

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 February 2016

Public Authority: Ministry of Justice

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information from the Ministry of Justice (MoJ) which, if held, would relate to complaints made about a named individual. The MoJ refused to either confirm or deny holding information within the scope of the request citing sections 40 (personal information) and 32 (court records) of FOIA.
2. The Commissioner has investigated MoJ's application of section 40(5).
3. His decision is that the MoJ was not obliged to confirm or deny if the requested information was held under section 40(5)(b)(i) of FOIA. He requires no steps to be taken.

Request and response

4. On 15 June 2015 the complainant wrote to the MoJ and requested information in the following terms:

"I emailed the county court at central London some considerable time ago and require disclosure of all complaints lodged against [name of bailiff redacted] unfortunately the court have not responded or fulfilled my wishes.

I was informed by [name redacted] customer service manager a few months ago there were at least three complaints against [name of bailiff redacted] so I require disclosure and confirmation of the same as a matter of urgency".

5. MoJ responded on 23 July 2015. It refused to provide the requested information citing sections 32 and 40 of FOIA (court records and personal information respectively).
6. MoJ provided an internal review on 29 September 2015 in which it revised its position in respect of the subsections of the exemptions being relied on. MoJ told the complainant that the correct response should have been to neither confirm nor deny whether MoJ held information in relation to complaints made against the individual named in the request. Accordingly it advised him that it considers sections 32(2) and 40(5) of FOIA apply.

Scope of the case

7. The complainant provided the Commissioner with the relevant documentation on 9 November 2015 to complain about the way his request for information had been handled.
8. The analysis below considers whether the MoJ was correct in relying upon section 40(5)(b)(i) of the FOIA to refuse to confirm or deny whether the requested information is held.

Reasons for decision

Section 40 personal information

9. The consequence of section 40(5)(b)(i) is that if a public authority receives a request for information which, if it were held, would be the personal data of a third party (or parties), then it can rely on section 40(5)(b)(i) to refuse to confirm or deny whether or not it holds the requested information.
10. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of personal data, and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.

Is the information personal data?

11. The first step for the Commissioner to determine is whether the requested information, if held, constitutes personal data, as defined by the Data Protection Act 1998 (DPA). If it is not personal data, then section 40 cannot apply.

12. The DPA defines personal data as:

"...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

13. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. 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.

14. The Commissioner considers that whether or not a complaint has been made against an individual acting in their professional capacity is information which constitutes the personal information of that individual.

15. In this case, the Commissioner is satisfied that the way in which the request is worded clearly indicates that the complainant is seeking personal information which can be linked to an identifiable individual.

16. Having considered the nature of this request, and the circumstances of the case, the Commissioner has concluded that if the requested information were held, it would be the personal data of the individual named in the request.

Would confirmation or denial breach the first data protection principle?

17. The Commissioner must consider whether confirming or denying whether relevant information is held would breach any of the data protection principles of the DPA. The relevant principle in this case would be the first data protection principle.

18. The first data protection principle 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."

19. In the case of a FOIA request, the personal data is processed (in this case by confirming or denying whether the information is held) 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.
20. The Commissioner has first considered whether disclosure would be fair.
21. 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
 - any legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the individuals who are the data subjects.
22. In this case, MoJ told the complainant:

"In this instance, I am satisfied that the expectations of the individual in question would be that his personal information would not be disclosed to the world at large under the FOI. He would have clear expectations of how his personal data would be collected and processed by the department and to process it under the FOIA would be contrary to those expectations".
23. The Commissioner recognises that people have an instinctive expectation that MoJ, in its role as a responsible data controller, will not disclose certain information about them and that it will respect their confidentiality.
24. 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.
25. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. He will also take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions. In the circumstances of this case, a statement made under FOIA as to whether information is held amounts to public disclosure.

26. MoJ did not provide any submissions with respect to the consequences of disclosure on the data subject. However, given the nature of the request, the Commissioner considers that disclosure in this case could lead to an intrusion into the private life of the individual concerned and that the consequences of any disclosure could cause them damage and distress.
27. Notwithstanding a data subject's reasonable expectations or any damage or distress caused, it may still be fair to disclose information, or in this case confirm or deny if information is held, if there is a more compelling public interest in doing so. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in confirming or denying if the information is held.
28. The Commissioner would stress that this is a different balancing exercise to the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest in confirming if information is held must outweigh the public interest in protecting the rights and freedoms of the data subject if providing confirmation or denial is to be considered fair.
29. 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.
30. In light of the nature of the information and the reasonable expectations of the individual concerned, the Commissioner is satisfied that confirming or denying if the requested information is held would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the data subject. He considers these arguments outweigh any legitimate interest in disclosure.
31. Accordingly, he finds that it would be unfair in the circumstances for MoJ to confirm or deny whether it holds the information within the scope of the request. It follows that he finds that confirmation or denial in this case would breach the first data protection principle.
32. The Commissioner therefore finds the exemption at section 40(5) engaged and the duty to confirm or deny did not arise.

Other matters

33. When considering a 'neither confirm nor deny' response, as in this case, the single issue the Commissioner must determine is whether the public authority was correct neither to confirm nor deny whether it holds the information. It would only be if he concluded that the 'neither confirm nor deny' response was incorrect that he would then require the public authority to go on to consider whether it should be disclosed (if it was in fact held).

Right of appeal

34. 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

35. 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.
36. 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