

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 April 2014

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

Decision (including any steps ordered)

1. The complainant requested information relating to inappropriate behaviour by staff working in a women's prison. The Ministry of Justice (MoJ) refused to disclose the requested information citing section 40(2) (personal information) of FOIA.
2. The Commissioner's decision is that the exemption was correctly applied to some of the withheld information but that the remaining withheld information is not 'personal data'.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - disclose the aggregate information it confirmed it holds relating to the number of prison officers suspended, dismissed or convicted as a result of sexually inappropriate behaviour with women prisons in the past five years.
4. The public authority 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

5. HMP Downview is a closed adult female training prison. The Josephine Butler Unit is attached to the women's prison and holds 17-year-old young women, whether sentenced, convicted or remanded by the courts.

Request and response

6. The complainant wrote to the MoJ on 5 October 2013 with the following three-part request:

"Please provide copies of any reports from prison service investigations into inappropriate sexual behaviour by staff working in HMP Downview, including in the Josephine Butler Unit.

Please also provide the following information:

1. *The number of prison officers working in HMP Downview who have been a) suspended, b) dismissed or c) convicted as a result of sexually inappropriate behaviour with women prisoners (over the age of 18) in the past five years*
 2. *The number of prison officers working in HMP Downview who have been a) suspended, b) dismissed or c) convicted as a result of sexually inappropriate behaviour with child prisoners (girls under the age of 18) in the past five years".*
7. The MoJ responded on 29 October 2013, referring only to the numbered parts of the request. It confirmed it holds that information – information relating to the numbers of prison officers. However it refused to provide it, citing section 40(2) of FOIA as its basis for doing so.
8. Requesting an internal review, the complainant pointed out to the MoJ that it had not responded to the first part of her request. With respect to the information requested about the numbers of prison officers she told the MoJ:

*"In relation to my request for specific data I would be satisfied to receive **aggregate data** on the number of prison officers working in HMP Downview who have been **suspended, dismissed or convicted** as a result of sexual inappropriate behaviour with a) women and b) girls in the past five years. I continue to request separate data for women and girls (those aged under 18)".*

9. Following an internal review the MoJ wrote to the complainant on 6 December 2013. With respect to the first part of the request – about any reports from investigations - it advised that section 40(2) applied. With respect to the other parts of the request, it upheld its original position – that section 40(2) applies.

Scope of the case

10. The complainant contacted the Commissioner on 19 December 2013 to complain about the way her request for information had been handled.
11. With respect to the complainant's request for "*separate data for women and girls (those aged under 18)*" the MoJ told the Commissioner:

"With regards to the figures for over 18s and under 18s we are under no obligation to report on this so we cannot provide robust data on this subject. We are only obliged to report a final figure which has been provided to you".
12. The Commissioner considers the scope of his investigation to be the MoJ's application of section 40(2) to the information within the scope of the request that the MoJ confirms it holds.

Reasons for decision

Section 40 - Personal information

13. 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 the disclosure of that personal data would be in breach of any of the data protection principles.
14. The requested information in this case relates to prison service investigation reports and the numbers of prison officers suspended, dismissed or convicted as a result of sexually inappropriate behaviour with women prisoners.
15. The Commissioner considers that, having initially failed to respond to that part of the request about reports, when it did provide its substantive response, the explanation the MoJ gave as to why it considered section 40(2) applied was inadequate. For example, it simply told her that disclosure in this case "*would be in breach of one or more of the Data Protection Principles*".
16. The Commissioner considers that it was not until his investigation had commenced that the MoJ provided a substantive response.

Is the requested information personal data?

17. The first step for the Commissioner to determine is whether the requested information constitutes personal data, as defined by the Data

Protection Act 1998 (DPA). If it is not personal data, then section 40 cannot apply.

18. The definition of personal data is set out in section 1 of the DPA. This provides that, for information to be personal data, it must relate to an individual and that individual must be identifiable from that information.
19. 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.
20. In the Commissioner's view, taking into account the wording of the request, it is clear that the withheld information 'relates' to a living person. It is linked to those alleged to be involved in inappropriate behaviour and records, or may have been used to inform, decisions affecting them, for example whether or not they have been dismissed.
21. The second part of the test is whether the withheld information identifies any individual.
22. The Commissioner has first considered the withheld information within the scope of the second and third parts of the request – aggregate data on the numbers of officers.

The number of officers

23. With respect to the requested numeric information, the MoJ told the complainant:

"Please note that if a request is made for information and the total figure amounts to five people or fewer, the MoJ must consider whether this could lead to the identification of individuals and whether disclosure of this information would be in breach of our statutory obligations under the Data Protection Act (DPA). As such, we have not provided details of staff disciplined or dismissed for their treatment of prisoners as the number of cases is very low. We believe that the release of this data could lead to identification of the individuals concerned..."

24. In requesting an internal review, the complainant asked the MoJ:

"to explain why you believe individuals could be identified by the information I have requested".

