

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 November 2011

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

Decision (including any steps ordered)

1. The complainant has requested information regarding payments to counsel. The Crown Prosecution Service disclosed some information within the scope of the request but withheld defendants' names citing the personal data exemption as its basis for doing so.
2. The Commissioner's decision is that the Crown Prosecution Service has correctly relied on the personal data exemption as a basis for withholding defendants' names.
3. The Commissioner does not require the Crown Prosecution Service to take any further steps in relation to this request.

Request and response

4. On 1 February 2011, the complainant wrote to the Crown Prosecution Service ("CPS") and requested information in the following terms:
 - Case details for 78 payments made to counsels by the CPS that were published in the Transparency publication of Whitehall finances by the Cabinet Office. This included the name of the defendant(s) in each case, the charge against them, the outcome of the case and the length of the trial.
5. The complainant was unable to supply a copy of the request in this case but he agreed that the above constituted the scope of his request based on subsequent correspondence with the CPS that he was able to provide.

6. The CPS responded on 1 March 2011. It provided some information within the scope of this request but withheld defendant names citing one of the personal data exemptions – section 40(2) – as its basis for doing so. Following a brief exchange of emails, the complainant disputed this in an email of 3 March 2011 and requested an internal review.
7. After conducting an internal review the CPS wrote to the complainant on 28 March 2011. It upheld its original position. It explained that the information was sensitive personal data and that none of the conditions set out in the Data Protection Act 1998 (DPA) for the processing of such information could be satisfied.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. He queried the CPS' reliance on the personal data exemption as a basis for withholding defendants' names. He noted that the defendants' names would have been listed publicly in the courts at the time of each trial. As a consequence, this information was already in the public domain.
10. The Commissioner has therefore investigated whether the CPS is entitled to rely on the personal data exemption as a basis for withholding the defendants' names.

Reasons for decision

11. Section 40(2) of FOIA states that:

"Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1) [this refers to information relating to the requester], and*
- (b) either the first or the second condition below is satisfied."*

Section 40(3) states that:

"The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-*

*(i) any of the data protection principles
..."*

12. In summary, this means that if disclosure under FOIA of requested information would breach any of the data protection principles of the DPA, that requested information is exempt from disclosure.
13. The data protection principles of the DPA only apply to personal data. This term is carefully defined in the DPA. Personal data is information which relates to a living and identifiable individual and is biographically significant about them.
14. The personal data exemption can therefore only apply to information that:
 - a) satisfies the definition of personal data set out in the DPA; and
 - b) cannot be disclosed without breaching one of the data protection principles of the DPA.

Is it personal data?

15. The withheld information is a list of persons who were the defendants in the court cases that fell within the scope of the complainant's request. The persons are listed against the court cases. The information disclosed about the court cases include the charges made against the defendants in question. The Commissioner is satisfied that the withheld information is personal data. It is a list of living identifiable individuals who have been charged with serious offences. Their names are linked to those offences. This information about them is clearly of biographical significance.
16. The Commissioner is also satisfied that the information is sensitive personal data as defined in section 2 of DPA¹. Information about a crime a person has committed or, crucially, is alleged to have committed, is that person's sensitive personal data. Where a person is a defendant in court, that biographically significant fact about them is sensitive personal data regardless of whether or not they are ultimately found guilty.

Would disclosure breach any of the data protection principles of the DPA?

17. When considering the personal data exemption under FOIA, the Commissioner normally looks at whether disclosure would accord with

¹ <http://www.legislation.gov.uk/ukpga/1998/29/contents>

the first data protection principle. This principle requires personal data to be processed fairly and lawfully and in accordance with at least one of the conditions for processing listed in Schedule 2 of the DPA. Where the information is sensitive personal data (as is the case here), it must also be processed in accordance with at least one of the conditions for processing listed in Schedule 3 of the DPA.

18. This means, in summary, that if disclosure under FOIA would be unfair, unlawful *or* would not be in accordance with any relevant conditions, that disclosure would contravene the first data protection principle. The information in question would, therefore, be exempt under the personal data exemption.
19. The Commissioner will therefore first consider whether disclosure of the requested information would be fair.

Would disclosure be fair?

20. The Commissioner has considered fairness in relation to similar personal data on a number of occasions, for example, in his decision notice referenced FS50352663². His thinking as to fairness on this earlier case (and other cases referred to in that decision notice) applies here. The Commissioner balances the consequences of any disclosure and the reasonable expectations of the data subject with general principles of accountability and transparency.
21. The complainant has argued that because the information has been disclosed at some point in open court, it cannot be exempt from disclosure under the Act.
22. The Commissioner's view is that disclosures that are required as part of the court proceedings are, in practice, only disclosures to a limited audience. The fact that the defendants' names may have been heard in 'open court' cannot be relied on to assume that future disclosure under FOIA is fair. Information gathered for a trial is used for that specific purpose and in the interests of justice. It is only processed by the justice system for that one specific purpose. The Commissioner is of the opinion that the expectation of those involved is that any of their personal data will only be used for that purpose. They would not reasonably expect that it may subsequently be released in its entirety to the public at large.
23. In case reference FS50075171, which concerned information about prosecutions relating to bus fare irregularities, the Commissioner

² http://www.ico.gov.uk/tools_and_resources/decision_notices.aspx (case ref: FS50352663)

recognised that data is disclosed in court and could be reported, but concluded that later disclosure would be unfair. It states:

"...in practice public knowledge of the issues is only short lived and may be limited to only a small number of people. Even where cases are reported in newspapers this does not lead to the establishment of a comprehensive, searchable database of offenders.

"To create such a database would prejudice the principle of the rehabilitation of offenders. There is established public policy on controlling access to the records of those who have been involved with the criminal justice system as demonstrated by the creation of the Criminal Records Bureau. It is clearly not desirable for the Freedom of Information Act to undermine these principles."

24. Given the nature of sensitive personal data, the Commissioner deems it to be information that individuals regard as the most private information about themselves. As disclosure of this type of information is likely to have a detrimental or distressing effect on the data subject, the Commissioner considers that it would be unfair to disclose it.
25. The complainant in this case has received detailed information about payments to counsel from public funds following a number of prosecutions for very serious offences. The Commissioner's view is that the extent of this disclosure accords with the general principles of accountability and transparency. He does not consider that these general principles would be further served by disclosure of defendants' names. Such a disclosure would therefore be unnecessary and disproportionate. The Commissioner is satisfied, therefore, that disclosure of the requested information would be unfair.
26. The victims in each of these court cases are not named in the withheld information. The Commissioner recognises that they and their surviving family members would reasonably have little concern for the sensitivities of those who committed (or who were alleged to have committed) the serious crimes in question. However, he cannot consider this as a relevant factor when examining fairness in this case.
27. As outlined above, if it would be unfair to disclose requested information, disclosure would contravene the first data protection principle of the DPA. It is not necessary to go on to consider whether disclosure might be lawful or whether any of the necessary conditions for processing in Schedule 2 or 3 could be satisfied.
28. That said, the Commissioner agrees with the public authority's view that none of the conditions for processing set out in Schedule 3 of the DPA could be satisfied. The Schedule 3 conditions relate to the processing of

sensitive personal data. For example, the fifth Schedule 3 condition for processing is where the subject of the sensitive personal data puts the information in question about themselves in the public domain. While the individuals in question may have appeared in court as a consequence of their alleged criminality, that is not the same as putting information about themselves into the public domain.

Personal data exemption - conclusion

29. The Commissioner is satisfied that disclosure of the requested information would contravene the first data protection principle of the DPA. In consequence, he is satisfied that the requested information is exempt under section 40(2) by virtue of section 40(3)(a)(i).

Right of appeal

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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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

Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF