

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 9 June 2015

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

#### Decision (including any steps ordered)

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1. The complainant requested information about legal aid costs relating to a number of cases involving named individuals. The Ministry of Justice (the 'MOJ') neither confirmed nor denied holding the requested information citing section 40(5) (personal information) of the FOIA.
2. The Commissioner's decision is that the MOJ was entitled to rely on section 40(5)(b)(i). He requires no steps to be taken.

#### Request and response

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3. On 31 December 2014 the complainant wrote to the Legal Aid Agency, which is an executive agency of the MOJ, and requested information in the following terms:

*"I wish to know the following information regarding the Legal Aid costs concerning the prosecution of R. v. [name redacted] and [name redacted] for alleged conspiracy to defraud, heard at Isleworth Crown Court before His Honour Judge Robin Johnson in 2013.*

*1. What were the total costs of the Legal Aid in the Magistrates Court for the Defendants?*

*2. What were the total costs of the Legal Aid in the Isleworth Crown Court for the Defendants?*

*3. What was the total costs [sic] of counsel's Legal Aid fees for the Defendants in the Newcastle Magistrates Court?*

*4. What was the total costs [sic] of counsel's Legal Aid fees for the Defendant in the Isleworth Crown Court?"*

4. On 22 January 2015 the MOJ responded. It refused to confirm or deny whether it held the requested information. The MOJ has acknowledged that its response to the complainant was incorrectly dated 29 January 2015.
5. Following an internal review the MOJ wrote to the complainant on 20 February 2015 and upheld its original position.

## **Background**

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6. In decision notice reference *FS50076855*<sup>1</sup> the Commissioner confirmed that whether or not an individual is in receipt of legal aid implies something about that person's financial position and is therefore their personal data.
7. In decision notice reference *FS50441223*<sup>2</sup> the Commissioner ordered the Legal Services Commission (predecessor to the Legal Aid Agency) to disclose the amounts paid in legal aid to Abu Qatada since 2008.
8. The complainant in the case under consideration in this notice has also made a number of similar requests about legal aid which the Commissioner has considered in decision notice reference *FS50566544*<sup>3</sup>. In that notice the Commissioner upheld the MOJ's reliance on section 40(5)(b)(i).
9. Notwithstanding the previous decisions detailed here, the Commissioner will assess each complaint about legal aid requests on an individual basis.
10. The Commissioner has noted that the named individuals in this particular case were acquitted of the charges brought against them.

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<sup>1</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2006/383306/DECISION\\_NOTICE\\_FS50076855.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2006/383306/DECISION_NOTICE_FS50076855.pdf)

<sup>2</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2012/767244/fs\\_50441223.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2012/767244/fs_50441223.pdf)

<sup>3</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1043634/fs\\_50566444.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1043634/fs_50566444.pdf)

## Scope of the case

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11. The complainant contacted the Commissioner on 9 March 2013 to complain about the way his request for information had been handled. He specifically asked the Commissioner to take it into consideration that it has been widely reported in the media that both of the named individuals were in receipt of legal aid at their trial, and further that legal aid confirmations have been made in response to other FOIA requests including Terence Shepherd, David Bieber, and Michael Adebolajo in the Lee Rigby case.
12. In addition, the complainant told the Commissioner he accepts that each case has to be considered individually, but argued that in this case, the balance for disclosure outweighs the balance in withholding the information.
13. The Commissioner has considered whether the MOJ has properly applied section 40(5) to the request.

## Reasons for decision

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### *Section 40(5) neither confirm nor deny in relation to personal information*

14. Section 1 of FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:
  - (a) the duty to inform the applicant whether or not requested information is held and, if so,
  - (b) the duty to communicate that information to the applicant.
15. Generally, the provisions in section 40 subsections 1 to 4 FOIA exempt personal data from disclosure. Section 40(5) of FOIA states that the duty to confirm or deny whether information is held does not arise if providing the public with that confirmation or denial would contravene any of the data protection principles set out in the DPA.
16. In this case, the MOJ considers section 40(5)(b)(i) applies. The MOJ argued that confirming whether or not it holds the requested information would breach the data protection rights of the individuals named in the request, as it would reveal under FOIA whether they had been recipients of legal aid. Such an argument is relevant to the exemption contained at section 40(5)(b)(i).

17. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of personal data, and second, whether disclosure of that personal data would be in breach of any of the data protection principles.

*Is the information personal data?*

18. The definition of personal data is given in section 1(1) of the DPA:

*"personal data' means data which relate to a living individual who can be identified:*

*(a) from those data, or*

*(b) from those data and any other information which is in the possession of, or is likely to come into the possession of, the data controller".*

19. The MOJ told the complainant:

*"I am satisfied that the information that you have requested would constitute personal data, because information relating to whether or not an individual is in receipt of legal aid can be classed as personal data, as it implies something about that person's financial circumstances".*

20. The complainant told the Commissioner:

*"I don't agree that the section 40 of the Data Protection Act 1998 is applicable, as I believe that the amounts of costs that were expended on this case can be supplied without giving "personal data" in respect of that case".*

21. The Commissioner considers that the way in which the request is worded clearly indicates that the complainant is seeking information which can be linked with the named individuals.

22. Previously, the Commissioner has determined whether legal aid constitutes personal information. As mentioned above, his decision in case reference *FS50076855* confirms that it is.

23. The Commissioner considers that to comply with section 1(1)(a) of the FOIA, (ie to either confirm or deny holding the information), would inevitably put into the public domain the existence or otherwise of information about each of those individuals, which in turn would constitute disclosure of information that would relate to them.

24. Therefore, the Commissioner considers that to confirm or deny whether the requested information is held would in itself constitute a disclosure of personal data.

*Would confirmation or denial breach one of the data protection principles?*

25. The MOJ told the complainant that the LAA would be in breach of the first data protection principle if it were to confirm the status of the named individuals in regard to the information requested by the complainant.

26. In the case under consideration here, the MOJ told the Commissioner:

*"For the LAA to confirm whether it holds data in scope of the request, would outline that one, none or both of the individuals qualified for legal aid. Even if the LAA then went on to exempt that information, it would still have breached the data rights of the individuals involved by placing information about their financial circumstances (in the fact they did or didn't have sufficient financial means to qualify for legal aid) in the public domain."*

27. When considering the first principle the Commissioner will generally look to balance the reasonable expectation of the data subject(s) with the consequences of compliance with the request, and general principles of accountability and transparency.

28. The first data protection principle requires that personal data is processed fairly and lawfully and that one of the conditions in schedule 2 of the DPA is met in order to disclose personal data.

29. The MOJ acknowledges that, in some cases, the disclosure of the amount of legal aid paid to individuals, and by extension confirmation that they received legal aid, is fair and lawful.

30. In that respect, the MOJ told the Commissioner that each request is considered on a case-by-case basis and the fact that legal aid figures have been disclosed on other occasions does not set a precedent for disclosure.

31. During the investigation, the MOJ provided the Commissioner with an explanation of the factors it takes into account when determining whether to confirm or deny in a case such as this. The Commissioner

recognises that these assessment criteria are in accord with his guidance on section 40<sup>4</sup>.

32. The Commissioner asked the MOJ to explain why it had previously provided legal aid costings for some FOIA requests but has refused to do so in this case. In reply, the MOJ said that it must consider its response in line with the requirements of the DPA, and, as such, there can never be a "blanket approach". This is because the legitimate expectations of the data subjects will vary by the circumstances in each case.
33. The MOJ confirmed that it had undertaken a balancing exercise of the data rights in respect of both named individuals in this case to establish whether section 40 is engaged. It provided the Commissioner with details of that exercise.
34. The MOJ argued that each request has to be considered on a case-by-case basis, with reference to the very specific circumstances of the case, a fact which the complainant has acknowledged. The MOJ said that while similar factors may present across a number of cases, the fact that legal aid figures have been disclosed for other individuals does not set a precedent for disclosure.
35. In addition, the MOJ argued that the fact that a case has been reported in the media does not mean that disclosure of the legal aid status of the individuals involved would be fair. It commented that in the majority of cases, legal aid status falls into "something of interest to the public" rather than "something in the public interest".
36. In determining whether section 40 is engaged in an individual case, the MOJ said that the LAA consider factors such as whether the individual concerned is in an official public position, whether the case or the issue to which it relates has been discussed or debated in Parliament, and whether it raises novel legal issues or is particularly high value or cost.
37. In the MOJ's view, this particular case did not meet those criteria in terms of costs and circumstances, and the individuals themselves are not public figures, which distinguishes this case from, for example, the Abu Qatada case in *FS50441223*.

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<sup>4</sup> <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

38. When compared to cases where the provision of legal aid has been confirmed, the MOJ advised that it does not consider this case to be 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"*.
39. 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.

#### *Reasonable expectations*

40. The MOJ stated that there is no expectation on the part of the LAA's funded clients that such information, if held, will be disclosed publicly and its privacy notices state that such information is confidential. The MOJ also considers that the named individuals in this case do not hold any official position, post or significant public profile that would lead them to expect greater levels of transparency, and that the information relates to their private life.
41. On this occasion, the Commissioner is satisfied that the data subjects would reasonably expect their personal data, if held, would not be disclosed.

