

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 January 2014

Public Authority: The Crown Prosecution Service
Address: 5th Floor Rose Court
2 Southwark Bridge
London SE1 9HS

Decision (including any steps ordered)

1. The complainant has requested information relating to abuse allegedly committed by Cyril Smith, former MP for Rochdale against children. The Crown Prosecution Service ("CPS") refused to provide this citing section 30 (investigations information) as its basis for doing so. It upheld this position at internal review and also introduced reliance on section 40 (unfair disclosure of personal data) and section 42 (legal professional privilege).
2. The Commissioner's decision is that the CPS is entitled to rely on section 30(1) and section 40(2) as its basis for refusing to provide the requested information.
3. No steps are required.

Request and response

4. On 24 November 2012, the complainant requested information of the following description:

"[1.] Please disclose how many files relating to alleged abuse by Cyril Smith have been found by the CPS; (Please see this link for more details: <http://www.dailymail.co.uk/news/article-2237627/Cyril-Smith-child-abuse-Chilling-claims-Smith-child-abuse-scandal-concealed-avoid-crisis-Westminster.html>)

[2.] Please disclose the dates of the files and which members of CPS staff were involved in assessing the allegations and files at the time;

[3.] Please disclose the number of allegations being considered, the number of alleged victims and the dates or range of dates of alleged offences;

[4.] Please disclose the name of the Director of Public Prosecutions and provide copies of the advice or notes taken of the advice given in relation to possible charges against Cyril Smith.

[5.] It is said in the article linked to above that "the Director of Public Prosecutions also sought outside opinion from a prominent barrister over whether charges should be brought in the 1970s. The barrister advised that there were sufficient grounds for prosecution. But the DPP still refused to act." Please provide any relevant documents in relation to this and any documents showing or explaining why a decision was made not prosecute."

5. For ease of future reference, the Commissioner has added numbering to the requests.
6. On 26 April 2013, the CPS responded. It refused to provide some information relating to Request 4 citing 30(1)(c) as its basis for doing so. It also explained that the CPS was not involved in the decision making of 1970. It also referred to previous disclosures it had made to the complainant as containing information caught by the scope of his requests and to previous press statements it had made.
7. The complainant requested an internal review on 27 April 2013. His request for internal review specified that he was disputing the CPS' use of section 30(1)(c).
8. The CPS sent him the outcome of its internal review on 17 July 2013. after a further protracted delay. It upheld its original position with regard to section 30(1)(c) but also introduced reliance on section 40(2) (unfair disclosure of personal data) and section 42(1) (legal professional privilege). CPS has described these exemptions as having been applied to "the advices in 1998 and 1999".

Scope of the case

9. The complainant contacted the Commissioner on 10 August 2013 to complain about the way his request for information had been handled.
10. In correspondence with the complainant, the Commissioner said that the focus of his investigation would be the CPS' use of exemptions in relation to Request 4. The complainant did not object to this.
11. This decision notice will therefore address whether the CPS is entitled to rely on the following exemptions in relation to Request 4.
 - section 30(1)(c)
 - section 40(2)
 - section 42(1)

Reasons for decision

Section 30(1) – investigations and proceedings

12. Section 30 has been considered first as it has been applied to the withheld information in its entirety.
13. Section 30(1)(c) of FOIA states that:

"Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(c)any criminal proceedings which the authority has power to conduct".
14. The phrase "*at any time*" means that information is exempt under section 30(1) if it relates to an ongoing, closed or abandoned investigation. It extends to information that has been obtained prior to an investigation commencing, if it is subsequently used for this purpose.
15. Section 30 of the FOIA is a class-based exemption, which means that there is no need to demonstrate harm or prejudice in order for the exemption to be engaged. In order for the exemption to be applicable, any information must be held for a specific or particular investigation and not for investigations in general. Therefore, the Commissioner has initially considered whether the requested information would fall within the class specified in section 30(1)(c).

16. The public authority in this case is the Crown Prosecution Service. It was created by the Prosecution of Offences Act 1985 and it is responsible for prosecuting criminal cases investigated by the police in England and Wales. As such, it has the power to conduct criminal proceedings. The Commissioner is therefore satisfied that it has the power to carry out investigations of the sort described in section 30(1)(c).
17. He has also considered the interpretation of section 30(1)(c), and is mindful that the exemption applies to information that has *at any time* been held by the authority for the purposes of criminal proceedings.
18. As the requested information clearly relates to a file considering possible criminal charges the Commissioner concludes that this exemption is properly engaged.

Public interest test

19. Section 30(1) provides a qualified exemption and is therefore subject to the public interest test under section 2(2)(b) of the Act. Section 2(2)(b) provides that such an exemption can only be maintained where:

"... in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information".

