

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 19 March 2009

Public Authority: Her Majesty's Court Service (an executive agency of the Ministry of Justice)
Address: Information Directorate
Ministry of Justice
First Floor – Zone C
102 Petty France
London
SW1H 9AJ

Summary

The complainant asked for the charges, verdict and impositions of the Court in relation to one case heard at a Magistrates' Court. The public authority responded in accordance with the provisions of section 1(1)(a) (it confirmed or denied it held the information requested). After considering the case, the Commissioner finds that the public authority was excluded from its duty to respond to the request under section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i) (exclusion from the duty to confirm or deny a public authority holds third party personal information) because in responding to the request, it would have to disclose, information which, if held would constitute the sensitive personal data of the third party. The Commissioner has also concluded that it would not have been reasonable to expect the public authority to have provided advice and assistance to the applicant and therefore the public authority did not breach section 16(1). The Commissioner does not require the public authority to take any steps in relation to the complainant's request.

The Commissioner's Role

1. 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 Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. In considering the case, the Commissioner also took into account his dual role as the regulator for the Data Protection Act 1998 (DPA).

The Request

3. The Commissioner notes that under the Act Her Majesty's Court Service (HMCS) is not a public authority itself. At the time of the request it was actually an executive agency of the Department of Constitutional Affairs. Therefore the public authority in this case was actually the Department of Constitutional Affairs not HMCS. For clarity in this notice the Commissioner refers to HMCS as if it were the public authority.
4. On 9 May 2007 the responsibilities of the Department of Constitutional Affairs were transferred to the new Ministry of Justice (MOJ). Therefore HMCS is now an executive agency of the MOJ which is why the Decision Notice is being served on the MOJ as the relevant public authority.
5. On 3 February 2007 the complainant requested the following information from the public authority under section 1 of the Act:

'I have been advised to apply to you for Information concerning the appearance of [Person redacted] at [Court redacted] on Friday 15th of December 2006'

 - (a) *The charges.*
 - (b) *The verdict (s).*
 - (c) *The impositions of the court – including what [gender redacted] is to pay.'*
6. On 6 February 2007 the public authority wrote to the complainant, prior to making a full response under the Act:

'Under our Data Protection Policy, no information relating to any person or case is to be given to a third party as a general rule. If you are seeking to help your [relative redacted] then it is suggested that you contact [gender redacted] directly in order to obtain the information.'
7. On 13 February 2007 the public authority responded in accordance with the provisions of section 1(1)(a) of the Act. In other words, it either confirmed or denied it held the information requested. The Notice does not detail the public authority's exact position under section 1(1)(a) due to the Commissioner's decision in this case.
8. On 5 March 2007 the complainant requested an internal review from the public authority. On 17 April 2007 the public authority conducted an internal review in relation to this request. It reasserted its previous position.

The Investigation

Scope of the case

9. Dissatisfied with the public authority's final response on 17 April 2007, the complainant wrote to the Commissioner on 7 June 2007 to complain about the way his request for information had been handled. The complainant also specifically asked the Commissioner to consider whether the public authority had provided sufficient advice and assistance to him.

Chronology

10. On 11 February 2008 the Commissioner wrote to the complainant to inform him that the case remained unallocated. In response to comments raised in a previous letter from the complainant the Commissioner explained that information released under the Act is considered to be a disclosure to the public at large. He also explained that his status as the relative of the data subject would not influence the Commissioner's investigation since the Commissioner's role was to decide whether this information, if held, could be released to the public in general.
11. On 25 February 2008 the complainant wrote to the Commissioner and expressed his concerns about the Commissioner's comments in his letter of 11 February 2008.
12. On 29 February 2008 the Commissioner responded and informed the complainant that his last letter was intended to simply be a statement of how the Act works.
13. On 14 April 2008 the Commissioner wrote to the complainant and informed him that the case was now allocated. He used the opportunity to clarify the scope of his investigation and apologise for the delays that the complainant had experienced up to this point.
14. On 16 April 2008 the Commissioner wrote to the public authority. On 30 May 2008 the public authority replied to the Commissioner's questions.
15. On 2 June 2008 the Commissioner wrote to the complainant and explained about personal information. The Commissioner invited the complainant to consider withdrawing his complaint. On 23 June 2008 the complainant wrote to the Commissioner and informed him that he was not happy to withdraw his complaint. He expressed his disappointment at the Commissioner's investigation.
16. On 26 June 2008 the Commissioner responded to the complainant to clarify a number of points. The Commissioner also informed the complainant that in light of his response he would now commence the drafting of his Decision Notice.