#### *Consequences of disclosure*

42. The MOJ told the Commissioner that disclosure would cause some damage or distress to the data subjects, who have since been acquitted, as this would be likely to lead to further public scrutiny. The Commissioner accepts the MOJ's view that this is because when information is disclosed under FOIA it is effectively disclosed to the world at large and not only to the requester.
43. The MOJ contended that it has *"never been confirmed publicly that these individuals were in receipt of legal aid funding nor has the LAA located any evidence that there has been press speculation"*.
44. Media interest in this case was largely focussed on the fact that the data subjects worked for individuals with high public profiles at the time of the alleged offences, and on how those individuals gave evidence in court.

45. The named data subjects were cleared of the charges brought against them and the case concluded a year prior to the complainant making his request. The MOJ therefore argued that these individuals will have had time to move on with their lives and have a reasonable expectation that matters and speculation around them would have concluded.

*General principles of accountability, transparency and legitimate public interest in disclosure*

46. The MOJ recognises that legal aid costs are ultimately funded by the tax payer and, as such, there is a public interest in knowing how taxpayer money is spent. In this respect, the Commissioner is aware that the LAA publishes a range of official statistics which serve to meet the public interest in openness and transparency in the operation and expenditure of the legal aid system.

47. Additionally, the MOJ acknowledges that disclosure of the requested information could assist the public's understanding of the legal aid system and how it operates in such cases.

48. It said, however, that these two points could be applied to the disclosure of whether it holds information in respect of any individual's legal aid case, and that it does not believe that the confirmation or denial of whether the information is held in relation to the named individuals in this case is necessary in this instance to meet that public interest.

49. In considering whether Schedule 2 Condition 6 of the DPA (legitimate interest) is met, the MOJ maintains that:

- there is no significant legitimate public interest in disclosure;
- the disclosure is not necessary;
- disclosure could cause unwarranted interference in, or harm to, the rights, freedoms and legitimate interests of the data subjects.

50. In terms of whether there were any wider "public interest" factors that might fulfil the "legitimate interests" criteria, the LAA concluded that:

- although the case received detailed media coverage in 2013, and some aspects of the case and the background of the individuals in question were already in the public domain, there were no wider public interest factors in the case that could override the rights of the data subjects;
- disclosure would cause some damage or distress to the data subjects, who have since been acquitted, as this would be likely to lead to further scrutiny, particularly given that disclosure under

FOIA is effectively to the world at large. The legitimate interests of the public are not sufficient on this occasion to justify any negative impact to the rights and freedoms of the data subjects.

51. The MOJ said that it did not consider it reasonable to seek consent from the named individuals in this case, because to do so would in itself be unreasonable processing of any data which is held. It also said that the LAA would not hold direct contact details for the data subjects and as such any contact would have to be made via any providers they had on file (if held). To contact the providers for reasons outside of the granting of legal aid (the reason the LAA would hold that data) would be processing the data beyond the reasons for which it was collected.
52. In addition, it is likely that any contact with the individuals over these matters would be likely to cause them distress given the passage of time since their case concluded.
53. For balance the LAA also considered additional factors specific to these individuals which highlighted a limited number of reasons why the disclosure would be fair, namely:
  - the case received widespread coverage during the trial and minimal coverage thereafter;
  - details of the case and the backgrounds of the named individuals are already in the public domain;
  - criminal legal aid is open to everyone at the outset, though those who can afford to do so are asked to pay a contribution;
  - the information for disclosure excluded sensitive personal data.
54. The LAA/MOJ concluded that, in this case, the balancing exercise favoured engaging section 40(5)(b)(i) as confirmation as to whether the requested information is or is not held would have disclosed data about those individuals.

### *Conclusion*

55. The Commissioner appreciates that there is a general public interest in accountability and transparency, and that the public is entitled to be informed about the legal aid costs relating to prosecutions.
56. However, the Commissioner recognises that this legitimate interest must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of any individual(s) who would be affected by confirming or denying that the requested information is held.

57. In considering whether the exemption contained within section 40(5)(b)(i) was correctly applied, the Commissioner has taken into account that disclosure under the FOIA should be considered in its widest sense – which is to the public at large. A confirmation or denial in the circumstances of this case would reveal to the public information which is not already in the public domain.
58. With due regard to the reasonable expectations of the data subjects, and the potential impact on them if the existence of their personal data were to be confirmed or denied, the Commissioner considers that it would be unfair to do so. While he accepts that there is a limited legitimate interest in the disclosure of this information, he does not consider that this outweighs these other factors.
59. Further, the Commissioner has carried out a search of the internet, as has the MOJ, and could not find any evidence to support the complainant's contention that it had been "*widely reported*" in the media that the named individuals were in receipt of legal aid at their trial.
60. The Commissioner has therefore concluded that confirmation or denial as to whether the requested personal data is held would be in breach of the first data protection principle. He considers that the exemption provided by section 40(5)(b)(i) is engaged and that, in this case, the MOJ was therefore not obliged to confirm or deny whether it held the information requested by the complainant.

## Right of appeal

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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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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 .....**

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