25. In response, the MoJ simply told the complainant:

"As your request relates specifically to one location and the numbers are so low, we believe that individuals could be identified

if we released the information in the level of detail being requested”.

26. The Commissioner acknowledges the sensitivity of the subject matter of the requested information – inappropriate sexual behaviour by staff working in a particular prison establishment. He accepts that this would lead to the MoJ being cautious.
27. He also accepts, as the MoJ stated in its response to the complainant, that the number of instances within the scope of the request is low.
28. However, he also notes that the request relates seeks aggregate numbers over a five-year period.
29. For the purposes of considering the application of section 40(2) the Commissioner must establish if the disclosure of this information could reasonably lead to the identification of a person by another individual.
30. In the Commissioner’s view, the MoJ failed to address the question of how, in the context of the request, the withheld numbers could be used to identify individuals.
31. The Commissioner acknowledges that, by its very nature, the requested information involves individual circumstances and outcomes. He also recognises that at the heart of each case is an individual.
32. Having considered the withheld information and the MoJ’s arguments, the Commissioner is not satisfied that the MoJ has demonstrated how disclosure of the requested information makes it likely that the individual prison officer or officers could be identified from that information.
33. He therefore considers that, in the circumstances of this case, the information at issue – the number of prison officers - is not personal data and thus can be disclosed without reference to the DPA.

Copies of any reports

34. The Commissioner has next considered the withheld information relating to the first part of the request. That part of the request relates to copies of any reports from prison service investigations into inappropriate sexual behaviour by staff working at the HMP Downview.
35. In correspondence with the complainant, the MoJ said:

“Any such reports would contain personal information of third parties and detailed information relating to the cases”.

36. Having viewed the withheld information, the Commissioner is satisfied that it relates to staff who have been the subject of investigation. This is information which relates to living individual(s) from which they could be identified. Therefore the Commissioner considers that the information in question is personal data and, as such, falls within the scope of this exemption.

Is the information sensitive personal data?

37. In correspondence with the Commissioner the MoJ said that it considered this information to be sensitive personal data as defined by the DPA.
38. 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.
39. The MoJ told the Commissioner:

"In accordance with the DPA sensitive personal data this includes details of any proceedings for any offence committed or alleged to have been committed by an individual".

40. In this case, the Commissioner is satisfied that the requested information within the scope of part (1) of the request satisfies the definition of sensitive personal data under section 2(g) of the DPA:

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

41. Having accepted that the information requested constitutes the personal data, and in some cases the sensitive personal data, of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles.
42. The Commissioner considers the first data protection principle is most relevant in this case.

Would disclosure contravene the first data protection principle?

43. The first data protection principle 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."

44. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be fair, lawful and meet one of the DPA Schedule 2 conditions (and Schedule 3 conditions if relevant). If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

45. The Commissioner has first considered whether disclosure would be fair.

Would disclosure be fair?

46. In 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.

47. The Commissioner recognises that people have an instinctive expectation that a public authority, in its role as a responsible data controller, will not disclose certain information and that they will respect its confidentiality. For example, he considers that information relating to an internal investigation or disciplinary hearing will carry a strong general expectation of privacy: such information is generally a personal matter between the employer and the employee.

48. Furthermore, in the Commissioner's view, information that falls within the category of sensitive personal data tends to hold a greater expectation of confidentiality than non-sensitive personal data.

49. In most cases, the very nature of sensitive personal data means it is more likely that disclosing it will be unfair. The Commissioner recognises that that an employee would not generally expect their employer to disclose to the public details of any investigation unless there was a very clear reason for them to do that.

50. The reasonable expectation of the data subject is that such information would not be disclosed and that the consequences of any disclosure could be damaging or distressing to them.

51. The Commissioner is satisfied in this case that the data subject(s) would reasonably expect that information which would identify them as being the subject of an investigation into inappropriate sexual behaviour would remain confidential.

52. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. He will also take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions.
53. With respect to the consequences of disclosure in this case, the MoJ told the Commissioner that releasing the information:

"was likely to cause damage or distress".
54. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in its disclosure.
55. In considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
56. The Commissioner acknowledges that the issue under consideration in this case raises issues in relation to accountability and transparency.
57. In light of the nature of the information and the reasonable expectations of the individual(s) concerned, the Commissioner is satisfied that release of the withheld information would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the data subject(s). He considers these arguments outweigh any legitimate interest in disclosure. He has therefore concluded that it would be unfair to disclose the withheld information - in other words, disclosure would breach the first data protection principle. He therefore upholds the MoJ's application of the exemption at section 40(2).
58. As disclosure would not be fair, the Commissioner has not gone on to consider whether disclosure is lawful or whether one of the Schedule 2 or schedule 3 DPA conditions is met. However, his initial view is that no such condition would be met.

Right of appeal

59. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

60. 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.

61. 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