Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 June 2011

Public Authority: **Her Majesty's Courts and Tribunals Service (an executive agency of The Ministry of Justice)**

Address: **102 Petty France**
London
SW1H 9AJ

Summary

The complainant requested the names and addresses of all individuals summoned for jury service at the Queen Elizabeth II Law Courts in Birmingham in July 2009. Her Majesty's Courts and Service (HMCS), an executive agency of The Ministry of Justice, refused the request on the basis of sections 40(2), 38(1)(a) and 38(1)(b). (In submissions to the Commissioner it also subsequently claimed that the requested information was also exempt from disclosure on the basis of section 31(1)(c).) The Commissioner has concluded that the requested information is exempt from disclosure on the basis of section 40(2) of the Act but in handling the request HMCS committed a number of procedural breaches of the Act.

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.

The Request

2. The Commissioner notes that under the Act Her Majesty's Courts Service (HMCS) is not a public authority itself, but is actually an executive agency of the Ministry of Justice (MoJ) which is responsible for HMCS and therefore, the public authority in this case is actually the MoJ not

HMCS. However, for the sake of clarity, this decision notice refers to HMCS as if it were the public authority.[1]

3. On 31 March 2010 the complainant submitted the following request to HMCS:

> 'I hereby request provision of the following information under Part I of the Freedom of Information Act 2000:
>
> Names and contact addresses of persons summoned for jury service at the Queen Elizabeth II Law Courts, 1 Newton Street, Birmingham, West Midlands, B4 7NA during the month of July 2009'.

4. HMCS acknowledged receipt of this request on 8 April 2010 and explained that a substantive response would be sent by 5 May 2010.

5. Having received no such response, the complainant contacted HMCS again on 7 May 2010.

6. HMCS issued the complainant with a substantive undated response which the complainant received on 10 May 2010. The response explained that although HMCS held the requested information it was withholding it on the basis of sections 40(2) and 38 of the Act. (HMCS did not specify which of the sub-sections of section 38 it was seeking to rely on.)

7. The complainant contacted HMCS on 18 October 2010 and asked for an internal review of this decision to be undertaken.[2]

8. HMCS informed the complainant of the outcome of the internal review in an undated letter which was received by him on 6 November 2010. The review upheld the application of sections 40(2) and 38 as a basis to withhold the information that had been requested.

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[1] On 1 April 2011 Her Majesty's Courts Service became Her Majesty's Courts and Tribunals Service.

[2] The Commissioner notes the complainant's delay in asking for an internal review in this case. The Commissioner recommends that requesters ask for an internal review of a public authority's decision as soon as possible and certainly within two months of receiving a refusal notice.

The Investigation

Scope of the case

9. On 14 December 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:

    - The information requested was not personal data as defined by the Data Protection Act 1998 (DPA) and thus cannot be exempt from disclosure under section 40(2) of the Act.

    - Even if the information were personal data as defined by the DPA, Part II of Schedule I of the DPA does not state that a data subject's reasonable expectations are a relevant consideration when assessing fairness.

    - HMCS' application of section 38 was irrational and without any evidence to support the suggestion that disclosure of the requested information would endanger the physical, mental health or safety of any individual.

Chronology

10. The Commissioner contacted HMCS on 29 January 2011 in order to inform it that this complainant had been received. The Commissioner also asked to be provided with a copy of the information that had been requested, along with submissions to support HMCS' decision to withhold the information.

11. HMCS provided the Commissioner with a copy of the withheld information on 11 March 2011.

12. The Commissioner contacted HMCS again on 21 March 2011 and asked for a response to number of specific points regarding the application of sections 40(2) and 38, including which sub-sections of section 38 it was seeking to rely on.

13. HMCS provided the Commissioner with a response to these queries on 11 May 2011. In this response HMCS also indicated that in addition to sections 40(2), 38(1)(a) and 38(1)(b) it considered the requested information to be exempt from disclosure on the basis of section 31(1)(c).

Analysis

Exemptions

Section 40(2) – personal data

14. Section 40(2) of the Act states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the DPA. HMCS has argued that disclosure of the requested information would be unfair and thus breach the first data protection principle which states that:

> '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.'

15. Clearly then for section 40(2) to be engaged the information being withheld has to constitute 'personal data' which is defined by the DPA 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 of the individual.'

16. The complainant has argued that the requested information does not fall within this definition. The Commissioner disagrees with this position because it is very clear that the names and addresses of the individuals who were summoned for jury service can easily be used to identify them.

17. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
    - what the public authority may have told them about what would happen to their personal data;
    - their general expectations of privacy, including the effect of Article 8 ECHR;
    - the nature or content of the information itself;
    - the circumstances in which the personal data was obtained;
    - particular circumstances of the case, e.g. established custom or practice within the public authority; and
    - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.

- The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
    - whether information of the nature requested is already in the public domain;
    - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?

18. Furthermore, notwithstanding the 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 it can be argued that there is a more compelling public interest in disclosure.

19. In considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.

20. Before turning to consider the application of the above criteria to this case, the Commissioner notes that the complainant has argued that Part II of Schedule I of the DPA, which explains how the data protection principles should be interpreted, does not make explicit reference to a data subject's reasonable expectations. However, the Commissioner does not believe that this precludes such a criterion

being used in an assessment as to whether disclosure of personal data would be fair as Part II should be been as guideline of how to interpret the principles rather than a specific framework. Moreover, Part II of Schedule I in fact explains that:

> 'In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they obtained is deceived or misled as to the purpose or purposes for which they are to be processed'.

21. In the Commissioner's view the above quote clearly implies that a data subject's expectations of how their personal data will be processed is central to the interpretation of the data protection principles.

HMCS' position

22. With regard to the reasonable expectations of the individuals falling within the scope of the request, HMCS has confirmed that the members of the public summoned for jury service are not explicitly told by HMCS, or in any of the MoJ's literature, that their names won't be disclosed to third parties. However, as the information is their personal data the individuals are entitled to believe that HMCS as an agency of the MoJ would keep personal information secure at all times and would not disclose this information to any third parties. This expectation is based upon the fact that the persons summoned generally must serve – i.e. they do not volunteer for jury service and thus they do not voluntarily disclose their personal data to HMCS.

23. With regard to the consequences of disclosure, HMCS has confirmed that its concern is that jurors may get unwarranted attention from the defendants, family members of the accused or other parties interested in the court cases in question. With regard to the specifics of this case, HMCS noted that Birmingham Crown Court deals with the full range of criminal cases, including murder, rape and GBH. As jurors are drawn from the local community they can be concerned about their safety.

24. HMCS confirmed to the Commissioner that it had considered whether any of the conditions in Schedule 2 of the DPA could be met. Given that none of the jurors had consented to their personal data being disclosed, the only condition which was relevant to this request was the sixth which states that:

> 'The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, expect where the processing in unwarranted in any particular case by reason of

> prejudice to the rights and freedoms of legitimate interests of the data subject'.

25. HMCS argued that the only party with any legitimate interest in knowing the names of the jurors is the accused because they should know who they are being tried by. However, this interest was already met because as part of the empanelment process the names of the jurors are called out in court. Although the defendant and people in the public gallery who could be friends or supporters of the accused can see the empanelment process and will hear the names read out, neither the defendant nor those the public gallery are provided with contact details or addresses of the jurors. HMCS also explained that in certain cases jurors are called out by number, rather than by name, for security reasons. As the accused in the vast majority of cases would know the names of the jurors, HMCS believed that this met any legitimate interests that exist in specific court cases. Therefore HMCS was strongly of the opinion that there were no legitimate interests in disclosure of the requested information to the wider public.

26. HMCS also emphasised that once a juror has completed his or her service it is not possible for a third party to seek reasons for their verdict as this would constitute contempt of court. HMCS drew the Commissioner's attention to section 8 of the Contempt of Court Act 1981 which states that:

> 'it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings'.

The Commissioner's position

27. Despite the fact that individuals are not explicitly told what will happen to their personal data when they are summoned for jury service, the Commissioner agrees with HMCS that any individuals who are called would still have a reasonable expectation that their names and addresses would not be disclosed to third parties. In reaching this conclusion the Commissioner has reviewed the various leaflets included on HMCS' website aimed at those who have been called up for jury service and he accepts that the description of the trial process set out in these documents clearly implies that a jurors' name and address would not be disclosed to third parties.

28. Furthermore the Commissioner also agrees with HMCS that disclosure under the Act of jurors' names and contact details could lead them to receive unexpected and unwarranted attention for the reasons identified by HMCS. In the Commissioner's opinion such attention could

be correctly seen as a significant invasion into the private lives of the individual jurors, particularly so if they were contacted at their residential addresses which comprise the requested information.

29. The Commissioner also believes that the consequences of any disclosure have to be seen in the context of the fact that the individuals do not 'volunteer' for jury service but are summoned. Therefore serving on a jury is not something that individuals have proactively chosen to do and for some individuals that have been summoned are perhaps doing so against their wishes, particularly if their application to be excused or deferred from attending has been declined. In the Commissioner's opinion this lends notable weight to the argument that disclosure of the requested information would be unfair.

30. The Commissioner does not believe that his position as set out in the previous paragraphs is undermined by the fact that in most cases jurors' names are in fact read out in open court. The Commissioner has previously issued a number of decision notices where the requested information comprises personal data that has previously been disclosed in open court but the notice has concluded that disclosure of that same information would breach the DPA. Although such cases have invariably related to the personal data of the defendant rather than the personal data of the jurors, the Commissioner believes that the principles identified in these decisions are relevant to this case for the following reasons:

31. The Commissioner's conclusions in these previous cases, supported by the findings of a number of subsequent Information Tribunal decisions, effectively adopted the position that simply because personal data was disclosed in open court this did not mean that such information would remain in the public domain. The general principle adopted in these decisions was that the more time that had elapsed since the date of the court case, the less likely any disclosure of that information would be fair.

