

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 July 2020

Public Authority: Crown Prosecution Service
Address: 102 Petty France
London
SW1H 9EA

Decision (including any steps ordered)

1. The complainant has requested information about staff dismissed from a particular division of the Crown Prosecution Service (the 'CPS'). The CPS advised that some of the information was not held and that the remainder was exempt from disclosure by virtue of section 40(2) (personal information) of the FOIA. The CPS subsequently revised its response and advised that it wished to rely on section 40(2) for all of the requested information.
2. The Commissioner's decision is that the CPS should have neither confirmed nor denied holding any information by virtue of sections 40(5A) and 40(5B)(a)(i) of the FOIA. No steps are required.

Background

3. This request was part of a much wider request which the complainant submitted to the CPS as a 'subject access request' under the terms of the Data Protection Act 2018 (the 'DPA').
4. The Commissioner is only considering that part of the request which was made under the terms of the FOIA.

Request and response

5. On 19 November 2019 the complainant wrote to the CPS and requested information in the following terms:

"Under this request and further to the Freedom of Information Act, I request information as to how many (number of) staff within the IJOCD [International Justice and Organised Crime Division] and Central Case work division have been dismissed for alleged "Gross Misconduct" in the periods of 2017/2018 and 2018/2019 under

- a. Code of Conduct 6.1 / 6.2 and 8.2*
- b. Alleged personal searches on the CMS system*
- c. How many included a formal investigation".*

6. The CPS responded on 9 January 2020. It advised that there were fewer than five staff dismissals falling within the scope of his request and refused to provide the exact number, citing section 40(2) (personal information) of the FOIA. It said that no information was held in respect of part (c) of the request.
7. On 14 January 2020, the complainant requested an internal review. When doing so he asked it to confirm the specific number of dismissals and added: *"Can you also confirm if this number includes or excludes me?"*. In respect of part (c) he also said: *"Based on you [sic] response of "less than five" surely it would be a simple task to look at those specific cases and extract the information regarding "formal investigations"*.
8. Following an internal review the CPS wrote to the complainant on 12 February 2020; it maintained its position.
9. During the Commissioner's investigation, the CPS revised its response to part (c) of the request. It advised that it wished to rely on section 40(2) for this part of the information request too.

Scope of the case

10. The complainant contacted the Commissioner on 12 February 2020 to complain about the way his request for information had been handled. He advised her as follows:

"I am currently taking the organisation to an employment tribunal for unfair dismissal and under a FOI request I requested information relating to the code of conduct, formal investigations and number of staff dismissed for the allegations made against me...

I dispute the view that asking for specific numbers and information as to how many of the "less than 5" individuals dismissed had formal investigations carried out and if this number includes me can

be considered as "personal" and therefore requires and [sic] anonymising".

11. Although open to interpretation, the Commissioner considers here that the complainant is trying to establish whether any of his former colleagues had been dismissed for alleged gross misconduct for the same reasons as himself, rather than for making allegations against him.

12. The complainant added that, in order to resolve his complaint, he required that the CPS:

*"1. Confirm the actual number rather than "less than 5"
2. Confirm if the number includes me
3. Clarify as to how if "less than 5" my asking for whether a "formal investigation" was carried out is information they do not possess. I find it someone suspicious that matters involving "gross misconduct" are not fully documented and logged with HR so that it can be confirmed whether a "formal investigation" occurred. I am asking for numbers not information that would divulge personal data".*

13. In order to expedite the case, the complainant has not been advised regarding the late citing of section 40(2) in respect of part (c) of the request. The Commissioner does not consider that he is disadvantaged by this as he is able to appeal her decision to the First-tier Tribunal.

14. The Commissioner will consider the citing of section 40 below.

15. 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 the FOIA. The 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. The 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.

Reasons for decision

Section 40 – personal information

16. In addition to the FOIA, the Commissioner is responsible for regulating data protection legislation. As such, she takes account of the need to protect personal data when considering whether such information may be disclosed under the FOIA. Accordingly, she will intervene and apply

exemptions herself to prevent the disclosure of personal data where she considers it necessary, to avoid a breach of data protection legislation.

17. Under section 1(1)(a) of the FOIA, a public authority is obliged to advise an applicant whether or not it holds the requested information. This is known as the "duty to confirm or deny". However, the duty to confirm or deny holding information does not always apply and authorities may choose to neither confirm nor deny ('NCND') holding any information through reliance on certain FOIA exemptions.
18. The exemption at section 40(5) of the FOIA provides that a public authority does not have to confirm or deny whether requested information is held if to do so would itself constitute a disclosure of personal data.
19. Having considered the request, and in view of information provided to her by the CPS, the Commissioner has considered sections 40(5A) and 40(5B)(a)(i) of the FOIA instead of section 40(2).

Section 40(5A) - complainant's own personal data

20. Section 40(5A) provides that the duty to confirm or deny does not arise in relation to information that, if held, would fall within the scope of section 40(1) of the FOIA.
21. Section 40(1) provides that information which is the personal data of the applicant is exempt from disclosure under the FOIA. This is because individuals may request their personal data under a separate legislative access regime, the right of subject access under the Data Protection Act 2018 ('DPA').
22. Section 40(1) of the FOIA is an absolute exemption, meaning that if it applies there is no requirement to go on to consider whether disclosure would nevertheless be in the public interest.