20. In considering where the public interest lies in this exemption, the Commissioner is guided by the Information Tribunal in the case of *Toms v Information Commissioner & Royal Mail* where it stated:

"... in striking the balance of interest, regard should be had, inter alia to such matters as the stage or stages reached in any particular investigation or criminal proceedings, whether and to what extent the information has already been released into the public domain, and the significance or sensitivity of the information requested".

21. The Commissioner, in considering the public interest test, starts by focusing on the purpose of the relevant exemption. The Commissioner's view is that the general public interest served by section 30(1) is the effective investigation and prosecution of crime, which inherently requires, in particular:

- the protection of witnesses and informers to ensure people are not deterred from making statements or reports by fear it might be publicised;
- the maintenance of independence of the judicial and prosecution processes;

- preservation of the criminal court as the sole forum for determining guilt.

In favour of disclosure

22. The CPS provided the complainant with the following arguments in favour of disclosure:

"[Disclosure would] increase public understanding of the CPS decision making and prosecuting process. This public interest factor has been weakened by the statement issued by the CPS which explained the rationale of the decision making at the time and by the subsequent consideration of the papers in 1997 and 1998 and the public explanation given as to how the CPS decision making (and the wider CJS [Criminal Justice System] considerations) has changed since then".

23. In correspondence with the Commissioner, the CPS acknowledged that there was a strong public interest in understanding the rationale behind its decision making at the time, particularly in such a high profile case. It added:

"However, there is a significant amount of information relating to the charging decisions already in the public domain, through detailed press releases provided to [the complainant] and on the CPS blog.¹ The key factors that led to the decisions not to charge are set out in some detail and consequently the public interest in disclosing the charging advice itself is reduced".

24. In his request for internal review, the complainant raised a number of points which he drew to the Commissioner's attention:

- The CPS statement in its blog that it would not make the decisions of 1970 today.
- Guidance published by both the ICO and the MoJ regarding section 30 acknowledges that "the public interest in disclosure is greatly strengthened 'in cases where justice was not seen to be done' ".² It could readily be argued that this is the case here.

¹ <http://blog.cps.gov.uk/2012/11/cps-statement-in-relation-to-cyril-smith.html>

² <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-exemption-s30.pdf>

- Other ICO guidance which states that "Once an investigation is completed, the public interest in understanding why an investigation reached a particular conclusion, or in seeing that the investigation had been properly carried out, could well outweigh the public interest in maintaining the exemption".³
- The complainant quoted other comments by the Commissioner: "There tends to be considerable public interest in criminal cases and in seeing that justice is done. There will be occasions when this factor favours disclosure, for instance where there is a well reported suspicion that justice was not done either to an accused person or a victim. In some cases, this may shift the balance of public interest in favour of the disclosure of information about completed cases or those which have been abandoned with no reasonable prospect of being reopened" and "In cases where a prosecution has collapsed for reasons of procedural failure or mismanagement on the part of the investigating or prosecuting authority, there will be a stronger public interest argument in favour of the disclosure of information about this and other, similar investigations."
- The complainant observed that "Clearly, because of Mr Smith's death, there is no opportunity for justice in this case".
- He contrasted the degree of transparency here with the extent of transparency in the Jimmy Savile case. He said "In fact, the charging decisions and CPS involvement in the Savile case relates to recent involvement. The decisions made in the Smith case are more historic, which only strengthens the case for transparency".
- He commented that most of the CPS' arguments seemed to apply more readily to section 36 (prejudice to the effective conduct of public affairs).
- There is a public interest in learning whether an impartial and robust process has been followed.

3

http://www.ico.org.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/section_30_investigations_13_oct_06.pdf

In favour of maintaining the exemption

25. The public authority provided the complainant with the following arguments in favour of withholding the information:

"There is a real importance in protecting a "safe space" for free and frank communications between the CPS and the police provided that such communications take place within the well established framework of the regime for disclosure in any subsequent criminal proceedings. The confidential quality of such communications – i.e. the fact that such communications will not routinely be made available to the defence or other persons who ask for them – enables CPS lawyers and police officers to be candid in their discussion of evidence. Such candour is vital for the prosecution process. The effective administration of criminal justice, and the effective prosecution of offenders, would be prejudiced if such free and frank communications were impeded by an anticipation of disclosure. This would not be in the public interest. This is a strong factor in favour of maintaining the exemption.

The above, combined with the strong public interest in the courts being the sole forum for determining guilt, outweighs the public interest in disclosure. The information is therefore exempt under section 30(1)(c)".

26. In its internal review the public authority restated these arguments.
27. The public authority also provided the following arguments to the Commissioner:

"[There] would be a danger that the CPS would make less well-informed decisions as to both the bringing of prosecutions and the litigation process thereafter. We also consider that these exchanges would be less likely to happen so fully (in writing at least) if this information was routinely disclosed.

