

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 August 2015

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information relating to grants of compensation to the family of a man wrongly convicted of murder.
2. The Ministry of Justice (MoJ) provided some information within the scope of the request, but withheld the remainder citing section 40(2) (personal information).
3. The Commissioner's decision is that MoJ incorrectly applied section 40(2) to some of the requested information.
4. The Commissioner requires MoJ to take the following steps to ensure compliance with the legislation:
 - disclose to the complainant the information identified at paragraph 81 of this decision notice.
5. The MoJ must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

6. Mahmood Hussein Mattan was hanged in Cardiff jail in September 1952, after being convicted of murdering a shopkeeper at the clothes store she ran in Bute Street, Cardiff.
7. After hearing new evidence in the case, the murder conviction was overturned by the Court of Appeal in 1998.

8. This was one of the first cases referred to the Court of Appeal by the Criminal Cases Review Commission.
9. The Criminal Cases Review Commission (CCRC) is the independent public body set up to investigate possible miscarriages of justice. The Commission assesses whether convictions or sentences should be referred to a Court of Appeal¹.
10. The requested information in this case relates to an application for compensation for a miscarriage of justice under section 133 of the Criminal Justice Act 1988 made by the relatives of Mr Mattan.

Request and response

11. On 20 December 2013 the complainant wrote to MoJ and requested information of the following description:

"..any information held relating to grants of compensation to the family of Mahmood Hussein Mattan, after the quashing of his conviction by the Court of Appeal in 1998, including the assessment conducted by Sir David Calcutt, dated 31 January 2001."

12. MoJ responded on 21 January 2014. It confirmed it holds information within the scope of the request but refused to provide it, citing section 40(2) of FOIA (personal information) as its basis for doing so.
13. The complainant requested an internal review on 19 March 2014. MoJ sent him the outcome of its internal review on 16 April 2014 upholding its original position with respect to section 40(2). MoJ explained that the information requested - *"which relates to the personal data of the relatives of Mr Mattan"* - would contravene the data protection principles if it was disclosed.

Scope of the case

14. The complainant contacted the Commissioner on 14 August 2014 to complain about the way his request for information had been handled.

¹ <http://www.ccrcc.gov.uk/about-us/>

15. He told the Commissioner that he was submitting this complaint at the same time as another complaint about the MoJ "*about a closely related request*". Although the complainant said that he was happy for both complaints to be dealt with together if that was more convenient, the Commissioner has decided to consider each complaint separately. The Commissioner has considered MoJ's handling of the related request in case reference FS50551592.

16. With respect to this case, the complainant told the Commissioner:

"The information requested has been wholly withheld as exempt under Section 40(2) (personal information). The internal reviewer states that the exempt information concerns Mr Mattan's relatives....

There was no reference to the fact that (as I had pointed out) most of the members of Mr Mattan's family to whom compensation was paid were now deceased....

I accept that information about the total compensation awarded has implications for the amount awarded to [name redacted]. However, the total amount of compensation had been reported in the news media as £700,000 or £725,000 (Times 7 June 2001; <http://news.bbc.co.uk/1/hi/wales/3204667.stm>), so it would appear that in essence that information is already in the public domain."

17. He continued:

"Even if it were not considered fair to release information about the pecuniary sums involved, the assessor's comments on the non-pecuniary aspects of the miscarriage of justice could not involve personal information about [name redacted] Nor would they be likely to involve personal information about any living individuals, as most of those involved in the case are dead (see list of deceased persons supplied). If any of the information is still considered exempt [in the light of these considerations], as far as is practicable it should be dealt with by redaction rather than by withholding entire documents".

18. During the course of the Commissioner's investigation, MoJ revisited the original request and conducted further searches. As a result, MoJ confirmed that further information within the scope of the request had come to light, information which was not identified at the time of the complainant's original request.

19. Following further correspondence and telephone calls, on 17 March 2015 the Commissioner issued MoJ with an Information Notice in accordance with his powers under section 51 of the FOIA. By way of that Notice, the

Commissioner required MoJ to furnish him with further information about its handling of the request for information in this case.

20. In response to that Information Notice, MoJ clarified the nature of the withheld information and the exemptions it considers apply, namely sections 40(2) and 21(2) (information accessible to applicant by other means) of FOIA. MoJ also confirmed that it had written to the complainant explaining about the additional material. It provided him with some information, namely the information that it considered engages section 21.
21. It is not in dispute that Mr Mahmood Hussein Mattan is deceased. The Commissioner acknowledges that both parties are satisfied that the information cannot be the personal data, or sensitive personal data, of Mahmood Hussein Mattan, the individual named in the request.
22. The complainant maintains that section 40(2) cannot apply to the withheld information.
23. In light of the above, the Commissioner considers the scope of his investigation to be MoJ's application of section 40(2) to the remaining withheld information.