Would confirming or denying that the requested information is held constitute a disclosure of personal data?

23. Although he does not refer to himself in his original request, when asking for an internal review the complainant adds in the wording cited in paragraphs 7 and 10 above, asking whether or not he is included in the figures referred to, thereby adding direct reference to himself.
24. Section 40(1) of the FOIA states:

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

25. The Commissioner is satisfied that the complainant could be identified from the information concerned and that this information, if held, would therefore be his own personal data.
26. The Commissioner therefore finds that the CPS should have cited section 40(5A) to NCND whether it held information about the complainant himself.
27. As this is an absolute exemption, the CPS was not required to confirm or deny whether any information is held.

Section 40(5B) – third party personal information

28. Section 40(5B)(a)(i) of the FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
29. Therefore, for the CPS to be entitled to rely on section 40(5B) of the FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request, the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

30. Clearly the claimant would expect any information held about himself to fall within the scope of his request and the Commissioner has dealt with that matter above. The issue being considered here is whether the CPS should confirm or deny that information about any other party is held.
31. Section 3(2) of the DPA 2018 defines personal data as:-

"any information relating to an identified or identifiable living individual".
32. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
33. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

34. For the information to constitute personal data it must be possible, or at least very likely, that the relevant data subject(s) could be identified from the information. If it is possible for the complainant or other members of the public (including staff at the CPS in this case) to identify the relevant data subject/s from the data it will constitute personal data.
35. The Commissioner considers a key element of her decision here is the limited volume of staff who would fall within the criteria given.
36. Clearly, if the withheld figure were 'one' then disclosure would reveal something about the complainant; as such it would be absolutely exempt from disclosure under section 40(1) of the FOIA, as advised above. However, if it were a different figure, then it would also relate to another party or parties who worked with the complainant in the IJOCD and Central Case work division during the two year time period specified.
37. The numbers of staff in the named division who were dismissed for alleged gross misconduct would be expected to be very small (this has already been indicated by the 'less than five' response provided).
38. The Commissioner considers that the complainant, and, indeed, others within the named division, will have access to other information which will enable them to 'work out' who has been dismissed for alleged misconduct. As such, in the Commissioner's view, it is highly likely that staff working in the division referred to would be able to identify those staff members who they understand may have been dismissed, were the CPS to confirm or deny whether any information is held; provision of the number would provide a public confirmation of their understanding. Furthermore, the figure would allow the complainant to personally ascertain something about one of his former colleagues – or it would confirm to him that none of them had been dismissed in such circumstances.
39. The Commissioner would like to point out that if the number of staff caught within the scope of the request had been wider, eg for the whole of the CPS, or had the figures under consideration been greater, then she may have reached a different view. Her decision is based on the specific division named, the small numbers concerned, the particular circumstances of this case and the need to consider any personal data and its potential disclosure very carefully.
40. Having carefully considered the wording of the request, the Commissioner is satisfied that the information, if held, would relate to an identifiable member/s of staff. She is satisfied that this information both relates to, and could identify, that / those individual/s. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

41. For the reasons set out above the Commissioner is satisfied that if the CPS confirmed whether or not it held the requested information this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.
42. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the data protection ('DP') principles.
43. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

44. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

45. In the case of an 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 lawful, fair and transparent.
46. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

47. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"¹.

¹ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

48. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part test:-

(i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

(ii) **Necessity test:** Whether confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;

(iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

49. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

50. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

51. The complainant has advised the Commissioner that he is taking the CPS to an employment tribunal for unfair dismissal and it is presumed that the information requested is in connection with that tribunal. However, how disclosure of the information requested (or confirmation or denial as to its existence) would actually be of any material value to him has not been stated.

52. In terms of any legitimate public interest in the confirmation or denial, the only possible conclusion the Commissioner can envisage is that the complainant is trying to establish whether anyone has been dismissed

for alleged misconduct under the same circumstances as himself, for his own private reasons. Whilst limited, this is nevertheless a legitimate interest.

Is disclosure necessary?

53. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under the FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
54. The Commissioner can see no alternative way for the complainant to establish the information required. Whilst it may be feasible via disclosure of information as part of an employment tribunal hearing, it is not clear whether this type of information would be accessible in this way.

(iii) Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

55. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
56. As stated above, the issue being considered here is whether the CPS should confirm or deny whether information about any other party than the complainant is held. However, on this occasion the Commissioner considers that it is not possible to confirm or deny whether any further information is held without also disclosing something about the complainant himself. For example, were the CPS to confirm that no information is held other than the 'one' figure covering the complainant personally, this would confirm to the world at large that he is the only party to have been dismissed in such circumstances. Alternatively, were it to confirm that further information is held, then this would confirm that one or more of his colleagues had also been dismissed under the circumstances described, which would place their personal data in the public domain. An individual who has been dismissed for alleged gross

misconduct would have no expectation that the CPS, as a responsible employer, would disclose this type of information about them to the general public under the terms of the FOIA.

57. The Commissioner considers that the complainant is seeking the information for his own private reasons and she can see no wider public interest in confirmation or denial in this case.
58. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's/s' fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.

Conclusion

59. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that she does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and transparent. The Commissioner has therefore decided that the CPS was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5)(B) of FOIA.

Right of appeal

60. 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@justice.gov.uk

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

61. 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.

62. 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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