

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 November 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 the costs involved in a particular prosecution. The Crown Prosecution Service ("the CPS") refused to confirm or deny holding the information as any information it held would be the complainant's own personal data.
2. The Commissioner's decision is that the CPS has failed to demonstrate that any relevant information it held would identify the complainant and would therefore be his personal data. As such, the information would not be covered by section 40(1) of the FOIA and therefore the CPS is not allowed to rely on section 40(5A) of the FOIA to neither confirm or deny holding information within the scope of the request.
3. The Commissioner requires the CPS to take the following steps to ensure compliance with the legislation.
 - Confirm or deny whether it holds information within the scope of the request and, to the extent that relevant information is held, either communicate that information or issue a refusal notice that complies with section 17 of the FOIA.
 - Any refusal notice must not rely on section 40(1) of the FOIA to withhold any information falling within the scope of the request.
4. The CPS 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.

Request and response

5. On 1 July 2019, the complainant requested information in the following terms:

"In Appeal Reference: EA/2018/0095 published at <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2328/015%20071218%20Decision.pdf> the following is stated at paragraph 1:

"On a date which it is not necessary to specify, criminal proceedings were brought by OP, the Appellant, against two individuals, QR and ST.

"Those proceedings were taken over by the Crown Prosecution Service ('CPS') and discontinued. That action was challenged by the Appellant through the medium of judicial review, which was successful. The prosecution was then resumed but subsequently, for a second time, taken over by the CPS and discontinued.'

"I hereby request the following information under the Freedom of Information Act:

"A breakdown of the costs to the CPS of dealing with the judicial review mentioned above. Please include the notional cost of staff time spent on dealing with the case, and the cost of any external counsel.

"While I appreciate the same request was submitted to you in December 2018, I believe sufficient time has now elapsed such that the reasons you had for refusing that request will no longer be material." [sic]

6. The CPS responded on 8 July 2019. It stated that, as the new request was the same as the complainant's previous request, it was relying on section 14(2) of the FOIA to refuse the new request as "repeated".
7. The complainant sought an internal review on the same day, arguing that there had been material changes of circumstance since the previous request had been submitted.
8. Following an internal review the CPS wrote to the complainant on 29 October 2019. It upheld its original position.
9. At that point the complainant brought a complaint to the Commissioner who issued decision notice FS50874299, finding that section 14(2) of

the FOIA did not apply to the request and ordering a fresh response to be provided.

10. The CPS issued its fresh response on 18 December 2019. It now refused to confirm or deny holding information within the scope of the request. The CPS argued that to issue a confirmation or a denial that it held information would, in itself, disclose personal data in a manner which would breach the data protection principles. It therefore relied on section 40(5) of the FOIA to withhold the information.
11. The CPS completed an internal review on 11 March 2020. It upheld its original position.

Scope of the case

12. The complainant contacted the Commissioner on 24 February 2020 to complain about the way his request for information had been handled.
13. At the outset of the investigation, the CPS confirmed that it was relying section 40(5A) of the FOIA to neither confirm nor deny holding information because it considered that any information it did hold would be the complainant's own personal data.
14. During the course of the investigation, the CPS did issue a further response outside of the FOIA, however the complainant asked for a decision notice considering whether the CPS's response under the FOIA was correct.
15. The Commissioner considers that the scope of this decision notice is to establish whether any information within the scope of relating to the request is (or, if it were held, would be) the complainant's own personal data.

Reasons for decision

16. Section 40(1) of the FOIA states that:

"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."

17. Section 40(5A) of the FOIA¹ states that:

The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

18. The definition of "personal data" can be found in section 3(2) of the Data Protection Act 2018

"Personal data" means any information relating to an identified or identifiable living individual.

19. Section 3(3) of the Data Protection Act expands that definition thus:

"Identifiable living individual" means a living individual who can be identified, directly or indirectly, in particular by reference to—

- (a) an identifier such as a name, an identification number, location data or an online identifier, or*
- (b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.*

20. The information in question (if it were held by the CPS) would be a series of numbers. The value of each number would not, in itself, reveal anything about the complainant. However, the fact that a particular number is, or is not held, can itself, in the correct context, reveal something about a living individual and thus be their personal data. For the exemption to be engaged, it need only be proven that information "to which the request relates" is the personal data of the person requesting it.

The CPS's position.

21. The CPS noted that the request itself contained a link to a previous decision of the First Tier Tribunal, appealing a decision of the Commissioner in which she had found that the CPS was entitled to refuse to confirm or deny holding information on the basis that any information it held would be that complainant's own personal data.