28. It gave particular emphasis to the impact disclosure could have on individuals who had spoken to the police about their experiences.
29. It added "The fact that there is a lot of information about the charging decision already in the public domain carries a lot of weight and significantly reduces the public interest in disclosure of the charging decisions. Our view is that this, combined with the strong public interest in protecting the complainants, means the public interest favours withholding the information".

Balance of the public interest

30. The Commissioner considers this matter to be finely balanced, with powerful public interest arguments on both sides. There is considerable public concern about individuals such as Cyril Smith who acted to place themselves in high public regard and yet took advantage of that position to exert power over children so that they could abuse them. There is further public concern about how allegations of abuse were handled at the time in the criminal justice system. The CPS and other bodies such as the police have made considerable effort to reassure the public that the decisions made in the Cyril Smith case (and similar notorious cases) would not have been made today.
31. The case against Cyril Smith is inevitably closed and considerable public concern remains about apparent historic failures to prosecute high profile figures who allegedly committed a series of offences against children. Releasing the requested information could add further to the public's knowledge of the CPS decision making process in this case.
32. That said, the Commissioner acknowledges that there is a strong public interest in supporting protection of the heart of the CPS' decision-making process. Although a certain amount has now been put into the public domain about this case, discussions of the detail of decisions made about sensitive cases must remain full and frank without fear of being made routinely available to the public. The Commissioner accepts that disclosure could well serve as a deterrent to it documenting honest and frank views and findings in the future. The Commissioner considers this argument to be particularly weighty in favour of maintaining the exemption. This is not to say that he would never conclude that such information should be made available, but, on this occasion, he is of the opinion that sufficient detail about the case has been made available in order to keep the public duly informed.
33. The Commissioner recognises the compelling public interest in disclosure in this case, particularly given the passage of time and the fact that the alleged offender is now dead. However, the Commissioner also recognises the vital importance of the public authority being able to deliberate fully, and without any hindrance to the process, when considering its position in relation to a criminal trial.
34. Although he notes that there is a significant public interest in disclosure, the Commissioner finds the public interest arguments in favour of maintaining the exemption to be more compelling. He therefore concludes that the public interest in maintaining section 30(1)(c) outweighs that in disclosure.

Section 40 – Unfair disclosure of personal data

35. In the light of his conclusion on the balance of the public interest in relation to the section 30(1)(c) exemption, the Commissioner considers it important to stress that a large portion of the withheld information is also exempt from disclosure under section 40(2).
36. The exemption at section 40(2) applies where disclosure of personal data under the FOIA would contravene one of the data protection principles of the Data Protection Act ("DPA"). Personal data is information which relates to a living individual and from which they can be identified. It is also information which is biographically significant about that individual. Disclosure under the FOIA would generally contravene the first data protection principle of the DPA where that disclosure is unfair.
37. When considering fairness, the Commissioner takes into account the reasonable expectations of the individual to whom the information relates. He also considers whether disclosure would, in any event, be necessary to serve a wider and legitimate interest that outweighs any legitimate interest the individual in question might have in keeping the information private.
38. Although information relating to Cyril Smith is not personal data because he is dead, information which relates to his alleged victims is the personal data of those individuals. Those individuals have an entirely realistic expectation that information disclosed to and considered by prosecuting authorities about their experiences would remain withheld in the absence of any prosecution. If those individuals chose to make some of their experiences public, that is a matter for them. However, that does not mean that the details of the individuals' allegations, including the information withheld in this case, become the subject of legitimate public interest such that they should be publicly disclosed. Individuals should be reassured that where they give information to police and the CPS about offences allegedly committed against them, the police and the CPS will handle that information sensitively and in confidence.
39. With the above in mind, the Commissioner has also concluded that a significant portion of the withheld information is exempt under section 40(2) of the FOIA.
40. In the light of his decision on section 30(1) and section 40(2), the Commissioner has not gone on to consider section 42.

Section 10 – Time for compliance

41. 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."

42. In this case, the request was made on 24 November 2012 and therefore the first working day following the date of receipt was 25 November 2012. The CPS did not provide a response until 26 April 2013 which is 105 working days following the date of receipt. In failing to provide a response within 20 working days, the CPS contravened the requirements of sections 1 and 10 of the FOIA.

Other matters

43. Whilst there is no explicit timescale laid down by the FOIA for completion of internal reviews, the Commissioner considers that they should be completed as promptly as possible. The Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
44. The Commissioner is concerned that in this case, it took 56 working days for an internal review to be completed. The Commissioner has not been made aware that any exceptional circumstances existed to justify that delay, and he therefore wishes to register his view that the CPS fell short of the standards of good practice by failing to complete its internal review within a reasonable timescale. He would like to take this opportunity to remind the CPS of the expected standards in this regard and recommends that it aims to complete its future reviews within the Commissioner's standard timescale of 20 working days.

Right of appeal

45. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. 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.
47. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF