

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 July 2013

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

Decision (including any steps ordered)

1. The complainant has requested information related to the prosecution of a named defendant. The public authority withheld the information citing the exemptions in sections 30(1)(c), 32(1), 40(2) and 42(1) of the FOIA. The Commissioner's decision is that the exemption in section 40(2) is engaged and that disclosure of the requested information would breach the Data protection Act 1998 (the "DPA"). He does not require the public authority to take any steps.

Request and response

2. On 8 August 2012, the complainant wrote to the public authority and requested information in the following:

"Name of defendant: [name removed]

The offence(s) that the defendant was prosecuted for:

Five counts of possession of 'extreme pornography' under section 63 of the Criminal Justice and Immigration Act 2008

One count of possession an indecent image of a child

Name of Crown Court: [location removed]

The approximate date when the case was last in court:

8 August 2012

I would like to request copies of:

1. *Any information provided by the relevant police authority to the CPS for the purpose of the prosecution of [name removed] for the charges detailed above.*
2. *Any correspondence between the relevant police authority and the CPS regarding the decision to prosecute [name removed]*
3. *Any internal CPS documents relating to the decision to prosecute [name removed]”.*
3. The public authority responded on 5 September 2012. It advised that the requested information was exempt from disclosure by virtue of sections 30(1)(c) and 40(2) of the FOIA.
4. Following an internal review the public authority wrote to the complainant on 19 December 2012. It maintained its position and additionally sought to rely on section 32(1)(a) of the FOIA.
5. During the course of the Commissioner's investigation the public authority further sought to rely on section 42(1).
6. The Commissioner has had sight of the withheld information in this case.

Scope of the case

7. The complainant contacted the Commissioner on 15 January 2013 to complain about the way her request for information had been handled.
8. Following correspondence with the Commissioner, the complainant clarified that she wanted him to consider the citing of exemptions. She also drew particular attention to her view that the public authority should have made an effort to seek the named party's consent, stating:

"I note the CPS's view ... that it is not required to seek [name removed]'s consent to disclosure of the requested documents. While I wish to challenge that assertion in the circumstances of this case, I would be grateful if the ICO would give me the opportunity, if it is minded to uphold the CPS's position, to contact [name removed]'s solicitor myself to seek [name removed]'s consent”.
9. The Commissioner notes that the complainant would already be able to attempt to seek out consent to accompany her information request,

assuming she is able to ascertain who represents the third party, and that this may obviously assist a public authority in determining whether or not information can be disclosed.

10. Additionally, the Commissioner advised her that whilst he welcomed the opportunity to reach an informal resolution, it is not standard practice to give 'preliminary views' as to whether or not he will find in favour of either party. He clarified that, on occasion, such a view may be given where it seems likely that it might assist in resolving the case without a formal decision notice. However, he advised that he did not believe that this would be appropriate on this occasion as several exemptions had been cited and he did not envisage an informal resolution without further investigation. He did advise that he would consider the issue of consent.
11. The complainant also asked the Commissioner to take some newspaper articles into consideration, which she provided to him along with her grounds for complaint. The Commissioner advised that he was not able to do so as the articles post-dated her request. She was dissatisfied with this response so it will be considered below.

Reasons for decision

Section 1 – general right of access

12. Section 1(4) of the FOIA provides that the information which should be considered by a public authority when responding to a request is the information which is held at the time when the request is received.
13. Consequently, the Commissioner's position is that because a public authority needs to take into account any information it holds at the time a request is received, it must naturally follow that any future investigation undertaken by the Commissioner must necessarily only consider the circumstances at that time. Otherwise, the situation would be in a constant flux and it would not be possible to make a decision based on the public interest at a specific time.
14. As identified in the scope of the complaint above, the complainant submitted some newspaper articles to the Commissioner in support of her case, which she wanted him to take into consideration. However, these post-dated the actual request so the Commissioner will not consider them as they were not available at the time of the request.

Section 40 – personal information

15. As the regulator for both the FOIA and the DPA the Commissioner will consider this exemption first.
16. Section 40(2) of the Act is an absolute exemption which relates to the personal information of persons other than the requestor. The Commissioner has produced guidance about 'personal data' which can be found on his website¹.
17. Section 40(2) together with the condition in section 40(3)(a)(i) or 40(3)(b) provides an absolute exemption if disclosure of information falling within the definition of personal data contained in section 1(1) of the DPA would breach any of the data protection principles.
18. Furthermore, the public authority has advised that the information is the 'sensitive personal data' of the third party concerned.
19. In order to reach a view on the public authority's arguments in relation to this exemption, the Commissioner has first considered whether the withheld information is the personal data of one or more third parties.

Is the information personal data?

20. The two main elements of personal data, as defined in section 1(1) of the DPA, are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way. The information can be in any form, including electronic data, images and paper files or documents.
21. In this case, the complainant has requested all information held in respect of the investigation of a named individual.
22. Having considered the nature of the withheld information, the Commissioner is satisfied that it constitutes information that falls within the definition of 'personal data' as set out in section 1(1) of the DPA. He has reached this conclusion on the basis that the information comprises personal data relating to a named individual and their alleged involvement in a criminal offence. The Commissioner is satisfied that the

¹[http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.ashx)

information is the 'personal data' of the named party in its entirety, as well as being the personal data of the other individuals involved. Accordingly section 40(2) is engaged.

Is the information sensitive personal data?

23. Sensitive personal data is defined in section 2 of the DPA. It is personal data which falls into one of the categories set out in section 2 of the DPA. In this case, the public authority has cited the following two elements:

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

and,

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

24. The information clearly relates to a criminal investigation involving the named party. The Commissioner is therefore satisfied that the withheld information in its entirety can be considered to be the 'sensitive personal data' of that named party as it consists of evidence gathered to determine the alleged commission of a criminal offence and further information about the processes undertaken.