¹ As modified by the Data Protection Act 2018

22. The CPS noted that the version of the request considered by the Tribunal was almost identical to the present request, but the original version named all the parties in the particular criminal proceedings and also made reference to a particular court in which the proceedings first began.
23. Because the complainant had made an explicit link to the Tribunal judgement, the CPS argued, it was entitled to consider any clues contained within the entirety of that judgement in deciding whether the relevant information was his own personal data.
24. Furthermore, the CPS argued, not only must the request be read in the context of the Tribunal judgement, but also the Commissioner's earlier decision notice (FS50717387). It argued that, when taken together, these documents revealed the names of the parties involved in the proceedings.
25. The CPS noted that disclosure under the FOIA was disclosure to the world at large and not to the individual concerned. It argued that even if the world at large knew that the criminal proceedings had taken place, the correct response under the FOIA would be to neither confirm nor deny holding relevant information if doing so would reveal the complainant's involvement in the proceedings.

The complainant's view

26. In his submission to the Commissioner, the complainant pointed out that the Tribunal judgement did not name any of the parties involved in the criminal proceedings – nor did it name the person who had brought the appeal to the Tribunal. Even if an individual did scour both the judgement and the decision notice that preceded it, that individual would still not be able to identify the parties involved – either from those documents or from cross-referencing them with other information in the public domain.
27. He continued:

"the tribunal issued a specific direction under Regulation 14 prohibiting disclosure of any of the identities of anyone involved, by anyone privy to that information. Therefore anyone who was privy to the identities of any of the individuals involved cannot, on penalty of contempt of the tribunal, divulge that information to anyone at all. Given the anonymity order made by the tribunal, I am not sure it is correct that the parties to the tribunal case could be identified by deduction or otherwise. I note in particular that the

published tribunal decision makes no reference to the dates or any substantive details of the underlying High Court case."

28. When the Commissioner noted that the sequence of events described in the Tribunal judgement might, in itself, allow for identification of the parties involved, the complainant responded to say:

"It is important to add that as the High Court case was settled no hearing was held in open court. As such, I do not see how, applying the motivated intruder test, anyone could possibly be identified, even if our hypothetical motivated intruder were a member of the legal profession. This is because the only members of the legal profession who would be able to recognise the case are those who either acted in or provided advice on the case (both in the Tribunal and in the High Court), such members of the legal profession are bound by legal professional privilege, as well as by their Code of Conduct, not to discuss the case with anyone. It is also reasonable to assume that those members of the legal profession who are employed by the CPS and the ICO would be bound by confidentiality clauses in their employment contracts."

The Commissioner's view

29. In the Commissioner's view, the first stage in determining whether a request involves personal data is to establish the means by which an individual can be identified. Unless a person is identifiable, either directly or indirectly, the information cannot be their personal data.
30. The definition of personal data is clear: the information does not just have to relate to a living individual, it has to relate to an *identifiable* living individual. The possibility of identification taking place must be more than just remote – as confirmed by the Upper Tribunal in *Information Commissioner v Miller* [2018] UKUT 229 (AAC).
31. In explaining her conclusions, the Commissioner considers it appropriate to first address the Tribunal judgement. The Tribunal was asked to consider a request involving a specified set of criminal proceedings in which all the parties to those proceedings were named. The Tribunal, noted the inescapable connection between those named parties and the information involved. Therefore by confirming or denying that information was held, the Tribunal found, the CPS would be confirming or denying that those named parties were involved in criminal proceedings. The question of redaction was irrelevant because the mere existence of information would reveal something about one or more of the identifiable living individuals named in the request.

32. However, the question faced by the Commissioner in this decision notice is fundamentally different from the one presented to the Tribunal. The wording of the present request does not identify any of the parties involved in the proceedings, nor does it establish any link between the person making the request and the information involved.
33. The Commissioner agrees with the CPS that it is entitled to consider the entirety of the judgement and the previous decision notice when determining whether individuals are identifiable from the request. However, the Commissioner does not consider that the CPS has demonstrated that the complainant (or anyone else for that matter) *is* identifiable, from either the Tribunal judgement, the decision notice that preceded it, or any other source. It would not appear that the CPS has taken account of the extent to which the Tribunal's published judgement and the Commissioner's published decision notice have been redacted, so as to protect the identities of the individuals involved.
34. Having cross-referenced the complainant's name with the reference number of the Tribunal judgement and details of the proceedings, the Commissioner cannot find public information linking the complainant to either the judgement, the proceedings or the decision notice. Having granted an anonymisation order, the Tribunal is unlikely to have left, in its published judgement, sufficient clues as to enable an individual to identify the parties involved.
35. The Commissioner has also considered the extent to which others might be able to use information not in the public domain to identify the parties involved in the proceedings or the Tribunal appeal.
36. The events described in the Tribunal's judgement may not be unique, but the Commissioner considers that this precise sequence would be unusual. Whilst the request being considered here was first submitted at least two years after the criminal proceedings took place, she considers that the sequence would be sufficiently unusual to be memorable – particularly to members of the legal profession.
37. However, as the complainant rightly points out, any risk of identifying the parties involved in the criminal proceedings already exists – regardless of the way that the CPS responds to his request.
38. The CPS's case for neither confirming nor denying holding relevant information is predicated on the fact that confirming or denying that information was held would indicate whether a particular individual was or was not involved in a particular set of criminal proceedings. But, if an individual can *already* establish the identity of one or more of the parties

involved, the way the CPS responds to the request is irrelevant because the link to the proceedings has already been established.