The approach taken by the Commissioner

24. Taking into account the wording of the request - '*any information held relating to*' - the Commissioner acknowledges that the request in this case is broad in nature.
25. With due consideration to his role as regulator, the Commissioner makes the following observations about the approach he has adopted in conducting his investigation into the complaint in this case:
 - the withheld information has been grouped into categories, for example '*skeleton argument for claim*', '*interim assessment*', '*Home Office correspondence, submissions and notes*';
 - given the voluminous nature of the withheld information in this case, in part due to the existence of duplicated material and multiple draft versions of documents, he has taken a proportionate approach, involving sampling of the withheld information;
 - he is satisfied that the sampling he has undertaken is representative of the withheld information;
 - he has considered the representations made to him by both parties;

- he has challenged the arguments and evidence provided by the MoJ; and,
- he has reached his conclusion based on his objective assessment of all the circumstances.

Reasons for decision

Section 40 personal information

26. Section 40(2) of the FOIA states that information is exempt from the duty of disclosure if it constitutes the personal data of a party other than the complainant and its disclosure under the FOIA would breach any of the data protection principles or section 10 of the DPA.
27. In correspondence with the complainant, MoJ explained that it considers the requested information relates to the personal data of the relatives of Mr Mattan. During the course of the Commissioner's investigation, MoJ confirmed that it considered that all the withheld information comprised the personal information of a living, identifiable individual.

Is the information personal data?

28. The first step for the Commissioner to determine is whether the withheld information constitutes personal data as defined by the Data Protection Act 1998 (DPA). If it is not personal data then section 40 cannot apply.
29. The definition of personal data is set out in section 1 of the DPA:

"...data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or 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 person in respect of the individual".
30. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
31. During the course of his investigation MoJ provided the Commissioner with a copy of the withheld information together with its substantive arguments in support of its application of section 40(2).
32. MoJ explained that the information relates to an application for compensation for a miscarriage of justice made by the relatives of Mr Mattan. MoJ told the Commissioner why it considers that the withheld

information constitutes personal information. For example it told him that the sole reason for the preparation of the documents at issue was in relation to the application by the family for, and subsequent award of, compensation for wrongful conviction.

33. Acknowledging that Mahmood Mattan is deceased and therefore no DPA considerations apply in relation to information which identifies him, MoJ told the Commissioner:

"In instances where personal data of the deceased and that of a living individual are inextricably linked, the Department assesses that it is unable to separate the data of the deceased (which could be considered appropriate for disclosure,) from that of [name redacted] without breaching [name redacted]'s data rights. By this virtue the Department submits that section 40 (2) applies to the information in question".

34. MoJ also stated that, in addition to the inextricable data, it considers that other aspects of the requested information *"while seemingly about process in nature"* also constitute personal data. For example, it explained that, in its view, the assessment describes how the relevant legislation applies to the third party claim.
35. In the Commissioners' view, while a family member may be identifiable from the information at issue, the existence of a family relationship between a living individual identifiable from the information under consideration does not automatically mean that the information is the personal information of that individual.
36. In this case, having considered the withheld information, the Commissioner is satisfied that the information relates to a living individual other than the requester in respect of the application for, and subsequent award of, compensation to Mr Mattan's family.
37. In the circumstances of this case, he accepts that the information at issue is personal data.
38. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the data protection principles.

Would disclosure contravene the first data protection principle?

39. The Commissioner considers that the first data protection principle is relevant in the circumstances of this case.

40. The first principle deals particularly with the privacy rights of individuals and the balance between those rights and other legitimate interests in processing personal data. It states:

"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".

41. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions and, if relevant, one of the Schedule 3 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

Would it be fair to the data subject to disclose the requested information?

42. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
- the individual's reasonable expectations of what would happen to their information;
 - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
 - the balance between the rights and freedoms of the data subject and the legitimate interests of the public.
43. In its correspondence with the complainant, MoJ did not explain the factors it took into account in respect of the above. However, in its substantive response, MoJ provided the Commissioner more detail about its application of section 40(2).

