

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

### **Decision notice**

**Date:** 18 January 2018

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

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

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1. The complainant requested information about a specified court case. The Ministry of Justice (the 'MOJ') refused to confirm or deny whether it held the requested information by virtue of sections 40(5) personal information and 32(3) court records of the FOIA.
2. The Commissioner's decision is that MOJ has applied section 40(5)(a) of the FOIA appropriately. She does not require the MOJ to take any further steps as a result of this decision.

#### **Background**

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3. There is some confusion on the complainant's part as to the exact date of his request and the associated correspondence. The complainant told the Commissioner he could not locate a copy of his original request but that he believed he had made it sometime in July 2017. His original complaint concerned what he believed to be an outstanding internal review.
4. Therefore, in October 2017 the Commissioner contacted the MOJ to clarify matters; she was advised by the MOJ that the internal review had been issued on 29 June 2017. The MOJ provided her with a copy of its internal review on 13 November 2017, which she forwarded to the complainant.
5. Given that the internal review was carried out in June 2017, she is therefore satisfied that the request cannot have been made in July 2017 as the complainant originally believed.

6. Based on the trail of correspondence before her, the Commissioner has concluded that the request in question was submitted by the complainant on or around 10 May 2017.

## **Request and response**

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7. On or around 10 May 2017 the complainant wrote to the MOJ and requested information in the following terms:

*"A copy of the Judge's certificate the case is fit for appeal and his decision on bail pending appeal.*

*A full list of documents supplied at present by Hull Crown Court to the Court of Appeal."*

8. The MOJ responded on 26 May 2017. It refused to confirm or deny whether it held the requested information, citing sections 32(3), court records, etc, of FOIA, with the advice that if "a person or organisation" is directly involved in a criminal case, usually as prosecutor or defendant, they may request the supply of information or documents under the Criminal Procedure Rules ('CPR') Part 5.7, providing the complainant with both a weblink and a copy of the associated form.
9. The complainant requested an internal review on 28 May 2017, in which he made clear that he was a party to the case concerned. The MOJ provided this late, on 29 June 2017. It upheld its original position.

## **Scope of the case**

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10. The complainant originally contacted the Commissioner on 7 August 2017 to complain about an outstanding internal review (see Background section for further details). In November 2017, the MOJ provided the Commissioner with a copy of its internal review which it had completed on 29 June 2017; the Commissioner sent this copy to the complainant.
11. Having received the internal review outcome, the complainant complained further to the Commissioner (on 14 November 2017) about the way his request for information had been handled. He stated that he believes he is entitled to the information requested.
12. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of FOIA. FOIA is concerned with transparency of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. FOIA does not require public authorities to

generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

13. The Commissioner's investigation will focus on the citing of section 40(5)(a) in relation to this request.

## Reasons for decision

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### Section 40 – personal information

14. Section 40(5)(a) of FOIA excludes a public authority from complying with the duty imposed by section 1(1)(a) of FOIA, ie confirming whether or not the requested information is held, in relation to information which, if held by the public authority, would be exempt information by virtue of subsection (1). In other words, if someone requests their own personal data, there is an exemption from the duty to confirm or deny under FOIA.

15. Section 40(1) of FOIA states that:

*"Any information to which a request relates is exempt information if it constitutes personal data of which the applicant is the data subject".*

16. In this case, the MOJ has not specified which limb of section 40(5) applies; however, as the request is for information concerning the complainant, the Commissioner considers section 40(5)(a) applies.

17. The definition of 'personal data' is given in section 1(1) of the Data Protection Act 1998 ('DPA') which states:

*"'personal data' means data which relate to a living individual who can be identified:*

*(a) from those data, or*

*(b) from those data and any other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."*

18. The two main elements of personal data 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 or has them as its main focus.

19. Having considered the wording of the request as well as the information provided by the complainant and the MOJ in this case, the Commissioner is satisfied that the complainant is, or would be, the subject of this requested information. This is because the information he has requested is about or connected to him. It is an approach for information which can be linked to a named living individual, ie the complainant himself.
20. It follows that the Commissioner considers that the complainant is the data subject within the meaning of the section 40(1) exemption.
21. In relation to such information, the provisions of section 40(5) mean that the MOJ is not required to comply with the duty to confirm or deny whether it holds the information, as the duty to confirm or deny does not arise in relation to information which is (or, if it were held by the MOJ, would be) exempt information by virtue of subsection (1).
22. For the MOJ to provide even a response to section 1(1)(a) by confirming or denying that such requested information is held confirms that the personal data asked about in the request actually exists or does not exist. Either response amounts to a public disclosure of personal data in respect of the data subject of the request.
23. Further, the MOJ has advised that it considers that the information, if held, would constitute 'sensitive personal data' as described in section 2 of the DPA. This defines sensitive personal data "*as consisting of information as to – (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 Commissioner considers that to comply with section 1(1)(a) of FOIA (ie to either confirm or deny holding the information) would inevitably put into the public domain the existence or otherwise of information about the named individual, which in turn would constitute disclosure of information that would relate to him.
25. The Commissioner is satisfied that confirming or denying whether it holds any information under the terms of FOIA means that the MOJ would be confirming, to the world at large, whether it holds details of a court case involving the complainant. She therefore considers that the section 40(5)(a) exemption was relied upon correctly by the MOJ in this case.
26. As the Commissioner has found section 40(5)(a) is engaged, she has not needed to consider the MOJ's reliance on section 32(3) of FOIA.

27. The Commissioner would also remind applicants that any individual wishing to access their own personal data should pursue this right under the subject access provisions of the DPA.

## **Other matters**

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### *Internal review*

28. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As she has made clear in her '*Good Practice Guidance No 5*', the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 23 working days for an internal review to be completed, despite the publication of her guidance on the matter.

### *Subject access requests*

29. The Commissioner would like to remind the MOJ that when it believes a request should have properly been made under the subject access provisions of the DPA it should inform the requester accordingly. She considers such action to be best practice.

## Right of appeal

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30. 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)

31. 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.
32. 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**