39. In *Commons Services Agency v Scottish Information Commissioner* [2008] UKHL 47, Lord Hope of Craighead, drew attention to the definition of personal data in the 1998 Data Protection Act

"[The definition] directs attention to "those data", which in the present context means the information which is to be barnardised, and to "other information" which is or may come to be in the possession of the data controller. "Those data" will be "personal data" if, taken together with the "other information", they enable a living individual to whom the data relate to be identified. The formula which this part of the definition uses indicates that each of these two components must have a contribution to make to the result. Clearly, if the "other information" is incapable of adding anything and "those data" by themselves cannot lead to identification, the definition will not be satisfied. The "other information" will have no part to play in the identification. The same result would seem to follow if "those data" have been put into a form from which the individual or individuals to whom they relate cannot be identified at all, even with the assistance of the other information from which they were derived. In that situation a person who has access to both sets of information will find nothing in "those data" that will enable him to make the identification. It will be the other information only, and not anything in "those data", that will lead him to this result."

40. Whilst the definition in the Data Protection Act 2018 is worded differently, the Commissioner still considers that the same principles apply. Personal data must reveal something about the individual that is not otherwise known.
41. However, for the sake of completeness, the Commissioner has also considered whether any actual information which existed might "relate to" the parties in the proceedings and reveal something not otherwise known about those parties.
42. The Commissioner does not consider that a person, who already knew the identities of the parties involved in the criminal proceedings, would learn anything of significance about any of the parties (with the exception of the CPS itself) merely by being provided with the costs the CPS had incurred in its involvement in those proceedings – as any data that was held would relate to the CPS, not the other parties.

43. In *Durant v Financial Services Authority* [2003] EWCA Civ 1746, Lord Justice Auld commented that:

"Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity."

44. The Tribunal judgement did not consider the *Durant* case to be of assistance because its own focus was not on the costs themselves but of the fact of the appellant's participation in the criminal proceedings. However, as mentioned above, the Tribunal was dealing with a substantially different request.
45. For an individual who already knew the identities of the parties involved in the criminal proceedings, the Commissioner considers it is necessary to return to *Durant* when determining whether any information the CPS held would be personal data.
46. It seems clear to the Commissioner that any costs themselves would reveal very little about the parties to the judicial review other than the CPS itself. Thus, in the unlikely instance that an individual were able to identify those other parties, what that individual would learn, if the CPS did confirm it held the costs, would reveal information almost exclusively about the CPS itself. Thus on the "continuum of relevance or proximity" any withheld information is likely to fall a considerable way away from the data subject.
47. If the CPS did hold information, the Commissioner considers that that information is highly unlikely to reveal (in itself) anything about the

matters that gave rise to, or were discussed in, the judicial review. Costs would reveal nothing about the merits of the review nor of the conduct of any of the other parties involved. Any costs the CPS held would only reveal how much it was required to spend on defending its position. The Commissioner cannot therefore consider that any information the CPS held would be personal data – it would be data and nothing more.

48. The Commissioner also understands that the complainant attempted to request the same information via a SAR. The CPS refused to provide the information under SAR on the grounds that it did not consider that the information was the complainant's personal data. It is of course not appropriate for the Commissioner to determine, as part of a decision notice issued under the FOIA, whether or not a public authority has responded appropriately to a SAR – but the CPS cannot have it both ways. Either it considers that any information it holds is the complainant's personal data (in which case it should be responding under SAR) or it does not – in which case it should be responding under the FOIA.
49. In order to complete her analysis, the Commissioner briefly considered whether, even if she did not accept that any information the CPS held would be the *complainant's* personal data, whether the mere act of confirmation or denial that relevant information was held would disclose the personal data of any other party. She concluded that it would not – and for the same reasons as above. Information can only be the personal data of an individual if that individual is identifiable. As none of the people involved anywhere within these matters are identifiable it follows that a confirmation or a denial that relevant information is held would not reveal any personal data of an identifiable living individual.
50. As the Commissioner has concluded that any information falling within the scope of the request would not, if it were held by the CPS, be the complainant's own personal data, such information would not be covered by the exemption at section 40(1) of the FOIA. It therefore follows that the CPS is not entitled to rely on section 40(5A) to neither confirm nor deny holding information.

Right of appeal

51. 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

52. 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.
53. 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

Phillip Angell
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF