry Printworks site, contracts granted irregularly to Crisp Websites Limited, Public First and others, etc.) is leading to public disrespect for the law.*
- B. *The government's stated intention and preparations to defy the European Union (Withdrawal) (No. 2) Act 2019, were perhaps the most blatant instances of it undermining the rule of law in this way.*
- C. *The Cabinet Office and the Department of Transport have confirmed that a total of at least £96.5 million was spent on preparations for the government's no-deal Brexit scheduled to happen on 31st October 2019. This was despite the fact that the EU Withdrawal (No.2) Act effectively prohibited a no-deal Brexit in that it required the prime minister to ask the EU for an extension to the Article 50 negotiating period specifically to avoid a no-deal Brexit. Thus, the incurring of expenditure in preparation for a no-deal Brexit at that particular time would appear to be in direct breach of the law, amounting to Misconduct in Public Office, and, in also requiring civil servants to help ministers break the law, the commission of an inchoate offence under Part 2 of the Serious Crime Act 2007, sections 44 to 46.*

I require to know:

- 1. Whether the CPS is aware which, if any, police force has investigated, or is investigating these offences,*
- 2. Whether any police force has sought advice from the CPS as to whether a prosecution should be brought in respect of these offences and, if so, on what charge.*
- 3. Which police force the CPS deems duty-bound to investigate these particular offences on jurisdictional grounds.*

4. *Whether the CPS intends to prosecute the abovementioned offences.*
5. *What protocols and procedures the CPS has in place to guard against being seen as politically biased in carrying out its duty to prosecute crimes perpetrated by government ministers and their advisers."*
6. The CPS responded, late, on 21 September 2020. For parts 1 to 4 of the request, it refused to confirm or deny whether it held the requested information, citing section 40(5), the exemption for personal information. The CPS responded to part 5, including a weblink to a Code for Crown Prosecutors.¹
7. On 6 October 2020, the complainant requested an internal review of parts 1 to 4 only of his request.
8. Following its internal review, the CPS wrote to the complainant on 2 November 2020 and maintained its original position with respect to parts 1 to 4 of the request.

Scope of the case

9. The complainant contacted the Commissioner on 8 December 2020 to complain about the way his request for information had been handled. He expressed concerns about his view that *"this government is flouting the law with impunity"* and provided further examples of where he believes this to be the case.
10. The Commissioner cannot comment on such issues as they are not within her remit. Furthermore, she cannot consider any of the latter examples provided as they were not part of this request. The complainant also argued that he considers *"full disclosure"* of the requested information is appropriate in this case, or at the very least provision of the information *"with redactions if necessary"*.
11. Having received the CPS' investigation response on 19 August 2021, the Commissioner contacted the CPS to ask it to explain how individuals could be identified from the list of alleged offences/issues detailed by

¹ <https://www.cps.gov.uk/publication/code-crown-prosecutors>

the complainant in his request, where no individual names had been cited.

12. The CPS responded on 6 September 2021 and maintained its position, stating:

"After further consideration, I have decided that I would like to stick with my initial response citing S40 (5). The reason for this is because I believe individuals would become identifiable if CPS was to deny or confirm any of the information sought by the requester.

As the second part of the request mentions specific government departments and the prime minister, the requester also asked whether a prosecution should be brought in respect of these offences and, if so, on what charge. If CPS had confirmed or denied its position and disclosed the information sought, it would have entailed us discussing identifiable individuals being involved/uninvolved in the criminal justice system.

I hope the above clarifies our position for using S40 (5) in our response."

13. The Commissioner has considered whether the CPS was entitled to neither confirm nor deny whether it held the requested information for parts 1 to 4 of the request relating to paragraphs 'A', 'B' and 'C'.

Reasons for decision

Section 40 - personal information

14. 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 General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
15. Therefore, for the CPS to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope 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.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

16. Section 3(2) of the Data Protection Act ('DPA') 2018 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.
18. 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.

Paragraph 'A' of request

19. In the case under consideration here, there are two individuals who are named by the requester in association with the commission of alleged offences, namely Dominic Cummings and Robert Jenrick. Clearly, confirmation or denial would reveal something about those individuals and the alleged commission of a crime.
20. The Commissioner is satisfied that this information constitutes the personal data of the two named individuals. Further analysis of whether the information requested here constitutes 'criminal offence data' is set out below.
21. For the reasons set out above the Commissioner is satisfied that, if the CPS confirmed whether or not it held the requested information as per paragraph 'A' where individuals are named, this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.

Paragraphs 'B' and 'C' of request

22. However, the Commissioner is not persuaded that the remainder of the request (ie that related to paragraphs 'B' and 'C') constitutes personal data, criminal offence data or otherwise. She has noted the CPS' explanation about criminal offence data set out in paragraph 27 below, but does not accept that confirming or denying whether this information is held would result in the disclosure of a third party's personal data and does not consider any argument provided by the CPS to be convincing. The remainder of the request details only alleged offences and does not name, or even require the name of, any individual. The Commissioner

finds that section 40(5B) is not engaged in relation to parts 1 to 4 in respect of paragraphs 'B' and 'C' and has, therefore, ordered the CPS to disclose the information related to these parts of the request.

23. For the reasons set out above the Commissioner has concluded that if the CPS confirmed whether or not it held the requested information in relation to parts 1 to 4, in respect of paragraphs 'B' and 'C', this would not result in the disclosure of a third party's personal data. Therefore, the first criterion set out above is not met and the CPS cannot rely on section 40(5B) of FOIA in the circumstances of this case to refuse to confirm or deny whether the requested information is held for these parts of the request.

Consideration of whether the information requested in paragraph 'A' constitutes criminal offence data

24. The CPS has also argued that confirming or denying whether it holds the requested information (for the request in its entirety) would result in the disclosure of information relating to the criminal convictions and offences of a third party.
25. Given the Commissioner's finding in relation to the majority of the request, she need only consider whether confirming or denying whether the information is held would result in the disclosure of criminal offence data of a third party for paragraph 'A' which names Mr Cummings and Mr Jenrick.
26. Information relating to criminal convictions and offences is given special status in the GDPR. Article 10 of 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.
27. The CPS told the Commissioner that:

"The information requested was considered as criminal offence data. Disclosure of this data would require compliance with two of the relevant processing conditions. These would be consent from the data subject or the data to have been clearly made public by the individual concerned. I do not believe either conditions had been met and therefore disclosure would be unlawful and in contravention of principle (a)."

28. Paragraph 'A' of the request clearly relates to the alleged commission of offences by named individuals. Therefore, it is clear to the Commissioner that confirming or denying whether the requested information is held would result in the disclosure of information relating to alleged criminal convictions and offences by the named third parties.
29. 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 FOI request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA 2018 can be met.
30. The Commissioner therefore asked the CPS to consider each of these conditions and whether any of them could be relied on to confirm or deny whether it held criminal offence data falling within the scope of this request. The CPS has informed her that none of the conditions can be met. Having regard for the restrictive nature of the Schedule 1, Parts 1 to 3 conditions, the Commissioner considers this to be entirely plausible.
31. 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. It follows that the CPS is entitled to refuse to confirm or deny whether it holds the requested information on the basis of section 40(5)(B) of FOIA in relation to paragraph 'A'.

Overall conclusions

32. In summary, in this case, the Commissioner has found that the information requested in relation to paragraph 'A' under parts 1 to 4 of the request constitutes criminal offence data. She has also found that provision of a confirmation or denial as to whether the requested information is held would breach data principle (a) and that the CPS, has correctly relied on section 40(5B) of FOIA.
33. In respect of the information requested by the complainant in paragraphs 'B' and 'C' under parts 1 to 4 of his request, the Commissioner finds that the information does not constitute personal data and that the CPS was not entitled to rely on section 40(5B) of FOIA.

Other matters

34. In this case, the CPS failed to respond to the request within the statutory 20 working days' timeframe. The Commissioner will use

intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft "Openness by Design strategy"² to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"³.

² <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

³ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

35. 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

36. 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.
37. 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
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