Findings of fact

17. The public authority have confirmed subsequent to the Commissioner's questions that if recorded information is held that is relevant to this request, it would be held in the following three locations:
 1. The paper and electronic case files.
 2. The Court Register.
 3. The fines paid on the courts accounts system.
18. The public authority has informed the Commissioner that there is an alternative regime for entitled members of the public to access information contained in the Court Register. This is governed by the Criminal Procedure Rules that state that the register shall be "open to inspection during reasonable hours by any Justice of the Peace or any person authorised in that behalf by a Justice of the Peace or the Lord Chancellor".
19. The public authority has explained that if the complainant wishes to inspect the Register, then he may apply to do so in accordance with Rule 6.1 (15) of the Criminal Procedure Rules. The process for this is as follows:
 1. The complainant should write to the Court Manager detailing the request and asking for an appointment at court to make the formal request to a Justice of the Peace.
 2. A convenient appointment time would be arranged when he could attend the court in person to present the application.
 3. The court hearing the application would then either grant/refuse the request.

Analysis

Procedural matters

Section 16(1) (Advice and assistance provided by the public authority)

20. In the complainant's initial complaint to this office on 7 June 2007 the complainant complained about the public authority's lack of advice and assistance in relation to the handling of his request. He reasserted this complaint in a letter to the Commissioner dated 23 June 2008. The Commissioner has therefore investigated whether the public authority has complied with Section 16 of the Act.
21. Section 16(1) (a full copy is in the legal annex attached to this notice) provides an obligation for a public authority to provide advice and assistance to a person making a request, so far as it would be reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in

- any particular case, when it satisfies the requirements of the Section 45 Code of Practice.
22. The request that the complainant has made to the public authority was clear in scope and the Commissioner is satisfied that no further clarification was needed. Additional assistance as outlined in paragraphs 8 to 11 of the Code was not required in this case.
 23. The request also did not attract the fees limit. Additional assistance as outlined in paragraphs 13 to 15 of the Code was not required in this case.
 24. The public authority also acknowledged the complainant's request promptly. It also informed the complainant that the information, if held, would be more easily obtained with the consent of his relative numerous times. It also appeared helpful in tone in the correspondence the Commissioner has access to.
 25. The Commissioner has therefore concluded that it would not have been reasonable to expect the public authority to have provided advice and assistance to the applicant and therefore the public authority did not breach section 16(1). Advice and assistance was not required to satisfy the Section 45 Code of Practice as none of the provisions were relevant in the circumstances of this case. A wider good practice recommendation that goes beyond the requirements of the relevant provisions of the section 45 Code is mentioned in the other matters section below.

Exemption

Section 40(5)(b)(i) (Exclusion from the duty to confirm or deny)

26. The information was requested in the belief by the complainant (and it is irrelevant whether this was right or wrong) that **[person redacted]** had been the subject of a court case. This therefore prompted the Commissioner to initially consider whether the public authority would have been automatically excluded from the duty imposed on it by the provisions of section (1)(1)(a) by virtue of the provisions of section 40(5)(b)(i).
27. From the outset, it is important to point out that the Act except in very few scenarios (none of which are applicable in this case) is applicant blind. In other words, a disclosure made under the Act is in effect to the world at large, as every other applicant would be entitled to that information upon request.
28. Generally, the provisions of section 40 subsections 1 to 4 exempt 'personal data' from disclosure under the Act. In relation to a request which constitutes the personal data of individual(s) other than the applicant(s), section 40(5)(b)(i) further excludes a public authority from complying with the duty imposed by section 1(1)(a) if complying with that duty would contravene any of the data protection principles or section 10 of the DPA or would do so if the exemptions in section 33A(1) of that Act were disregarded.

29. In *Bowbrick v Information Commissioner* in paragraph 51, the Information Tribunal confirmed that the Commissioner had discretion under the Act to look at section 40 issues when considering cases under the Act:

'If the Commissioner considered that there was a section 40 issue in relation to the data protection rights of a party, but the public authority, for whatever reason, did not claim the exemption, it would be entirely appropriate for the Commissioner to consider this data protection issue because if this information is revealed, it may be a breach of the data protection rights of data subjects....Section 40 is designed to ensure that freedom of information operates without prejudice to the data protection rights of data subjects.'