25. Having accepted that the information requested constitutes the sensitive personal data of a living individual the Commissioner must next consider whether disclosure would breach one of the data protection principles.

Will disclosure breach one of the data protection principles?

26. The Commissioner has considered whether disclosure of the requested information would breach any of the data protection principles as set out in schedule 1 of the Data Protection Act (DPA). He considers the most relevant principle in this case to be the first principle, which states that:

"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".*

Would it be fair to disclose the requested information?

27. In answering the question of fairness, the Commissioner recognises the importance of considering whether the data subject has consented to

the disclosure and/or whether the data subject has actively put some or all of the requested information into the public domain.

28. The Commissioner also considers it appropriate to consider the consequences of any disclosure and the reasonable expectations of the data subject.

Has the data subject consented to the disclosure?

29. The public authority advised the complainant that it had not sought the third party's consent and that it was: *"of the view that it is not required to seek consent"*.
30. As the requested information is the sensitive information of the named party, it requires explicit consent prior to any consideration of disclosure. As stated in his guidance, the Commissioner understands this to mean:

"For the public authority to rely on this condition, it must have a record that shows that each of the data subjects concerned has specifically consented to their sensitive personal data being disclosed to the world in response to the FOIA request."

31. The public authority does not have such consent. Furthermore, in the circumstances of this case the Commissioner would not expect it to seek such consent. Additionally, having considered the withheld information itself the Commissioner believes it would be highly unlikely that the third party would consent to the general disclosure of any of the information held.

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

32. Where the data subject themselves has put some or all of the requested information into the public domain, the Commissioner considers that this weakens the argument that disclosure would be unfair.
33. In this case the Commissioner has not seen any evidence that the named party himself had actively placed some or all of the requested information into the public domain at the time of the request. The Commissioner notes that there was a trial and that this will necessarily involve the public hearing of some of the requested information in Court. However, he does not consider that such circumstances can be deemed to be an active disclosure by the named party himself as such disclosure is a necessary part of the trial process rather than being an active disclosure by the named party.

34. The Commissioner notes that the results of the trial were publicised in the media on the day that the request was made. However, the Commissioner again does not consider this to be a disclosure as a result of the named party himself electing to make any information public; rather, it is related to the media interest in this particular case.
35. It is also worth noting that it is the Commissioner's view that disclosure of personal data may still breach the data protection principles even after it has been disclosed in open court.

Reasonable expectations

36. The public authority explained to the Commissioner:

"Whilst [name removed] cannot reasonably expect that his case will not be reported to the public, he is entitled to expect that any reporting takes place through the medium of reporting on his criminal trial rather than through unfettered disclosure under FOIA after the event. This is because the criminal courts are the sole forum for determining guilt or otherwise. Moreover, [name removed] was acquitted and is entitled to be able to put this matter behind him.

The material also includes detailed material relating to prosecution witnesses, which constitutes the personal data of those individuals. The CPS view is that personal data relating to such prosecution witnesses is covered by the absolute exemption in s.40(2) ... Prosecution witnesses are entitled to have future protection from public release of their evidence, outside of the trial process.

The same principle applies to references in the unused material schedules or unused statements in the case file which constitutes the personal data of those individuals; in this case it constitutes sensitive personal data as it relates to the sexual life of individuals. The CPS view is that personal data relating to unused prosecution witnesses or individuals referred to in unused material is covered by the absolute exemption in s.40(2) FOIA ... disclosure would cause prejudice to the "rights and freedoms or legitimate interests of the data subject" particularly as the information relates to sexual life which is something individuals have a legitimate expectation will be given extra protection".

37. The Commissioner recognises that the requested information in this case was obtained as part of a criminal investigation and subsequent trial, some of it not being used. The Commissioner does not consider it likely that the named party, or indeed any of the other parties concerned, would reasonably expect the detailed documentation about this case to

be placed fully into the public domain immediately after the trial. Furthermore, some of the information gathered was not actually required as evidence at the trial so those parties would have no reasonable expectation that, having not been used in the trial, the information they had provided would subsequently be released into the public domain.

Consequences of disclosure

38. In looking at the consequences of disclosure on the named party, and any other parties involved in the investigation, the Commissioner has considered what those consequences might be. In doing so, he has considered the nature of the information itself and the climate in which the information would be disclosed.
39. Mindful of the fact that disclosure under the FOIA is disclosure to the world at large, the Commissioner considers that, in this case, the named party has already been the subject of media interest. The request was made on the day that the media announced his acquittal and the Commissioner does not believe it would be fair on him to have issues raised again which could further affect his working and private life. As disclosure of this type of information is likely to have a detrimental or distressing effect on the data subject, and also those who gave evidence, the Commissioner considers that it would be unfair to disclose it.

Conclusion

40. The Commissioner notes that the information in this case relates to the named party's alleged commission of an offence and the associated proceedings. As such, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information is likely to have a detrimental or distressing effect on the named party the Commissioner considers that it would be unfair to disclose the requested information.
41. As the Commissioner has concluded that it would be unfair to the named party concerned to disclose the withheld information - as well as the witnesses - and to do so would contravene the first principle of the DPA, he has not gone on to consider whether disclosure is lawful or whether one of the Schedule 2 DPA conditions is met. However, his initial view is that no Schedule 2 condition would be met.
42. As section 40 is an absolute exemption there is no need to consider the public interest in disclosure.

Other exemptions

43. As the Commissioner has found that it would not be fair to disclose the requested information, he has not gone on to consider the other exemption cited by the public authority in this case.

Right of appeal

44. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

45. 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.
46. 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

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