

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 May 2016

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 relating to allegations of child sexual abuse allegations made against Cyril Smith. The Crown Prosecution Service withheld some information under the exemptions at sections 21(1) (information accessible to applicant by other means) and 40(2) (personal information) of the FOIA. It also relied on the provisions in sections 23(5) (information supplied by, or relating to, bodies dealing with security matters) and 24(2) (national security) of the FOIA as the basis for neither confirming nor denying whether it held any information in scope subject to the exemptions at sections 23(1) and 24(1).
2. The Commissioner considers that the Crown Prosecution Service has applied sections 23(5) and 24(2) and 40(2) appropriately but has not applied section 21 appropriately. He also considers that the Crown Prosecution Service has breached section 17(1).
3. However, as the complainant is in possession of all of the information which is not correctly exempt from disclosure, the Commissioner does not require the Crown Prosecution Service to take any further steps as a result of this decision.

Request and response

4. On 10 March 2015, the complainant wrote to the Crown Prosecution Service (the CPS) and requested information in the following terms:

"1 During the period January 1 1987 to 1 January 1989 did the Director of Public Prosecutions (DPP) and or anyone acting on his behalf exchange correspondence and communications with the Cabinet Office and or Downing Street. I am interested in those correspondence and communications which in any way relate to child sexual abuse allegations levied against Sir Cyril and or the related police enquiries. I am also interested in correspondence and communications which in any way touch upon the subject of honours (actual or suggested) for Sir Cyril. If the answer is yes can you please provide copies of this correspondence and communications?"

2 During the aforementioned period did the DPP and or anyone acting on his behalf meet with any representative of the Cabinet Office and or Downing Street to discuss the child sex abuse allegations against Sir Cyril and or related police enquiries. If the answer is yes can you please provide details of these meetings. Can you provide the date and venue of these meeting (s). Can you please provide a full list of all of those present?"

5. The CPS responded on 19 May 2015. It stated that it had been unable to locate any information that was transferred from the DPP's Office but had located some information that was sent from the Cabinet Office to it in 2014. The CPS confirmed that the information included a draft letter from Sir Robin Butler to the DPP's Office but was unable to confirm whether the letter was sent during the time period specified in complainant's request or to locate the details of any response from the DPP's Office.
6. The CPS also confirmed that there was a hand written note detailing a meeting between Sir Robin Butler, Mrs Mary Hedley-Miller, Sir Alan Green and a fourth individual whose role it was not able to locate. The CPS confirmed that the meeting was held on 9 May 1988 but that the location was not recorded. It also explained that the name of the fourth individual was exempt from disclosure under section 40(2) (personal information) of the FOIA.
7. The CPS explained that it was applying section 21 (information accessible by other means) of the FOIA to both of these as the Cabinet Office had already disclosed them to the complainant. The CPS also explained that it was neither confirming nor denying whether it held any information in accordance with sections 23(5) (Information supplied by, or relating to, bodies dealing with security matters) and 24(2) (national security) of the FOIA.
8. Following an internal review the CPS wrote to the complainant on 22 June 2015. It upheld its original decision.

Scope of the case

9. The complainant initially contacted the Commissioner on 18 May 2015 to complain about the way his request for information had been handled.
10. As well as complaining about the application of sections 21, 23(5), 24(2) and 40(2), the complainant confirmed to the Commissioner that he was also complaining about the time taken to deal with his request.
11. The Commissioner will consider the CPS's application of the exemptions and the time taken to deal with the request.

Reasons for decision

Section 21 (Information accessible to the applicant by other means)

12. Section 21 provides an exemption for information that is already reasonably accessible to the applicant by other means. It is an absolute exemption and therefore is not subject to the public interest test.
13. This allows a public authority to take the individual circumstances of the applicant into account.
14. The CPS explained to the Commissioner that it was applying section 21 to two documents, as the Cabinet Office had already disclosed them to the complainant.
15. In order for section 21 to apply, there should be another existing, clear mechanism by which the applicant can reasonably access the information outside of the FOIA. Therefore, when considering whether section 21 of the FOIA has been applied correctly, it will depend on whether or not the requested information is reasonably accessible to the applicant who has requested it.
16. For Information to be reasonably accessible to the applicant the public authority must:
 - know that the applicant has already found the information; or
 - be able to direct the applicant to the information so that it can be found without difficulty.

17. The CPS has applied section 21 to a record of a meeting between Sir Robin Butler, Mrs Mary Hedley-Miller, Sir Alan Green and a fourth individual whose role it was not able to locate, held on 9 May 1988 and a draft letter from Sir Robin Butler to the DPP's Office.
18. Having considered the documents in question, the Commissioner notes that there are redactions in both of them. The Commissioner considers that section 21 cannot be applied to these documents, as the complainant would have to be able to access all of the information for section 21 to be appropriately applied.
19. The Commissioner notes that the complainant provided him with copies of these documents and pointed out that they had been disclosed to him by the Cabinet Office in response to a previous request about Cyril Smith. The complainant complained about the way the Cabinet Office dealt with this request and the Commissioner issued a decision notice – FS50579583 – in relation to it.
20. The Commissioner will go on to consider whether the CPS has applied section 23(5) and 24(2) appropriately.
21. 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 does not always apply; public authorities may issue a neither confirm nor deny response ("NCND") through reliance on certain exemptions under the FOIA.

Section 23(5) (Information supplied by, or relating to, bodies dealing with security matters) and 24(2) (National security)

22. Information supplied by or relating to security bodies specified in section 23(3) is exempt information by virtue of section 23(1). Information which does not fall under 23(1) is exempt from disclosure under section 24(1) if the exemption is required for the purpose of safeguarding national security.
23. Sections 23(5) and 24(2) exclude the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under section 23(1) or where confirmation or denial as to whether requested information is held is required for the purpose of safeguarding national security.
24. The CPS explained that both sections 23(5) and 24(2) were engaged. The Commissioner does not consider the exemptions at sections 23(5) and 24(2) to be mutually exclusive and he accepts that they can be relied on independently or jointly in order to conceal whether or not one or more of the security bodies has been involved in an issue which might

impact on national security. However, each exemption must be applied separately on its own merits. As section 23 is an absolute exemption it is not subject to the public interest test. However, section 24 is a qualified exemption and therefore is subject to the public interest test.

25. The test as to whether a disclosure would relate to a security body is decided on the civil standard of proof, that is, on the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then the section 23 exemption would be engaged.
26. From the above it can be seen that section 23(5) has a very wide application. If the requested information is within what could be described as the ambit of security bodies' operations, section 23(5) is likely to apply. This is consistent with the FOIA access regime as security bodies themselves are not subject to its provisions.
27. Factors indicating whether a request is of this nature will include the functions of the public authority receiving the request, the subject area to which the request relates and the actual wording of the request.
28. The Commissioner finds that on the balance of probabilities, information about the allegations of child sexual abuse in relation to Cyril Smith, if held, could be related to one or more bodies identified in section 23(3).
29. With regard to section 24(2), the Commissioner considers that this exemption should be interpreted so that it is only necessary for a public authority to show either a confirmation or denial of whether requested information is held, would be likely to harm national security. The Commissioner interprets the phrase 'required' to mean 'reasonably necessary'. In effect this means that there has to be a risk of harm to national security for the exemption to be relied upon, but there is no need for a public authority to prove that there is a specific, direct or imminent threat. The CPS explained that if held, it considered that the information in question would undermine national security.
30. In relation to the application of section 24(2), the Commissioner notes that the First Tier Tribunal (Information Rights) has indicated that only a consistent use of a NCND response on matters of national security can secure its proper purpose. Therefore, in considering whether the exemption is engaged and the balance of the public interest test, regard has to be given to the need to adopt a consistent NCND position and not simply to the consequences of confirming whether the specific requested information in this case is held or not.
31. As a general approach the Commissioner accepts that withholding information in order to ensure the protection of national security can

extend, in some circumstances, to ensuring that matters which are of interest to the security bodies are not revealed. In the present case, the Commissioner is satisfied that complying with the requirements of section 1(1)(a) would be likely to reveal whether the security bodies were interested in the subject matter of the request.

32. The Commissioner is satisfied that the CPS is entitled to rely on both sections 23(5) and 24(2) in the circumstances of this case. He accepts that revealing whether or not information is held within the scope of the request which relates to security bodies would reveal information relating to the role of the security bodies. It would also undermine national security and for that reason, section 24(2) also applies because neither confirming nor denying if information is held, is required for the purpose of safeguarding national security.

Public interest test

33. When considering the public interest test, the Commissioner must consider whether the public interest in neither confirming nor denying whether the CPS holds information which would be exempt under section 24 outweighs the public interest in confirming or denying whether such information is held.
34. In light of the allegations of historic child abuse which have come to light following the death of Cyril Smith, the Commissioner acknowledges the strong public interest in the public authority confirming or denying whether it holds information within the scope of the request which would engage sections 23(1) or 24(1).
35. However, in all the circumstances of this case, the Commissioner considers that the significant public interest in protecting information required for the purposes of safeguarding national security outweighs the public interest in favour of confirmation or denial.
36. The Commissioner therefore finds that on balance, the public interest in maintaining the exemption at section 24(2) outweighs the public interest in complying with the duty imposed by section 1(1)(a).
37. The Commissioner will go on to consider the application of section 40(2).

Section 40 (Personal information)

38. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and whether the disclosure of that personal data would be in breach of any of the data protection principles.

Is the information personal data?

39. The first step for the Commissioner to determine is whether the withheld information constitutes personal data as defined by the Data Protection Act 1998 (the DPA).
40. The definition of personal data is set out in section 1 of the DPA. This provides that, for information to be personal data, it must relate to an individual and that individual must be identifiable from that information.
41. The DPA 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 indecision of the intention of the data controller or any other person in respect of the individual.”*
42. 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 biological significance for them, is used to inform decisions affecting them or has them as its main focus.
43. In this case, the CPS told the complainant that it considered the name of the individual concerned constituted his personal information and that it would be unfair to disclose it.
44. The Commissioner has considered the withheld information. He is satisfied that it constitutes information which falls within the definition of ‘personal data’ as set out in section (1) of the DPA as the information comprises personal data relating to an individual.

Would disclosure breach one of the data protection principles?

45. The CPS told the complainant that it considered that disclosure of the requested information would contravene the first data protection principle. The Commissioner agrees that the first data protection principle is relevant in this case.

Would disclosure contravene the first data protection principle?

46. The first principle deals with the privacy rights of individuals and the balance between those rights and other legitimate interests in processing personal data. It 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”.

47. 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 fair, lawful and would meet one of the DPA Schedule 2 conditions and, in this case, one of the Schedule 3 conditions for sensitive personal data. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

Would it be fair to disclose the requested information?

48. When 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
- the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

49. Under the first principle, the disclosure of the information must be fair to the data subject. Assessing fairness involves balancing the data subject’s rights and freedoms against the legitimate interest in disclosure to the public.

50. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in its disclosure.

Has the data subject consented to the disclosure?

51. The Commissioner is not aware of anything to suggest that consent has been given for disclosure of the requested information by the data subject.

Has the data subject actively put some or all of the requested information into the public domain?

52. Where the data subject has put some or all of the requested information into the public domain, the Commissioner considers that this weakens the argument that disclosure would be unfair.
53. In this case the Commissioner has not seen any evidence that the data subject has actively put some or all of the requested information into the public domain.

Reasonable expectations

54. In order to reach a view on whether the disclosure of this information would be fair in this case, the Commissioner has placed specific emphasis on the nature of the information itself.
55. The requested information, if disclosed, would reveal information about the named individual. The Commissioner does not accept that disclosing this information would be fair and considers that it would be very likely to cause distress to the individual involved or have an unfair impact on him.

Consequences of disclosure

56. When considering the consequences of disclosure on the data subject, the Commissioner has considered what they might be.
57. The CPS explained that the honours system is highly confidential and that the individual concerned would not have any expectations that he would be identified to the world at large over 20 years later.

Conclusion

58. The Commissioner considers that there is limited legitimate public interest in the disclosure of the name of the individual in question. However he does consider that given the context of the request, disclosure of this information into the public domain would be likely to cause further distress to the individual concerned and could also lead to repercussions specifically targeted at him for being part of any consideration given to awarding Cyril Smith an honour.

59. Therefore, in the circumstances of this case the Commissioner accepts that it would be unfair to disclose the information requested, as he considers it is the personal data of the individual in question. The Commissioner considers that disclosure would contravene the first data protection principle.
60. He has not gone on to consider whether disclosure is lawful or whether one of the Schedule 2 DPA conditions is met.
61. The Commissioner considers that the section 40(2) exemption is engaged.
62. The Commissioner will go on to consider the length of time taken by the CPS to deal with the request.

Procedural issues

Section 17 – refusal notice

63. Section 17(1) provides that where a public authority is applying an exemption to withhold information it must issue a refusal notice stating this within the time for compliance set out under section 10(1), which is twenty working days following the date of receipt of the request.
64. As the request was dated 10 March 2015 and the CPS did not provide a refusal notice until 19 May 2015, the Commissioner considers that it has breached section 17(1).

Right of appeal

65. 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

66. 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.
67. 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

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