30. The nature of the request meant that the public authority's response in accordance with the duty under section 1(1)(a) inevitably disclosed whether or not an individual was involved in a court case.
31. The Commissioner is of the general view that whether or not an individual was involved in a court case is information which constitutes the personal data of that individual.
32. In order for section 40 to be applicable, the information being requested must therefore constitute personal data as defined by section 1 of the DPA. Full copies of both sections are contained in the legal annex of this notice.
33. Section 1 of 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 indication of the intention of the data controller or any other person in respect to the individual'.

34. The Commissioner is satisfied that the requested information, if held, would be the third party's personal information in this case. The Commissioner accepts that the information relating to the charges against a person in court (if held) and the verdicts of the court (if held), clearly falls within the description of personal data as defined by the DPA because it is information which directly relates to a living individual. He is also satisfied that, if there was information held, there is no possibility of information falling within the scope of the request without being the individual's personal data.
35. The Commissioner is also satisfied that all the information requested, if held, would also fall within the definition of sensitive personal data as contained in section 2 of the DPA.
36. Section 2 of the DPA says that:

'In this Act 'sensitive personal data' means personal data consisting of information as to:

...

(g) the commission of alleged commission by him [non gender specific] or any offence .

(h) any proceedings for any offence committed or alleged to have been committed by him [non gender specific], the disposal of such proceedings or the sentence of any court in such proceedings'

37. The Commissioner believes that all the requested information, if held, falls within the definition of section 2(h) and therefore is sensitive personal data.
38. At the time the request was made, the Commissioner is satisfied that the person the request was about was alive and at the time of drafting this Notice, there is nothing to suggest that this is no longer the case.
39. In light of the above findings, the Commissioner considers that the proper approach would be to first consider whether or not in responding to the request, the public authority would have been excluded from the duty imposed by section 1(1)(a).
40. In line with the provisions of section 40(5)(b)(i), the Commissioner therefore first considered whether or not confirming or denying whether there was a court case against an individual would contravene any of the data protection principles.
41. The complainant has argued that his purpose for wanting the information and his motives should be taken into account when determining whether any disclosure would contravene the Data Protection Act. However the Freedom of Information Act explicitly states that a public authority should not simply consider whether confirming or denying whether information was held to the particular applicant would breach the data protection principles. The proper test is whether confirming or denying whether the information is held to any member of the public would breach the data protection principles.

Would complying with section 1(1)(a) contravene the first data protection principle?

42. The Commissioner believes that the relevant principle in relation to this matter would be the first data protection principle: the requirement that processing should be fair and lawful.
43. The first data protection principle for sensitive personal information has three stages, which need to be satisfied together for the principle not to be contravened when releasing any information. These are outlined below:
 1. The personal data should be processed fairly and lawfully, and
 2. Personal data shall not be processed unless one of the conditions in Schedule 2 of the DPA is met.

3. Sensitive personal data shall not be processed unless one of the conditions in Schedule 3 of the DPA is met.
44. The public authority argued that the disclosure of whether or not a person was subject to a court case and the verdict against them would be unfair and would not satisfy the first component. It informed the Commissioner that it had a separate regime to ensure that information, if held, can be disclosed to the relevant parties in a case but that it does not release this information to the public.
45. There is established public policy on controlling access to the records of those who have been involved with the justice system. The Commissioner is satisfied that the alternative process under the Rule 6.1 (15) of the Criminal Procedure Rules establishes the correct balance between public accountability and the privacy of the data subject. It is not desirable for the Freedom of Information Act to undermine these principles.
46. The Commissioner is not aware that there is any information presently in the public domain which would confirm whether or not the particular individual has been the subject of a court appearance.
47. The Commissioner is inclined to agree that in this case to reveal to the whole public whether someone was subject to a court case would be unfair. He does not feel that releasing sensitive personal data into the public domain will be fair unless there are exceptional circumstances. He considers that there is a general and reasonable expectation that if someone was to appear in court that the information would not be released to the public domain. The Commissioner is of the view that even if there was sensitive personal data is disclosed in open court at the time of prosecution/sentencing, it would not be in a defendant's reasonable expectations that there will be a later disclosure to the general public. This is supported by the reasoning of the Information Tribunal's decision of *David Armstrong and the Commissioners for Her Majesty's Revenue and Customs* [EA/2008/0026] paragraph 84.
48. As mentioned above, as well as requiring that the processing of personal data must be fair and lawful, the first data protection principle also states that sensitive personal data shall not be processed unless at least one condition in Schedule 3 of the Data Protection Act 1998 can be satisfied. The Commissioner considers that none of the conditions Schedule 3 can be met. He is also certain that none of the conditions in The Data Protection (Processing of Sensitive Personal Data) Order 2000 are satisfied either. For this reason alone disclosing the information would contravene the first data protection principle.
49. The Commissioner is satisfied that any response provided in this regard in line with the provisions of section 1(1)(a) of the Act would contravene the first data protection principle. As the Commissioner is satisfied that complying with section 1(1)(a) would in this case contravene the first data protection principle, he has not gone on to consider the other data protection principles.
50. He therefore finds that the public authority was not obliged to have responded the complainant's request in accordance with the duty imposed on it by the provisions

