

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 June 2011

Public Authority: Crown Prosecution Service
Address: 50 Ludgate Hill
London
EC4M 7EX

Summary

The complainant asked a series of questions about named employees of the CPS. The request was for, amongst other things, details of the disciplinary and criminal records of named individuals; the previous employment history of a named individual; the ethnicities of named individuals involved in a disciplinary case; and the gender and ethnicities of complainants and respondents in dismissal appeals heard by a named individual, together with the outcomes of those cases. The CPS withheld the majority of the information, citing section 40(2) of the Freedom of Information Act 2000. The Commissioner upheld its application of section 40(2) but found procedural breaches in respect of the time taken to respond to the 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.

Background

2. The complainant requested the information in connection with a grievance procedure that he was bringing against the CPS, alleging discriminatory practices and unfair dismissal. Some of the information requested was quite sensitive. It was required for comparative purposes, the complainant wishing to ascertain whether the CPS was consistent in its disciplinary approach towards white and non-white employees.

The Request

3. On 4 April 2010 the complainant submitted a request for information consisting of eight questions, each containing several detailed sub-questions. On 4 May 2010, following on from the first request, he submitted a further multi-part request. Both sets of requests are reproduced in Annex A to this Decision Notice.
4. Because each question is quite detailed, and because the complainant did not go on to challenge the CPS's response to every question, only those questions where he asked the CPS to review its response are reproduced in Annex A.
5. Furthermore, the questions include references to the disciplinary and criminal records, employment history and ethnicities of named individuals. Their identities have therefore been redacted from the questions reproduced in Annex A.
6. In response to the request of 4 April 2010, the CPS issued a refusal notice dated 5 May 2010, one day after the permitted twenty working days for responding. The Notice provided some of the requested information, explained that it did not hold other items and refused the remainder under section 40(2) of the Act.
7. It refused requests 3, 4, 6 (points 3, 8 and 9) and 7 under section 40(2) on the grounds that the requested information constituted the personal data of the members of staff named. In respect of request 8, the CPS responded that the mail log had been checked for the time period 16 November 2009 through to 31 December 2009 and there was nothing recorded that suggested any mail was received from the complainant.
8. On 12 May 2010 the complainant asked the CPS to review its responses in respect of requests 3, 4, 6, 7 and 8.

9. In respect of the second request, dated 4 May 2010, the CPS issued a refusal notice on 21 May 2010. It provided some of the requested information and refused the remainder under section 40(2) of the Act.
10. Regarding point 3, the CPS commented that it did not understand what was meant by 'relationships' and asked the complainant to clarify this part of the request. In respect of points 5, 6 and 7, the CPS refused to supply this information under section 40(2) of the Act, on the grounds that it was sensitive personal data.
11. The complainant asked the CPS to review its decisions in respect of the above points on 21 June 2010. In respect of point 3, he clarified that he wished to know whether a named member of staff had had a "more than professional relationship" with a particular colleague. He asked the CPS to disclose how long they had worked together, when and in what capacity. In respect of point 5, 6 and 7 he clarified that he was not asking for any personal data to be released.
12. The CPS provided the outcome of its internal review of both sets of requests on 23 July 2010.
13. It upheld its application of the exemption at section 40(2), apart from an instance where information about a named individual's current position was already in the public domain (request 4 April 2010, question 7, final point). This information was duly disclosed.
14. Commenting on question 3 of the request of 4 April 2010, the CPS stated that all employees are engaged according to CPS recruitment policy.
15. Commenting on question 8, it stated that the complainant's emails were not accepted by its server because he had wrongly addressed them. It stated that he should have received an automated non-delivery of email message. It also supplied information in respect of point (h) of question 8.
16. Turning to the complainant's requests of 4 May 2010, in respect of question 3 the CPS provided information about when and where the two named individuals had worked together.
17. In respect of questions 5, 6 and 7 it confirmed that the named individual had dealt with one appeal against dismissal and that release of any further information would lead to the identification of the person involved. It re-stated its position that the information was therefore exempt under section 40(2).

The Investigation

Scope of the case

18. On 27 July 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

- that the CPS had failed to provide him with the information he asked for, and that section 40(2) did not apply;
- that it had failed to respond to his requests within appropriate time limits;
- that it had failed to engage properly with his requests, often giving one general answer, when several specific answers were required.

