

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 January 2018

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

Decision (including any steps ordered)

1. The complainant requested information about prisoner recalls in relation to Parole Board hearings. The Ministry of Justice (the 'MOJ') refused to provide the requested information, citing section 40(2), the exemption for personal information, of FOIA.
2. The Commissioner's decision is that the MOJ was entitled to rely on section 40(2) of FOIA to refuse this request. She does not require the MOJ to take any steps.

Request and response

3. On 9 August 2017 the complainant wrote to the MOJ and requested information in the following terms:

"Since the 13-08-10 the Parole Board for England & Wales have been to Northern Ireland Establishments 49 times to sit hearings for 22 prisoners, who had transferred to Northern Ireland on restricted transfers. 2 of these prisoners were recalled back to prison. So I would like to make a request under the Freedom of Information Act 2000 (FOIA) for the following information. Were these 2 prisoners who had been recalled returned to prisons in England & Wales before their recalls were dealt with by the Parole Board for England & Wales in Northern Ireland establishments."

4. The MOJ responded on 6 September 2017. It refused to provide the requested information, citing section 40(2) of FOIA, the exemption for personal information.

5. The complainant requested an internal review on 11 September 2017. The MOJ provided its internal review outcome on 13 October 2017 and maintained its original position; however it added the following clarification:

"...it may have been more prudent to state that confirming the status of the two cases referenced could potentially have led to their identities being disclosed if their movements had been confirmed".

Scope of the case

6. The complainant contacted the Commissioner on 13 September 2017 to complain about the way his request for information had been handled. In his view, the information he requires is "*statistics*" not personal data.
7. The Commissioner has considered whether the MOJ is entitled to rely on section 40(2) of FOIA to refuse this request.

Reasons for decision

Section 40 personal information

8. The FOIA exists to place official information into the public domain. Once access to information is granted to one person under the FOIA, it is then considered 'public' information which can be communicated to any individual should a request be received. As an exemption, section 40 therefore operates to protect the rights of individuals in respect of their personal data.
9. 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 where the disclosure of that personal data would be in breach of any of the data protection principles.

Is the requested information personal data?

10. In order to rely on section 40(2) the requested information must constitute personal data as defined in section 1 of the Data Protection Act 1998 (the 'DPA'). For information to constitute personal data, it must relate to an individual, and that individual must be identifiable from that information, or from that information and other information in the possession of the data controller.
11. 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.

12. The MOJ applied section 40(2) to this request. It said that the requested information relates to two individuals, for the purposes of their parole reviews. Additionally, it said that it considers that confirmation of the movements of two individuals, specifically relating to their parole reviews, relates to their private lives.
13. The MOJ further advised that, in the circumstances of this case, the complainant, who is also a prisoner, may be able to identify the individuals. It said that confirming the status of the two individuals referenced by the complainant could potentially have led to their identities being disclosed if their movements had been confirmed.
14. 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 re-identification of an individual from information which, on the face of it, appears to have been anonymised.
15. The ICO's Code of Practice on Anonymisation¹ 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".

16. In summary, the motivated intruder test is that if the risk of identification is "reasonably likely" the information should be regarded as personal data.
17. Whilst the complainant has not asked for the names of the prisoners, he is aware that two were involved in the scenario he has outlined in his request, although it seems likely that he does not know the outcome. As he is a prisoner himself it is likely that he may therefore have a more detailed personal knowledge of the movement of individuals throughout the prison establishment.

¹ <https://ico.org.uk/media/fororganisations/documents/1061/anonymisation-code.pdf>

18. It is also understood that the complainant may be requesting the information for his own personal reasons in relation to recalls rather than to identify any party. However, from information which has been provided to the Commissioner by the MOJ, it seems more likely than not that the complainant either knows the parties concerned, or could use the information requested to try to identify them.
19. Given these particular circumstances, the MOJ felt that confirming whether the two offenders were indeed transferred to Northern Ireland for their parole reviews would potentially lead to them being identified by the complainant.
20. The Commissioner is therefore satisfied, that in the circumstances of this case, it is reasonably likely that a motivated intruder, ie the complainant himself, could identify the individuals concerned and that the requested information therefore constitutes the personal data of those two individuals within the meaning of section 1 of the DPA.

Is the information sensitive personal data?

21. Under the DPA 1998, sensitive personal data is defined as that falling in one or more of the following categories:
 - Racial or ethnic origin
 - Political opinions or persuasion
 - Religious beliefs or other beliefs of a similar nature
 - Trade union membership or affiliation
 - Physical or mental health or condition
 - Sexual life
 - Commission or alleged commission of offences
 - Any proceedings for any offence, committed or alleged, including any sentencing decisions made by the court
22. As parole reviews by their very nature consider prisoners in relation to offences committed, and are proceedings related to those offences, the Commissioner is satisfied that the requested information would constitute sensitive personal data.
23. 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, because it is sensitive personal data, also one of the Schedule 3 conditions. If confirmation or denial would fail to satisfy any one of these criteria, then the MOJ is not required to provide a response.
24. Therefore, even if the Commissioner found that disclosure would be generally fair and that there was a suitable Schedule 2 condition to support it, these would not result in that action if no Schedule 3 condition could be satisfied. She has therefore gone on to firstly

consider the applicability of the Schedule 3 DPA conditions. If there is no relevant Schedule 3 condition then a full consideration of any data protection principle or any Schedule 2 condition is unnecessary.

Is there a relevant Schedule 3 condition?

25. The Commissioner's view, as set out in her guidance on section 40², is that the two conditions in Schedule 3 that might apply in relation to disclosures made under the FOIA are the first condition, which is that the data subject has consented to disclosure, and the fifth condition, which is that the data subject has already deliberately made the personal data public. This is because the other conditions concern disclosure for a stated purpose, and so cannot be relevant to the 'applicant blind' and 'purpose-blind' nature of disclosure under FOIA.
26. The Commissioner is aware of no evidence that the first or fifth condition is met and no arguments have been advanced to support either of these conditions.
27. In conclusion, the Commissioner does not find that any condition in DPA Schedule 3 is met. Therefore, disclosure of this sensitive personal data would be in breach of the first data protection principle. The finding of the Commissioner is that the exemption provided by section 40(2) is engaged and the MOJ was not obliged to disclose any information held.

² <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

Right of appeal

28. 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

29. 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.

30. 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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