of section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i). The Commissioner will not proactively seek to consider exemptions in all cases before him, but in cases where personal data is involved the Commissioner believes he has a duty to consider the rights of data subjects. These rights, set out in the Data Protection Act are closely linked to Article 8 of the Human Rights Act and the Commissioner would be in breach of his obligations under the Human Rights Act if he ordered disclosure of information or confirmation/denial without having considered these rights, even if the public authority has not cited the exemption.

The Decision

51. The Commissioner's decision is that the public authority did not have a duty to comply with section 1(1)(a) of the Act on the basis of the exemption contained at section 40(5)(b)(i).
52. The Commissioner has also concluded that it would not have been reasonable to expect the public authority to have provided advice and assistance to the applicant and therefore the public authority did not breach section 16(1).

Steps Required

53. The Commissioner requires no steps to be taken.

Other matters

54. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
55. The Commissioner acknowledges that this is a complex case and can comprehend the public authority's failure to correctly apply section 40(5)(b)(i) on this occasion. However in light of the interpretation of the definition of personal data, he would encourage the public authority to always initially consider the possibility of the application of section 40(5)(b)(i) when considering its response to a request of this nature in future. This will ensure that it also remains focussed on its responsibilities under the DPA as well as under the Act when responding to the request.
56. It is Good Practice for the public authority to immediately direct requestors to alternative access regimes, such as those outlined in paragraphs 18 and 19 above, should they be appropriate.

Right of Appeal

57. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 19th day of March 2009

Signed

**Steve Wood
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

Section 1 - General right of access to information held by public authorities

- (1) Any person making a request for information to a public authority is entitled—
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.

...

Section 16 – Duty to provide advice and assistance

- (1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.
- (2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

Section 40 – Personal information

- (1) 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.
- (2) 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), and
 - (b) either the first or the second condition below is satisfied.
- (3) 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 [1998 c. 29.] 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, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

(5) The duty to confirm or deny—

(a) 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), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the [1998 c. 29.] Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the [1998 c. 29.] Data Protection Act 1998 shall be disregarded.

(7) In this section—

- “the data protection principles” means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
- “data subject” has the same meaning as in section 1(1) of that Act;
- “personal data” has the same meaning as in section 1(1) of that Act.

Data Protection Act 1998

Section 1 - Basic interpretative provisions

(1) In this Act, unless the context otherwise requires—

- “data” means information which—

(a)

is being processed by means of equipment operating automatically in response to instructions given for that purpose,

(b)

is recorded with the intention that it should be processed by means of such equipment,

(c)

is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or

(d)

does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

- “data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;
 - “data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;
 - “data subject” means an individual who is the subject of personal data;
 - “personal data” means 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 intentions of the data controller or any other person in respect of the individual;
 - “processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—
 - (a) organisation, adaptation or alteration of the information or data,
 - (b) retrieval, consultation or use of the information or data,
 - (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
 - (d) alignment, combination, blocking, erasure or destruction of the information or data;
 - “relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.
- (2) In this Act, unless the context otherwise requires—
- (a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and
 - (b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.
- (3) In determining for the purposes of this Act whether any information is recorded with the intention—
- (a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or

(b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.

Section 2 - Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to—

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the [1992 c. 52.] Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (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.