

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 April 2018

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

Decision (including any steps ordered)

1. The complainant requested information relating to criminal justice proceedings involving a named individual.
2. The Crown Prosecution Service (CPS) neither confirmed nor denied holding information relating to the individual named in the request, citing section 40(5) (personal data) of the FOIA.
3. The Commissioner's decision is that the CPS was not obliged to confirm or deny if the requested information was held by virtue of section 40(5)(b)(i) of the FOIA.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 6 November 2017, the complainant wrote to the CPS and requested information in the following terms:

"I request information regarding the criminal court case for [name redacted]. Her court case was in Leicestershire, possibly Leicester Crown Court December 1992 or December 1993.

The case involving allegations from [name redacted] resulted in a successful prosecution.

I request full details of the trial, or all information held pertaining to the trial".

6. The CPS responded on 8 November 2017. It refused to confirm or deny whether it held the requested information, citing section 40(5) (personal information) of the FOIA.
7. Following an internal review the CPS wrote to the complainant on 4 January 2018 maintaining its original position.

Scope of the case

8. The complainant contacted the Commissioner on 31 January 2018 to complain about the way his request for information had been handled.
9. The analysis below considers the CPS's application of section 40(5) of the FOIA to the requested information.

Reasons for decision

Section 40 personal information

10. Generally, the provisions of section 40(1) to (4) exempt 'personal data' from disclosure under the FOIA if to do so would breach the data protection principles of the Data Protection Act 1998 (DPA).
11. Section 40(5) further excludes a public authority from complying with the duty imposed by section 1(1)(a) (that is, to either confirm or deny holding the information), if complying with that duty would:
 - constitute a disclosure of personal data, and
 - this disclosure would breach any of the data protection principles or section 10 of the DPA.
12. This exemption is absolute and therefore requires no consideration of the public interest.
13. In this case, the CPS has not specified which limb of section 40(5) applies. However, with due regard to the wording of the request, the Commissioner considers section 40(5)(b)(i) applies as the request is for information concerning a third party.
14. Accordingly, the analysis below considers section 40(5)(b)(i) FOIA. The consequence of section 40(5)(b)(i) is that if a public authority receives a request for information which, if it were held, would be the personal data of a third party (or parties), then it can rely on section 40(5)(b)(i), to refuse to confirm or deny whether or not it holds the requested information.

15. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of personal data, and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.

Is the information personal data?

16. The definition of personal data is set out in section 1 of the DPA. Section 1 defines personal data as:

"...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and 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."

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. 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.

18. In correspondence with the complainant, the CPS told him:

"FOI is a public disclosure regime, not a private regime. This means that any information disclosed under the FOI Act by definition becomes available to the wider public. If any information were held, confirming this would reveal to the world at large that this individual was involved in the criminal justice system; this would constitute the sensitive personal data of that individual".

19. Sensitive personal data is personal data which falls into one of the categories set out in section 2 of the DPA. The relevant category in this instance is:

"(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".

20. The Commissioner is satisfied from this that the requested information comprises sensitive personal data. This is because the requested information, if held, relates to proceedings involving the individual named in the request.

21. Accordingly, the Commissioner considers that if the CPS confirmed or denied holding the requested information it would represent the disclosure of the sensitive personal data of the individual specified in the request. This is because, in the circumstances of this case, the very act of stating that the requested information is or is not held would disclose to the requester whether or not that individual has been involved in the criminal justice system.
22. Having accepted that the request is for the sensitive personal data of a living individual other than the applicant, the Commissioner must go on to consider whether confirming or denying if the information is held would contravene any of the data protection principles.
23. The Commissioner considers that the first data protection principle is relevant in the circumstances of this case.

Would confirmation or denial breach the first data protection principle?

24. 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."

25. 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 would meet one of the DPA Schedule 2 conditions and, in this case, one of the Schedule 3 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.
26. The Commissioner has first considered whether disclosure would be fair.
27. 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
 - any legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the individuals who are the data subjects.

28. 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 about them and that they will respect their confidentiality.
29. In that respect, the CPS explained that it takes the privacy rights of individuals very seriously.
30. Furthermore, the Commissioner considers that, in most cases, the very nature of sensitive personal data means it is more likely that disclosing it will be unfair. 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.
31. In light of the above, the Commissioner considers that information relating to involvement in the criminal justice system, if held, will carry a strong general expectation of privacy for those parties concerned.
32. As to the consequences of disclosure upon a data subject, the question – in respect of fairness – is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
33. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. She will also take into account the fact that disclosure under the FOIA is effectively an unlimited disclosure to the public at large, without conditions.
34. Given the nature and timeframe of the request in this case, and the sensitivity of the subject matter, the Commissioner considers that disclosure by way of confirmation or denial could lead to an intrusion into the private life of the individual concerned and the consequences of any disclosure could cause her damage and distress.
35. Notwithstanding a data subject's reasonable expectations or any damage or distress caused, it may still be fair to disclose information, or in this case confirm or deny if information is held, if there is an overriding legitimate interest in disclosure. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public and the private interests of the requester.
36. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The legitimate interest in confirming if information is held must outweigh the public interest in

protecting the rights and freedoms of the data subject if providing confirmation or denial is to be considered fair.

37. Examples of a legitimate public interest in disclosure include the general public interest in transparency, public interest in the issue the information relates to and any public interest in disclosing the specific information.
38. The Commissioner acknowledges that a requester's private interests will, by their very nature, be personal to them. Accordingly, an authority may not be aware of what those private interests are. However, the Commissioner considers that if the requester informs the authority of a private interest in the requested personal data, then the authority will need to take this into account when considering disclosure.
39. In this case, from the evidence she has seen, the requester has not provided any such details to the CPS. Nor did he explain any private interests in his correspondence with the Commissioner.

Conclusion

40. In considering whether the exemption contained within section 40(5)(b)(i) was correctly applied in this case, the Commissioner has taken into account that disclosure under the FOIA should be considered in its widest sense – which is to the public at large.
41. With due regard to nature and age of the requested information, the reasonable expectations of the data subject and the potential impact on them if the existence of their personal data were to be confirmed or denied, the Commissioner considers that it would be unfair to do so.
42. The Commissioner is satisfied that confirming or denying if the requested information is held would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the data subject. She considers these arguments outweigh any legitimate interest in disclosure.
43. Accordingly, she considers that the exemption provided by section 40(5)(b)(i) is engaged and that the CPS was therefore not obliged to confirm or deny whether it held the information requested by the complainant.
44. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, it has not been necessary to go on to consider whether this is lawful or whether one of the schedule 2 or schedule 3 DPA conditions is met.

Right of appeal

45. 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

46. 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.
47. 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

Deborah Clarke
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