Chronology

19. On 3 September 2010, the Commissioner notified the CPS of the complaint against it and asked to be sent copies of any information it held which was covered by the requests, within twenty working days. He asked the CPS to specify which information was subject to exemption from disclosure.
20. On 15 September 2010 the CPS provided four files it had compiled in the course of responding to the complainant's requests. These files, whilst they record certain exchanges regarding the handling of the requests, did not set out precisely what information the CPS held which it considered to be exempt, or its reasons for considering it so. The bundle did, however, contain a fairly detailed overview of the CPS's interpretation and application of the exemption at section 40(2).
21. On 17 January 2011 the Commissioner again asked the CPS to provide him with the withheld information. The Commissioner also asked a series of questions about the CPS's response to particular requests.
22. There followed an exchange of correspondence between the CPS and the Commissioner, in which it addressed each of the complainant's requests individually. During the course of the exchange the Commissioner determined that further information held by the CPS should be disclosed to the complainant, namely:
- information already in the public domain;
 - operational information about a CPS department;

- a response to each individual point of question 8 of the request of 4 April 2010.
23. The Commissioner also advised that in order to comply with the requirements of section 17(5), the CPS should supply a valid refusal notice detailing:
- a costs estimate in respect of a claim that section 12 applied.
24. The CPS communicated all of the above information to the complainant in emails dated 19 April 2011 and 14 June 2011. However, it maintained its position that section 40(2) applied in respect of the requests for information about named individuals.

Analysis

Exemptions

Section 40

25. Section 40(2) provides an exemption for information which is the personal data of any third party and where either of the conditions set out in section 40(3) is met. (The relevant sections of section 40 are included in the legal annex).
26. In order to rely on the exemption provided by section 40, the information being requested must therefore constitute personal data as defined by the Data Protection Act 1998 (DPA).
27. The information which the CPS continues to withhold under section 40(2) is as follows: the disciplinary and criminal records of named individuals; the employment record of a named individual; the ethnicities of named individuals involved in a disciplinary case; and the gender and ethnicities of complainants and respondents in dismissal appeals heard by a named individual, together with the outcomes of those cases.
28. All of this information is considered to be personal data because it 'relates to' identifiable living individuals and provides details about their employment. In the case of the dismissal appeals, although the complainant did not ask for names to be released, the CPS confirmed that the named individual had heard only one case, and argued that the requested information was therefore information relating to a particular individual (the appellant) who could easily be identified from that information. The Commissioner notes that taken together the requested information could easily identify an individual, particularly to other employees of the CPS, and that it therefore constitutes personal data.

29. In addition, the complainant requested information about ethnicity and criminal convictions, both of which are designated as sensitive personal data under section 2(a) and (g) of the DPA.
30. Having established that the withheld information is personal data, the Commissioner is satisfied that section 40 of the Act is engaged. It is therefore necessary to decide whether the information is exempt from disclosure under any of the conditions described in section 40(3). The first condition applicable is that described at section 40(3)(a)(i), that disclosure will breach any of the data protection principles.
31. The Council has argued that the withheld information is exempt under section 40(2) because disclosure would breach the first data protection principle.
32. The first data protection principle has two components:
 1. personal data shall be processed fairly and lawfully; and
 2. personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met and, in the case of sensitive personal data, one of the conditions of schedule 3 is also met.

Fairness

33. In considering whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has first considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations of the individuals concerned, the nature of those expectations and the consequences of disclosure to the individuals. He has then balanced against these the general principles of accountability and transparency, as well as any legitimate interests which arise from the specific circumstances of the case.

Expectations of the individuals concerned

34. A data subject's expectations are likely in part to be shaped by generally accepted principles of everyday interaction and social norms, for example, privacy. It is accepted that every individual has the right to some degree of privacy. However, expectations are also shaped by a commitment to transparency in the way public authorities conduct their activities, and the Act's presumption in favour of disclosure. This was recognised by the Tribunal in *The Corporate Officer of the House of Commons v Information Commissioner and Norman Baker MP* (EA/2006/0015 & 0016), which commented that:

“The existence of FOIA in itself modifies the expectations that individuals can reasonably maintain in relation to the disclosure of information by public authorities, especially where the information relates to the performance of public duties or the expenditure of public money. This is a factor that can properly be taken into account in assessing the fairness of disclosure.” (para 43)

35. The Commissioner considers that although there are no absolute rules, where information relates to an individual's private life (i.e. their home, family, social life or finances), it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life). The Commissioner believes that employees of public authorities should be open to scrutiny and accountability and should expect to have some personal data about themselves released because their jobs are funded by the public purse. However, as set out in his guidance on section 40, the Commissioner also considers that information which might be deemed 'HR information' (for example details of pension contributions, tax codes, etc) should remain private, even though such information relates to an employee's professional life, and not their personal life.
36. In this case the Commissioner has considered whether the requested information might be deemed HR information. The Commissioner believes that the information relevant to this case could be argued to fall into the category of HR information, because it relates to disciplinary actions and employment histories and is a personnel matter, and his general view is that this type of information should remain private. The Commissioner is satisfied that the data subjects would have had a reasonable expectation that details of disciplinary action, allegations of misconduct and employment histories, and highly personal information about ethnic origin would be kept confidential and not passed on to third parties without their consent.

Consequences of disclosure

37. In light of the nature of the information and the reasonable expectations of the individuals concerned, as noted above, the Commissioner is satisfied that release of the withheld information would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the data subjects.
38. When considering the consequences of disclosing the withheld information, the Commissioner has also considered how this data could be used by the public. Disclosure under the Act represents disclosure to the public at large. Given the nature of some the requested information

about disciplinary and criminal records, the Commissioner considers that there is a possibility that, should the information be disclosed, it could expose the individuals to unjustified harassment.

General principles of accountability and transparency

39. Notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if there is a more compelling public interest in disclosure.
40. The Commissioner notes that in the complainant's opinion, disclosure of the requested information would be in the public interest, because it would allow scrutiny of whether the CPS manages employee recruitment and discipline in a fair and consistent manner, and particularly whether it adheres to its racial equality policies.
41. The complainant argues that:

"There is a legitimate public interest to know that CPS is 1) complying with their equal opportunity policy, 2) complying with the recruitment policy and 3) complying with the civil service code for recruitment and transparent in the effective use of their policies.

Disclosure is therefore relevant and reasonable in all circumstances."

42. The Commissioner also believes there is a legitimate public interest in disclosure of information which would promote accountability and transparency in the spending of public money. In particular, the Commissioner believes there is a legitimate interest in knowing that the staff appointed are suitably experienced to perform their roles.
43. However, the Commissioner believes that the public's interests must be weighed against the prejudices to the rights, freedoms and legitimate interests of the members of staff concerned. The Commissioner accepts the CPS's contention that these members of staff would have a strong expectation of privacy and confidentiality over the details of disciplinary matters and employment histories. The Commissioner also notes that there is no suggestion that either the CPS or the individuals have placed any of the requested personal data into the public domain; and that the CPS has explained that all staff are recruited in line with established policies and procedures, and has explained to the complainant what these are.
44. The Commissioner's conclusion is that disclosure of the requested information would mean private information about individuals would be

placed in the public domain (in the case of the dismissal appeal information, disclosure would enable private information to be deduced about individuals by others who possessed 'corroborating information').

45. The Commissioner finds that these individuals would have a reasonable expectation that the information related to disciplinary proceedings, employment histories and ethnicities would remain confidential, and he therefore concludes that the disclosure of the requested information would be unfair and a breach of the first data protection principle. It has therefore not been necessary to go on to consider any of the conditions in Schedule 2 of the Data Protection Act 1998.
46. The Commissioner therefore upholds the CPS's application of the exemption provided at section 40(2) of the Act.

Procedural Requirements

47. The CPS exceeded the 20 working day time limit for responding to the complainant's request of 4 April 2010.
48. It failed to include in its refusal notice an explanation that the provision of certain information would exceed the costs limit.

The Decision

49. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - it correctly identified that the exemption at section 40(2) applied in respect of the requested information.
50. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - it failed to communicate within the statutory time for compliance that a non-disclosure exemption applied, which is a breach of section 10(1);
 - it failed to issue a refusal notice within twenty working days, which is a breach of section 17(1);
 - in relation to section 12, it failed to issue a refusal notice complying with section 17(5) within the statutory timescale.

Steps Required

51. The Commissioner requires no steps to be taken.

Right of Appeal

52. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

53. 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.
54. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 29th day of June 2011

Signed

**Jon Manners
Group Manager
Information Commissioner's Office
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Legal Annex

General Right of Access

Section 1(1) provides that -

"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 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

Refusal of Request

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (g) states that fact,
- (h) specifies the exemption in question, and
- (i) states (if that would not otherwise be apparent) why the exemption applies."

Section 17(5) provides that –

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

Section 40(2) provides that –

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

- (j) it constitutes personal data which do not fall within subsection (1), and
- (k) either the first or the second condition below is satisfied."

Section 40(3) provides that –

"The first condition is-

- (l) 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-
 1. any of the data protection principles, or
 2. section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(m) 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 Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

Section 40(4) provides that –

"The second condition is that by virtue of any provision of Part IV of the 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)."

Annex A - Requests

4 April 2010

“Request 3:

What recorded information does the CPS hold of the following:

- 1. How many complaints were made against [J] in the last 10 years prior to his resignation on [date redacted]?*
- 2. What were the outcomes of the complaints*
- 3. How many were up held, not upheld, partially upheld*
- 4. What were the nature and type of complaints*
- 5. What is the name of the CCP and North Region Legal Director*
- 6. What is his or her relationship with [J]?*
- 7. How was the informal process initiated by the CCP and North Region Legal Director?*
- 8. What initiated and led to [D] writing to [J] providing him with a copy of the investigation report and advising him that he had 10 days to appeal*
- 9. Who appointed the appellate authority in the London CPS [C] to hear [J]’s appeal*
- 10. What record(s) does CPS hold of such or similar events staff resigning, re-engaged informally, allowed to appeal after Syears¹ or more and his or her appeal allowed in the last 10years?*

Request 4:

On 19/3/10, [P] says “You incorrectly state that I have failed to deal with this point. I gave this matter proper consideration and I confirm that [X] has no conflict of interest and I am fully satisfied that she will remain neutral, considered and fair in discharging her duty”.

- 1. What recorded or recordable information including documentations does CPS holds in the investigation of [X]’s involvement in the informal*

¹ The Commissioner assumes this should read “5 years”

recruitment of [J], appeal and appointment of the appellate authority namely [C]?

- 2. If no investigation has been carried out, what record (s) does CPS hold of [X]'s involvement in the informal recruitment of [J], appeal and appointment of the appellate authority namely [C]?*

Request 6

On 19/3/10, [P] in a letter to me wrote "[V]'s involvement was in compliance with paragraph 5.3 (a) of the CPS Disciplinary Policy and as such your concerns of unfairness are not legitimate"

What records (s) does the CPS holds of the following:

- 1. What is the official title of [V]?*
- 2. What office is she based or located?*
- 3. What was her previous job positions?*
- 4. When did she move to her current position?*
- 5. What were her specific involvement under paragraph 5.3?*
- 6. In what form was the appointment of [X] by [V] as [X] stated in her letter to me, made?*
- 7. Flowing from above, was it in writing including electronic emails, kindly supply the document appointing [X]?*
- 8. What disciplinary investigation was carried out following the Employment Tribunal's judgment and Court Appeal decision in Aziz v CPS, in which [V], [Y], [Q] were criticized for not following CPS disciplinary procedures?*
- 9. What are the ethnicities of [V], [Y] and [Q]?*

Request 7:

What record (s) does the CPS hold of the ethnicity of [B]?

What record does the CPS hold of a drink driving criminal charge against [B], if any

What record does the CPS hold of any criminal conviction recorded against [B]?

What disciplinary measure was taken against him by the CPS?

What is [B]'s current position in the CPS?

Request 8

[P] repeated on 19/3/10 in her letter "As I stated in my 8th March 2010 response no second appeal was ever received from you and your Grievance process concluded on 10th November 2010".

Further, I informed [X] on the 22/3/10 that [G] instructed me whom to send my further appeal to and I duly complied on 16/11/09 and even sent it to two other staff including [D], who stated that he had checked 7 times and no further appeal received. The assertion that no second appeal was ever received is astonishing.

What record does the CPS holds of the following:

- a) what forms were these checks or searches made?*
- b) Save for [D], what other staff made these checks or searches*
- c) What electronic check was made of [N]'s computer*
- d) What electronic check was made of [D]'s Computer*
- e) What electronic Check was made of [T]'s computer*
- f) What access subject search has CPS made of the emails received on 16/11/09 at 1613hours and 1642 hours respectively?*
- g) What forensic interrogation has been made of these individuals computers*
- h) What inquiries were made by [X] following the receipt of detailed information from me on 22/3/2010 of whom the further appeal was sent in addition to [D]?*
- i) What record (s) of mail logs received between 16/11/03 and December 2009 through the post?"*

4 May 2010 – letter addressed to [K]

3. *What records do you hold or CPS holds of your relationships with the following below?*

[P]

[Z]

[X]

[D]

[T]

[G]

[C]

[V]

[R]

[A]

Alternatively, which one of the above appointed you as the appellate body?

5. *How many dismissal appeals have you conducted in the last 10 years? Of these cases I would like to know:*

- The gender/race background of the complainant(s)*
- The gender/race of the respondent (s)*
- How many did you uphold, not uphold or partially uphold?*
- The outcome of the dismissal - breakdown in terms of sex/race*

6. *Of those upheld or partially upheld or not upheld, what were the ethnicities of appellants?*

7. *Of the dismissal appeal you have conducted?*

- How many were for criminal conducts or following conviction in a criminal court?*
- What did you uphold i.e. the disciplinary officer's decision or the appellant's appeal?*
- What did you recommend in each appeal, reduced penalty or not?*