Reasonable expectations

44. In the Commissioner's view, a key issue to consider in assessing fairness is whether the individual concerned has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy and also the purpose for which they provided their personal data.
45. The Commissioner recognises that people have an instinctive expectation that a public authority, in its role as a responsible data

controller, will not disclose certain information and that they will respect its confidentiality.

46. Referring to the age of the information, MoJ expressed the view that the data subject would have a reasonable expectation that such information would not be disclosed.
47. The Commissioner accepts that the background to this request is likely to be a sensitive matter for those involved – and that the matter refers back to events some considerable time ago.
48. In the circumstances of this case, the Commissioner is satisfied that the data subject would have a reasonable expectation that the withheld information, which constitutes their personal data, would not be disclosed to the public at large.

Possible consequences of disclosure

49. As to the consequences of disclosure upon a data subject, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
50. MoJ provided the Commissioner with detailed arguments in support of its withholding of the disputed information. For example, it told the Commissioner that, if information relating to how the decision to award compensation was disclosed, that would impact upon the private life of the data subject. It acknowledged that while there is some relevant information in the public domain, disclosure in this case would result in the world at large being provided with significantly more detail about the application and award for compensation. In MoJ's view, this would impact on the data subject's private and family life.
51. The Commissioner considers that disclosure in this case would amount to an infringement into the privacy of a living identifiable individual and has the potential to cause damage and distress, particularly as he has found that disclosure of the information would not have been within their reasonable expectations.

The balance between the rights and freedoms of the data subjects and the legitimate interests of the public.

52. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.
53. Despite the reasonable expectations of individuals and the fact that damage or distress may result from 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 its disclosure.

54. The Commissioner considers that any public interest in disclosure must be weighed against the potential prejudices to the rights, freedoms and legitimate interests of the data subject whose personal data is contained within the withheld information, including their right to privacy.
55. The interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.
56. In considering any legitimate interests in the public having access to the information, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
57. The withheld information in this case relates to the assessment when considering the amount of compensation to be awarded in respect of an individual wrongly convicted of, and hanged for, murder.
58. The Commissioner is mindful that the subject matter of the disputed information in this case relates to one of the first cases referred to the Court of Appeal by the newly formed CCRC.
59. In light of the unique aspect of that review case, the Commissioner considers that there is likely to be a significant public interest in the disclosure of any such information within the scope of the request which may add to the understanding of how the assessment for compensation was undertaken. Furthermore, he considers that there is likely to be a significant public interest in the disclosure of any of the withheld information to the extent that it aids transparency and accountability in relation to how legislation was applied to the decision-making process about the level of compensation.
60. However, the Commissioner acknowledges the sensitive circumstances of how the determination was made and the level of detail required to make such a determination.
61. Moreover, the Commissioner is not aware there is any legitimate public interest in the disclosure of much of this information; he accepts that, given the content of much of the withheld information, its disclosure would add little to the information already in the public domain.
62. In balancing the legitimate interests with the rights of the data subject, he has not seen any evidence to indicate that there is a sufficient wider legitimate public interest in this case which would outweigh the rights and freedoms of the data subject and support further disclosure in

respect of some of the withheld information. The Commissioner is satisfied that it would be unfair to the individual concerned to release that information. Disclosure would not be within their reasonable expectation and the loss of privacy could cause unwarranted distress.

63. With respect to the remainder, and taking the above factors into account, the Commissioner is satisfied that the legitimate interests of the public are sufficient to justify any negative impact to the rights, freedoms and interests of the individual concerned. He therefore considers that disclosure of the remaining withheld information would be fair in the particular circumstances of this case.

Schedule 2 DPA

64. Having determined that it would be fair and lawful to disclose some of the withheld personal data, the Commissioner has next considered whether disclosure would meet a condition in Schedule 2 of the DPA. In relation to the conditions in Schedule 2, the Commissioner considers that the most relevant condition in this case is the sixth.

65. In correspondence with the Commissioner, MoJ said:

"In terms of whether any conditions in schedule two of the DPA is met the department has considered these factors and do not consider them met for disclosure under the FOIA.... In terms of the subsequent sections of schedule 2, the Department does not consider the 'necessary processing conditions' including those outlined in section 6 concerning legitimate interests of third parties are met by this request."

66. Schedule 2 condition 6 permits disclosure where it is:

"necessary for the purposes of the legitimate interests pursued by the data controller or by a 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."