32. In case FS50075171, which concerned information about prosecutions relating to bus fare irregularities, the Commissioner recognised that data is disclosed in court and could be reported, but the found that later disclosure would be unfair:

> '…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.' (para. 5.3.5)

33. In another case, reference FS50076855, which concerned the legal aid costs awarded to one of the parties, and did not therefore relate to the details of an offence the Commissioner noted that, 'disclosures that are required as part of the court proceedings are, in practice, only disclosures to a limited audience.' (para. 26)

34. Following the approach adopted in these earlier decisions, in the circumstances of this case the Commissioner does not believe that simply because the names of the jurors were read out in court during the empanelment process at Birmingham Crown Court in July 2009 this means that when the request was submitted in March 2010 these names could still said to be in the public domain. Although the passage of time between any relevant court cases and the request is not particular lengthy, the Commissioner believes that the names of all the jurors were obviously disclosed to a very limited audience, i.e. those individuals in the public galleries of the relevant court rooms on the days in July 2009 when each jury was sworn in. Furthermore, given that several hundred names have been withheld, rather than just say the names of the 12 people sitting on one particular jury, it would appear highly unlikely that an individual could have been in each court to hear all of the names. Moreover, even though the media may report the key details of court cases they rarely, if ever, report the names of the jurors who have served in a particular case, and the Commissioner has no reason to assume that this practice was not followed in respect of the cases heard at Birmingham Crown Court in July 2009.

35. Finally, having considered the circumstances of this case, carefully the Commissioner is sceptical as to whether there is in fact a genuine public interest in the requested information being disclosed. It is obviously in the public interest that the public have confidence in the justice system; disclosure of this information could allow the public to assess the suitability of jurors and independently verify that they were eligible to serve. However, HMCS already has safeguards in place to ensure the correct people are chosen to effectively serve the public interest of the administration of justice. Moreover, in the vast majority of cases defendants are informed in court of the names of those on their jury. In light of the limited weight which any public interest arguments in disclosure attract and the strongly held expectation of

the individuals summoned for jury service and the detrimental consequences of disclosure, the Commissioner is satisfied that disclosure of the requested information would be unfair.

36. In light of his findings in respect of section 40(2) the Commissioner has not gone on to consider whether HMCS was also entitled to withhold the requested information on the basis of sections 38(1)(a), 38(1)(b) and 31(1)(c).

Procedural Requirements

37. Section 10(1) of the Act requires a public authority to respond to a request within 20 working days following the date of receipt. If a public authority wishes to rely on an exemption to refuse to provide the information requested, in line with section 17(1) it must issue a refusal notice to the applicant within the time period required by section 10(1).

38. In this case the complainant submitted his request on 31 March 2010 and therefore the HMCS had until 29 April 2010 to issue its response. Although the refusal notice issued to the complainant was not dated, the complainant did not receive it until 10 May 2010. The Commissioner is therefore satisfied that this notice was not issued within 20 working days and this constitutes a breach of section 17(1).

39. Section 17(1)(b) of the Act requires public authorities to specify the sub-section upon which they are relying. In this case the refusal notice issued by HMCS simply stated that it was relying on section 38 rather than confirming that it was in fact relying on both sub-sections within this exemption, i.e. sections 38(1)(a) and 38(1)(b). This failure constitutes a breach of section 17(1)(b).

The Decision

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40. The Commissioner's decision is that the public authority dealt with the following element of the request in accordance with the requirements of the Act:

- The requested information is exempt from disclosure on the basis of section 40(2).

41. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- HMCS breached section 17(1) by failing to issue its refusal notice within 20 working days of the request and furthermore breached

section 17(1)(b) by failing to state the specific sub-sections of section 38 it was seeking to rely on.

Steps Required

42. The Commissioner requires no steps to be taken.

Right of Appeal

43. 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

44. 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.

45. 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 20th day of June 2011

Signed ……

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

Legal Annex

Freedom of Information Act 2000

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"

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

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 -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

Law enforcement

Section 31(1) provides that –

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) the prevention or detection of crime,

(b) the apprehension or prosecution of offenders,

(c) the administration of justice,

(d) the assessment or collection of any tax or duty or of any imposition of a similar nature,

(e) the operation of the immigration controls,

(f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

(h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or

(i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment."

Health and safety

Section 38(1) provides that –

"Information is exempt information if its disclosure under this Act would, or would be likely to-

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual."

Personal information

Section 40(2) provides 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), and

(b) either the first or the second condition below is satisfied."

Section 40(3) provides 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-

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

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

Data Protection Act 1998

Part I

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

"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;

Schedule 2

Conditions relevant for purposes of the first principle: processing of any personal data

1. The data subject has given his consent to the processing.

2. The processing is necessary— (a) for the performance of a contract to which the data subject is a party, or (b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4. The processing is necessary in order to protect the vital interests of the data subject.

5. The processing is necessary—

(a) for the administration of justice

(b) for the exercise of any functions conferred on any person by or under any enactment

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department

(d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

6. — (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.