

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 02 August 2012

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

### Decision (including any steps ordered)

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1. The complainant requested copies of all correspondence, including emails, between two named senior Crown Prosecution Service (CPS) officers (officers A and B) and the CPS Freedom of Information Unit or any other person, relating to his FOIA request of 17 November 2011 for the work email addresses of officers A and B.
2. The Commissioner's decision is that CPS applied the section 40(1) and 40(2) exemptions correctly but contravened a number of the procedural obligations set out in sections 10 and 17 FOIA when handling this request.
3. The Commissioner does not require CPS to take any steps because it has correctly maintained the section 40(1) and 40(2) exemptions.
4. The complainant made a separate but related complaint to the Information Commissioner about the initial withholding of the email addresses of officers A and B. The Information Commissioner's decision about this matter is contained in his case reference FS50428801.

### Request and response

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5. On 20 December 2011, the complainant wrote to CPS and requested information in the following terms:

*"Please provide copies of all correspondence including Emails between [two named senior CPS officers, officers A and B] and the CPS Freedom of Information Unit or any other known person relating to the Freedom of Information request that I [the*

*complainant] made on 17 November 2011 for the work Email addresses of [officers A and B]."*

6. On 22 December 2011 the complainant sent CPS a rider to his information request clarifying that he wanted to see:

*"copies of 'all correspondence' included any correspondence regarding this matter even if it was sent using personal Email address's or SMS txt messages Etc."*

He added that deleting or concealing information following receipt of a request was a criminal offence under section 77 FOIA.

7. CPS responded on 20 January 2012 saying that some recorded information was held that fell within the scope of the information request. CPS provided copies of the recorded information held but redacted information that it said was exempt from disclosure under section 40(2) FOIA.
8. Following an internal review CPS wrote to the complainant on 14 February 2012 saying that some additional information had come to light: a letter dated 17 November 2011 and an email dated 19 December 2011. CPS had not identified these in time for them to be communicated on 20 January 2012. CPS disclosed these additional documents to the complainant with some further redactions for which it relied upon the section 40(1) exemption of FOIA.

## **Scope of the case**

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9. On 15 February 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He said that officers A and B both had a public-facing role acting in their professional capacity when working for CPS. He complained of procedural breaches of FOIA and added that the section 40(1) FOIA exemption had not been cited in the CPS refusal notice of 20 January 2012 but was only relied upon at internal review.
10. On 25 April 2012 the complainant asked the Information Commissioner to record any breaches of FOIA, including breaches of sections 1, 10, 17, and to issue a decision notice
11. On 20 April 2012 CPS told the Information Commissioner that it would be disclosing some further information to the complainant. In making the further disclosures, CPS continued to redact some of the information relying on section 40(1) FOIA exemption, while continuing to rely on the section 40(2) FOIA exemption in withholding other information.

12. The Information Commissioner considers the scope of his investigation to be the application of section 40(1) and 40(2) and any procedural breaches of FOIA.

## Reasons for decision

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### Applicant's personal information (section 40(1))

13. Generally, the provisions of section 40(1) to (4) exempt 'personal data' from disclosure under FOIA if to do so would breach the data protection principles.
14. Section 40(1) of FOIA states that:

*"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."*
15. Section 40(1) provides an exemption for information that constitutes the personal data of the applicant. The Information Commissioner has found that the withheld information is the personal data of the applicant and that the personal information exemption provided by section 40(1) is engaged in respect to that information. As the exemption is absolute he has not proceeded to consider a public interest test in respect of that information.

### Third party personal information (section 40(2))

16. Section 40(2) FOIA states that:

*"Any information to which a request for information relates is also exempt information if-*  
*(a) it constitutes personal data which do not fall within subsection (1), and*  
*(b) either the first or the second condition below is satisfied."*

Section 40(3) states that:

*"The first condition is-*  
*(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-*  
*(i) any of the data protection principles, 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 Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."*

Section 40(4) FOIA states 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)."*

17. In order to rely on the exemption provided by section 40(2), the withheld information must constitute personal data as defined by the Data Protection Act 1998 (DPA). Section 1 of the DPA says that:

*"'personal data' is data which relates to a living individual who can be identified:  
(a) from that data, or  
(b) from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller."*

It 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.

18. The first data protection principle 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."*

19. The Information Commissioner has found that the information withheld by CPS in reliance on the section 40(2) exemption comprised:

- the official telephone, facsimile and mobile phone numbers of officer A (but not officer A's postal and email addresses);
- the signature of officer A; and,

- an expression of opinion by a named CPS officer.

The Information Commissioner has decided that all of this information was the personal data of CPS officers and that section 40(2) was engaged.

20. The Information Commissioner has gone on to consider whether or not it would be fair to disclose the personal data of the CPS officer(s) concerned. He has regard to the fact that information disclosed under FOIA is made available not just to the requester but to the world at large.
21. The Information Commissioner has also considered the reasonable expectations of the relevant CPS officers. As senior CPS officers, the officers concerned could reasonably expect to be contacted by some members of the public from time to time and they would expect to have at least some of their relevant official contact details made available. He has decided that the provision of relevant postal and email addresses meet those reasonable expectations. He has also decided that the communication to the world at large of CPS senior officers' telephone, facsimile and mobile phone numbers – which opened up the possibility of their being the subject of uncontrollable communications, possibly at unwelcome times within, and perhaps even outside of, the working day - would not be proportionate and would not reasonably be expected by them. He has decided that there was no public interest objective that would be served by disclosing this further information and that its communication would be unfair processing of this personal data.
22. With regard to the signature of officer A, the Information Commissioner's decision is that this information had a utility for officer A which extended far beyond officer A's public role within CPS and would be routinely used by him in his private capacity. The officer would therefore not reasonably expect that his signature would be made available to the world at large. The Information Commissioner sees no public interest objective which would be served by the widespread communication of officer A's signature and has therefore decided that its communication would be unfair.
23. Turning to the expression of an opinion by a senior CPS officer, the Information Commissioner has found that the withheld information was a personal professional judgement made within the context of the CPS officer's official role; he infers that the information was likely to have been intended to enable the officer's colleagues to consider their own professional actions. The Information Commissioner has decided that the officer could reasonably have expected that his view, given in the close confines of a closed professional exchange between CPS colleagues, would be treated in confidence but also that the officer could

reasonably expect his expression of a professional judgement to be the subject of wider scrutiny in some exceptional circumstances. The Information Commissioner has considered whether disclosing this information would be a proportionate means of promoting a legitimate public interest but, having regard for the content of the information and the context in which the expression of opinion was given, does not believe that it is. He has therefore decided that disclosure would be unfair and that the exemption was correctly maintained by CPS.

24. Section 40 is an absolute exemption so there is no public interest test.

### **Procedural matters**

25. The Information Commissioner has considered whether CPS had complied with its obligations under section 10 (time for compliance with request) and section 17 (refusal of request) FOIA.

#### ***Section 10 (Time for compliance)***

26. Section 10(1) of the FOIA 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."*

27. In this case, CPS received the request on 20 December 2012 and a rider to it on 22 December 2012 and therefore responded within 20 working days following the date of receipt. However, as some information within the scope of the request was not identified until later, there was a breach of section 10(1) FOIA.

#### ***Section 17 (Refusal of request)***

28. Section 17(1) FOIA provides that:

*"A public authority which ... 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."*

29. Section 17 imposes a number of procedural obligations upon public authorities to explain their reasons for applying exemptions clearly and in a timely manner. Public authorities must also set out details of any complaints procedure that they have and, in any event, explain the requester's right to appeal to the Commissioner under section 50 of the Act. In its 20 January 2012 refusal notice CPS applied the section 40(2) FOIA exemption and gave reasons why it applied but did not make clear that it would also rely on the exemption in section 40(1) FOIA. CPS was therefore in breach of section 17(1) FOIA.

## Right of appeal

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30. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

31. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed** .....

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**