

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 May 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 legal aid payments made in respect of Michael and Mairead Philpott. Ministry of Justice (MoJ) confirmed it held the requested information but refused to provide it citing section 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that MoJ incorrectly withheld the information relating to Mr and Mrs Philpott and their legal representatives by virtue of section 40(2). The Commissioner requires the public authority to disclose the withheld information.
3. The public authority 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

4. Legal Aid Authority (LAA) is an executive agency, sponsored by MoJ. According to its website, the LAA provides civil and criminal legal aid and advice in England and Wales¹.
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¹ <https://www.gov.uk/government/organisations/legal-aid-agency>

5. For the purposes of this decision notice, the Commissioner considers the relevant public authority to be the MoJ.

Request and response

6. On 2 October 2014 the complainant wrote to MoJ and requested information in the following terms:

"Please provide the total cost of legal aid for Michael Philpott, who was found guilty of manslaughter in April 2013 in relation to the deaths of six children in a house fire.

Please provide a breakdown of the costs. For example: Barrister for crown court trial in 2013 etc. This includes the cost of any appeals.

Please provide the total cost of legal aid for Mairead Philpott, who was found guilty of manslaughter in April 2013 in relation to the deaths of six children in a house fire.

Please provide a breakdown of the costs. For example: Barrister for crown court trial in 2013 etc. This includes the cost of any appeals".

7. MoJ responded on 30 October 2014. It confirmed it held the requested information but refused to provide it citing section 40(2) (personal information) of the FOIA.
8. MoJ provided an internal review on 28 November 2014 in which, although it continued to rely on section 40(2), it revised its reasoning for doing so. It explained that, while it now considered that disclosure would be fair, no suitable Schedule 2 condition of the Data Protection Act 1998 (DPA) is met.

Scope of the case

9. The complainant contacted the Commissioner on 28 November 2014 to complain about the way his request for information had been handled.
10. He told the Commissioner:

"it must be open to the public to be able to scrutinise spending on individual cases, especially ones as high-profile and important as that in this case. The LAA has previously released information in relation to other high-profile cases, on the grounds that

transparency trumps the need for secrecy over the LAA's expenditure, and ultimately, decision making...

Transparency will increase the confidence of the public that the system is open to scrutiny and accountability in the most serious cases”.

11. He said that, in his view, MoJ had not properly considered the pressing social need for disclosure.
12. During the course of the Commissioner’s investigation, MoJ confirmed that it considers that all the requested information constitutes third party personal data. Confirming its application of section 40(2) of FOIA, MoJ told the Commissioner:

“...the internal review outlined that it considered the fair processing principle was met, but that a schedule 2 condition was not met and section 40 (2) still applied”.
13. The Commissioner considers the scope of this case to be to determine if MoJ has correctly cited section 40(2) of the FOIA in response to the request.

Reasons for decision

Section 40 personal information

14. 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.
15. During the course of the Commissioner’s investigation, MoJ confirmed that it considered the withheld information comprised the personal information of the two individuals named in the request and, with respect to the breakdown of costs, the personal data of their legal representatives.
16. With respect to information relating to the breakdown of the costs, the Commissioner considers that that information is inextricably linked to the total cost of legal aid for the Philpotts.

Is the information personal data?

17. Personal data is defined in section 1(1) of the DPA as:

"...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".

18. In correspondence with the complainant, MoJ said:

"In this specific request, you provided the names of individuals for whom you sought information about the amount of legal aid paid to legal representatives acting on their behalf in criminal proceedings. I am satisfied that information relating to whether or not an individual is in receipt of legal aid is personal data".

19. The Commissioner has previously considered the issue of whether legal aid constitutes personal information. His decision in case reference FS50076855² was that whether or not an individual is in receipt of legal aid implies something about that person's financial position and is therefore personal data.

20. Accordingly he accepts that the information at issue is the personal data of Michael and Mairead Philpott.

21. Although no separate submission was made explaining how the requested information comprises the personal information of the legal representatives acting for the Philpotts, MoJ maintains that information about the breakdown of the costs is also their personal data.

22. Notwithstanding MoJ's lack of explanation, the Commissioner accepts that information about the breakdown of the costs is the personal data of the legal representatives. He has reached this decision on the basis that the information relates to living and identifiable individuals and is clearly linked to them.

Would disclosure breach the first data protection principle?

23. The next step is to address whether disclosure of the personal data would be in breach of any of the data protection principles. The

² https://ico.org.uk/media/action-weve-taken/decision-notice/2006/383306/DECISION_NOTICE_FS50076855.pdf

Commissioner considers – and both parties agree - that the first data protection principle is relevant in this case.

24. The first data protection principle has two components:
- personal data shall be processed fairly and lawfully; and
 - personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met and in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
25. It is not in dispute that the information at issue in this case comprises personal data rather than sensitive personal data.
26. 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. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure. This is an absolute exemption.

Would disclosure be fair?

27. With respect to fairness, MoJ told the complainant:

"I consider that disclosure of this information would be fair. In coming to this view, I have taken into account the following factors, as recommended by the ICO:

- *whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;*
- *the individual's reasonable expectation of what would happen to the information;*
- *whether the legitimate interests of the public are sufficient to justify any negative impact to the rights and freedoms of the data subject".*

28. The Commissioner has issued guidance on section 40 of FOIA³. He acknowledges that the factors considered by MoJ are the factors he recommends taking into consideration.

³ <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

29. In its correspondence with the complainant, MoJ did not expand on the factors it took into account in respect of the above. However MoJ told the Commissioner that, in reaching its decision about fairness, it took into account not only LAA's standard assessment criteria for section 40 but also additional factors specific to the individuals named in this request. For example, it told the Commissioner:

"The case received widespread coverage both during and after the trial. Details of the case and the background of the individuals in question are already in the public domain, including information about Mr and Mrs Philpott's financial circumstances and receipt of benefits....The criminal case had concluded and the individuals sentenced."

Reasonable expectations

30. In the Commissioner's view, a key issue to consider in assessing fairness is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. He considers that the expectations of an individual will be influenced by the distinction between his or her public and private life. This means that it is more likely to be fair to release information that relates to the professional life of an individual.
31. In relation to the reasonable expectations of Mr and Mrs Philpott, the Commissioner acknowledges that they do not hold any official position or post which would lead them to expect greater levels of transparency. However, the Commissioner considers that given the high profile nature of the case – one that attracted strong media interest - it would not be unreasonable or unexpected that the public interest would require transparency.
32. With respect to their legal representatives, the withheld information relates to them in a work capacity rather than their private lives. In the circumstances of this case, the Commissioner is not satisfied that the Philpott's legal representatives could reasonably expect that their personal data would not be disclosed.

Consequences of disclosure

33. The Commissioner accepts that disclosure of the cost of legal aid in a high profile case such as this one, could potentially cause damage and distress to those involved: for example by the reopening of matters which they believed had been concluded once their trial had ended. In that respect, he acknowledges that disclosure might result in the Philpotts receiving further public criticism.

34. With respect to the legal representatives, the Commissioner doubts whether any specific damage would arise, given the notoriety of the case.

The legitimate public interest

35. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to provide the information if there is an overriding legitimate interest in disclosure to the public. 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.

36. Responding to the complainant's observation that LAA has disclosed information about legal aid in other cases, MoJ told the Commissioner:

"Our view is that the circumstances surrounding the Philpotts' crime have become notorious but unlike the Abu Qatada case (ICO ref FS50441223) which had wider public interest considerations, such as charges relating to national security and terrorism, the Department does not consider that the Philpotts' cases are of such a high profile nature for it to be reasonable or expected that the public interest would require transparency in all aspects of the matter".

37. With regard to the legitimate interests of the public the Commissioner considers that:
- there is a legitimate public interest in the openness and accountability of the LAA as a public authority responsible for the expenditure of substantial public funds;
 - the case had been subject to significant press and public interest;
 - the issue of legal aid, who qualifies and how much they get is a matter of some debate; and
 - disclosure of the information would augment and assist the public's understanding of the legal aid system and how it operates in such cases.
38. 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 individuals concerned. He therefore considers that disclosure of the information would be fair.

Schedule 2 DPA

39. Having determined that it would be fair to disclose the requested personal data, the Commissioner has gone on to consider whether a condition in Schedule 2 of the DPA would be met. In relation to the conditions in Schedule 2, the Commissioner considers that the most relevant condition in this case is the sixth.
40. 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."*
41. In other words, for the condition to be met, 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.
42. 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.
43. 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.
44. 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?

45. 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 transparency and the accountability of the LAA as a public body responsible for the expenditure of substantial public funds.

46. In correspondence with the complainant, MoJ said:

"...in this case, the only "pressing social need" which I can identify is the general accountability and transparency of public bodies when spending taxpayers' money".

47. In the circumstances of this case, and mindful of the arguments relating to transparency and accountability about how public money is spent, the Commissioner is satisfied that there is a pressing social need for disclosure. The eligibility for - and cost of - legal aid is an important aspect of social policy and the impact of recent changes in the availability of legal aid is a matter of serious public debate.

48. In reaching this decision, he has taken into account that it may not have been obvious to the individuals concerned that a pressing social need existed for the information to be disclosed.

Is disclosure necessary to meet the identified legitimate interests?

49. With respect to what the complainant considers to be an overriding requirement for transparency and accountability, the complainant told MOJ:

"The public must be able to scrutinise such expenditure in crimes of this magnitude".

50. In response, MoJ told the complainant:

"... I accept that there is a specific public interest in disclosure of information that concerns the expenditure of public funds. However, details of how much public money is spent on criminal legal aid by the LAA is contained in the LAA's annual report, which I consider satisfies that specific public interest".

51. The Commissioner acknowledges that, in its annual report, the LAA publishes statistics about legal aid expenditure. However, the requested information in this case relates to costs in specific proceedings. He does not consider that the LAA annual report satisfies the legitimate interests of the public in this case.

52. The provision of legal aid – who qualifies and how much they receive - is a matter of public interest and a subject that attracts considerable debate. In the circumstances of this case, the Commissioner notes the

significant media interest in the proceedings – coverage amounting, in his view, to public interest not mere public curiosity.

53. The Commissioner acknowledges that disclosure of the information could augment and assist the public's understanding of the legal aid system and how it operates in such cases.
54. 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 subjects?

55. In considering the potential effect of disclosure, the Commissioner has already addressed much of the limb of the test when considering fairness. For example he has considered the reasonable expectations of the individuals as to whether the information would be disclosed.
56. Given the level of interest in matters concerning the Philpotts, the Commissioner considers that it would not be unreasonable or unexpected that the public interest would require transparency about their legal aid costs.
57. 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?

58. 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.
59. In this case MoJ told him that it has established that the information is not protected by any duty of confidence or statutory bar and therefore its disclosure would be lawful.
60. The Commissioner is not aware of any evidence to the contrary. He therefore considers that its disclosure would be lawful.

Right of appeal

61. 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

62. 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.
63. 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
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SK9 5AF