67. In other words, for the condition to be met, the Commissioner considers that disclosure must satisfy a three part test:

- there must be a legitimate interest in disclosing the information;
- the disclosure must be necessary for that legitimate interest; and
- even where the disclosure is necessary it must not cause unwarranted interference or harm to the rights, freedoms and legitimate interests of the data subject.

68. The Commissioner is satisfied that he has considered the first and third parts of the test in concluding that disclosure is fair. This leaves the second part of the test. Accordingly, the Commissioner has considered whether it is **necessary** to disclose the requested information in order to meet the identified legitimate interests.
69. Following the approach taken by the then Information Tribunal in *House of Commons v ICO & Leapman, Brooke, Thomas (EA/2007/0060 etc)*, and approved by The High Court, the Commissioner recognises that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate.
70. The Commissioner has therefore considered whether there is a pressing social need for the disclosure of the information in this case. He has also considered whether any pressing social need is likely to be satisfied in some other way.

Is there a pressing social need for disclosure?

71. In considering the 'necessity' test, the Commissioner must first establish the pressing social need – in other words, what the legitimate interests in disclosure are. In this case, he is satisfied that the legitimate interests in disclosure are in relation to the 'test case nature' of the subject matter.
72. The Commissioner is mindful that the withheld information in this case relates to an application for, and award of, compensation on the basis of a miscarriage of justice. In that respect he acknowledges MoJ's view that the subject matter can be considered sensitive and emotive.
73. In this case, he is satisfied that the legitimate interests in disclosure are transparency and accountability in relation to the decision-making process regarding the methods used in assessing and awarding compensation from public funds.
74. In the particular circumstances of this case - the quashing of the conviction by the Court of Appeal in 1998 - the Commissioner is of the view that the need for such transparency and accountability should not be underestimated. As a result the Commissioner has concluded that there is a pressing social need for disclosure.

Is disclosure necessary to meet the identified legitimate interests?

75. In the Commissioner's view there is a legitimate interest in the public knowing more about the decision-making process and understanding the methods by which compensation payments were calculated in relation to this particular case that was reviewed by the newly formed CCRC.

76. Taking the above into account, the Commissioner is satisfied that disclosure is necessary to meet the pressing social need and that there is no other means of meeting it that would interfere less with the privacy of individuals.

Would disclosure have an excessive or disproportionate adverse effect on the legitimate interests of the data subject?

77. In considering the potential effect of disclosure, the Commissioner has already addressed much of the limb of this test when considering fairness. For example he has considered the reasonable expectations of the data subject as to whether the information would be disclosed.

78. Having already established that the processing is fair, the Commissioner is also satisfied that release of the information would not cause any unnecessary interference with the rights, freedoms and legitimate interest of the data subject. He is therefore satisfied that the schedule 2 condition is met.

Is there a lawful basis for disclosure?

79. For the first data protection principle to be satisfied, disclosure must be lawful, as well as fair. The approach of the Commissioner to the issue of lawfulness under the first data protection principle is that he will find that disclosure would be lawful unless the public authority has advanced convincing arguments as to why disclosure would be unlawful.

80. In this case, MoJ has advanced no arguments on the issue of lawfulness and the Commissioner has no reason to believe that disclosure would not be lawful.

Conclusion

81. The Commissioner has found that disclosure of the information in the following information groups would be both fair and lawful and, therefore, would satisfy the first data protection principle:

- CCRC statement of reasons
- Home Office submission application for compensation
- Final assessment by Independent Assessor Sir David Calcutt QC

82. As there would be no breach of the first data protection principle through the disclosure of this information, the overall conclusion of the Commissioner is that the exemption provided by section 40(2) cannot be relied upon to withhold the above information.

83. It follows that he does not find the MoJ correctly applied section 40(2) in respect of that information and he orders its disclosure.

Other matters

84. During the course of the Commissioner's investigation, MoJ identified further information falling within the scope of the request. Its failure to identify this information when providing its initial response to the request, or during its internal review, suggests that, prior to the Commissioner's involvement, adequate searches may not have been made.
85. Where public authorities experience difficulty establishing whether information relevant to a request is held, this might also indicate records management problems. The code of practice issued under section 46 of FOIA set out the practices which public authorities should follow in relation to the creation, keeping, management and destruction of their records.
86. The Commissioner recognises the challenges that records management poses for organisations such as MoJ which hold a complex range, and large volume, of information. Nevertheless, the Commissioner expects that, in future, the authority's records management practice will conform to the recommendations of the section 46 code.

Right of appeal

87. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

88. 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.
89. 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
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