

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 August 2016

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

Decision (including any steps ordered)

1. The complainant requested information relating to an allegation of assault. The Ministry of Justice (MoJ) confirmed it held the requested information but refused to provide it, citing sections 40(2) (personal information) and 41(1) (information provided in confidence) of the FOIA.
2. The Commissioner has investigated the MoJ's application of section 40(2) and has concluded that the withheld information is exempt from disclosure on the basis of that exemption.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. Following earlier correspondence, on 10 September 2015 the complainant wrote to the MoJ and requested information under the FOIA. It is not in dispute that the requested information in this case was for:

"1. A report provided by NOMS [National Offender Management Service] to Nottinghamshire police in July 2014 stating that an inmate had made an allegation of serious sexual assault by [name redacted] between February 1988 and July 1988.

2. Details of information passed from NOMS to Nottinghamshire Police that [name redacted] had been "previously charged with sexually related harassment to a prisoner". "

5. Treating that correspondence as a new request, the MoJ responded on 1 October 2015. It confirmed it held the requested information but refused to provide it citing the following exemptions as its basis for doing so:
 - section 40(2) personal information
 - section 31(1)(c) law enforcement
6. Following an internal review the MoJ wrote to the complainant on 22 January 2016 revising its position with regard to exemptions. It advised that it no longer considered that section 31(1)(c) applied and disclosed information previously withheld by virtue of that exemption – information relating to part (2) of the request.
7. The MoJ confirmed its application of section 40(2) in respect of the remaining withheld information, additionally citing section 41(1) of the FOIA (information provided in confidence).

Scope of the case

8. The complainant contacted the Commissioner on 22 March 2016 to complain about the way his request for information had been handled - namely the refusal of NOMS to provide the requested report. With respect to the information they were seeking, the complainant told the Commissioner:

“Our aim in making this complaint ... is to obtain .. all the details which are pertinent to the allegation made against [name redacted] which are contained in the Report, subject to redactions being made solely to the extent necessary to protect the [Third Party's] identity”.
9. It is not in dispute that the individual named in the request is deceased.
10. Regarding the nature of the withheld information that is the subject of this complaint, the MoJ told the complainant:

“In response to the part of your question which requested a report provided by NOMS to Nottinghamshire Police in July 2014, I enquired of the departments in NOMS who could have communicated with Nottinghamshire Police, which report, if any, was passed from NOMS to Nottinghamshire Police...”
11. The MoJ confirmed that, having made those enquiries, the information that it holds within the scope of that part of the request comprises an individual's:

"written testimony of their time in an establishment".

12. During the course of the Commissioner's investigation, the complainant advised that they had received some relevant information from another source, namely details of the allegations made within the Report against the individual named in the request. The complainant confirmed they no longer require the requested information insofar as it details those allegations. However, they told the Commissioner:

"For the avoidance of doubt, though, we fully maintain [complainant's] FOI complaint insofar as it seeks all other information contained in the Report".

13. The analysis below considers the MoJ's application of section 40(2) of the FOIA to that information. For the purposes of this Decision Notice, the Commissioner will refer to that information as 'the Report' and the author of the Report as 'the Third Party'.

Reasons for decision

Section 40 personal information

14. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3) or 40(4) is satisfied.
15. In this case the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (DPA).
16. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 cannot apply.
17. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

Is the information personal data?

18. Section 1 of the DPA defines personal data as:

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

a) from these 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."

19. 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.
20. The complainant acknowledges that any data in the report identifying the individual named in the request cannot constitute their personal data as they are no longer alive.
21. The MoJ confirmed that it considers that the withheld information in this case comprises the personal data of the Third Party and other individuals identifiable from the Report. In that respect the MoJ told the complainant that the withheld information:

"..involves medical records, information on other prisoners and staff, as well as the details of specific complaints".
22. The MoJ also confirmed that:

"the information, if released, could lead to identification of the individual concerned, especially considering the personal and sensitive experiences described in the testimony".
23. In its submission to the Commissioner, the MoJ confirmed that release of the withheld information could result:

"not only in the identification of the individual who wrote the testimony, but also the identification of other individuals named in the account".
24. Having viewed the withheld information, and mindful of the context in which the information is held, the Commissioner considers that it is appropriate to consider the Report in its entirety as comprising the personal data of the Third Party, whose testimony it is: there can be no doubt that the information relates to them.
25. Furthermore, she considers that the withheld information also both identifies and relates to other individuals other than the individual

making the request. The information is, therefore, also the personal data of those individuals according to section 1(1) of the DPA.

Is the information sensitive personal data?

26. Sensitive personal data is defined in section 2 of the DPA. It is personal information which falls into one of the categories set out in section 2 of the DPA:

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union,
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

27. In that respect, in correspondence with the complainant, the MoJ said that the withheld information comprises a personal testimony that involves, amongst other things, medical records.

28. The Commissioner is satisfied that, given the nature of the information, the information withheld by virtue of section 40(2) constitutes information that falls within the definition of 'personal data' and that some of it falls within the definition of 'sensitive personal data'.

Can the information be anonymised?

29. With respect to the definition of personal data, the complainant told the Commissioner:

"... 'personal data' is limited to information which relates to a living individual who can be identified from those data. Accordingly, provided that NOMS redact such information in the Report that could identify [the Third Party], disclosing the Report would plainly not involve the disclosure of personal data".

30. The complainant also told the Commissioner:

"... NOMS should have considered whether the data which could identify [the Third Party] (or another living individual) could have been redacted from the Report. Had NOMS done so, then the inevitable conclusion would have been that NOMS could have disclosed the Report without disclosing any personal data and accordingly without contravening any of the data protection principles".

31. The Commissioner acknowledges that the Report comprises the Third Party's personal account of their time in an establishment and that other individuals are identifiable within that account. The Commissioner also notes the complainant's view that her investigation should consider the extent to which appropriate redactions could and should be made.

32. Mindful of the content of the withheld information and the context in which it is held, having carefully considered the matter, the Commissioner does not accept that the withheld information could be made suitably anonymous through redaction.

Would disclosure contravene one of the data protection principles?

33. The Commissioner must next consider whether disclosure would breach one of the data protection principles.

34. In this case, the Commissioner notes that the MoJ considers that disclosure would breach the first data protection principle. The Commissioner agrees that the first data protection principle is the most relevant in this case.

Would disclosure contravene the first data protection principle?

35. 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."

36. In the case of an 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, in the case of sensitive personal data, 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 disclosure be fair?

37. 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.
38. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
 - the data subject'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 individuals concerned); and
 - the balance between the rights and freedoms of the data subjects and the legitimate interests of the public.

Reasonable expectations

39. 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, whether the information relates to an individual in a professional capacity or to them as individuals and the purpose for which they provided their personal data.
40. With respect to the Third Party, the MoJ told the complainant that releasing the requested information would cause damage and distress and that :

"all individuals involved in these types of complaints have a clear and strong expectation that their personal data will be held in confidence and not disclosed to the public under the FOIA, which is especially true of sensitive personal data as it comprises information that individuals will regard as the most private".

41. Similarly, it told the Commissioner that:

"..based on the extremely personal and sensitive experiences being described, there is a clear and strong expectation from the individual [that their personal information would not be disclosed to the public under the FOIA]".

Consequences of disclosure

42. As to the consequences of disclosure upon the data subject, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
43. The complainant said that, if the report was appropriately redacted to protect the Third Party's identity, disclosure in this case could not cause damage and distress.
44. In further support of their argument in favour of disclosure, the complainant told the Commissioner that individuals who make serious allegations of assault "*do not have any expectation that details of their allegations will not be disclosed to the public*".
45. They also argued that:

"it should have been clear [to the Third Party] that by investigating the allegations, the Police were inevitably likely to disclose details about them ... If the allegations resulted in one or more prosecutions.... then the allegations would of course be aired in the most public of forums – a court of law".

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

The legitimate public interest

46. 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.
47. The complainant made submissions in relation to their interest in this information being disclosed. The Commissioner acknowledges that the information at issue is of particular interest to the complainant. However she must consider whether or not it is appropriate for the requested information to be released to the general public.
48. As disclosure under the FOIA is considered to be disclosure to the public at large and not to the individual applicant 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.
49. In correspondence with the Commissioner, the MoJ acknowledged that there is a need for transparency in the investigation process of alleged crime taking place in prison establishments. However, it told the Commissioner that it does not consider that releasing an individual's

testimony of their time in prison meets the legitimate interest of the public for transparency. In its view, there are no wider public interest considerations in this case which would meet the expectation that a greater level of transparency is necessary.

Conclusion - the Third Party

50. Dealing first with the Third Party, the Commissioner is satisfied that they would have no reasonable expectation that the information in question would be disclosed to the world at large.
51. Regarding the complainant's view that the Third Party could expect that any allegations reported to the police would be aired in a court of law, the Commissioner is mindful that in cases where criminal proceedings are brought, it is a matter for the police or the CPS to obtain any relevant material and if an individual is to bring civil proceedings that their rights to disclosure will be governed by the Civil Procedure Rules, not the FOIA.
52. The Commissioner is also satisfied that the loss of privacy resulting from disclosure could cause unwarranted distress, particularly as she has found that disclosure of the information would not have been within the reasonable expectations of the Third Party.
53. The Commissioner recognises that, when assessing fairness, it is the legitimate interests of the public in disclosure that must be balanced against the interests of the data subject, including their right to privacy. However, in this case she is satisfied that there is no legitimate public interest in disclosure which would outweigh any detriment which might be caused to the data subject as a result of disclosure of the requested information.
54. Therefore, disclosure would be unfair and would breach the first data protection principle.
55. As the Commissioner is satisfied that disclosure would breach the first data protection principle she upholds the MoJ's application of the exemption provided by section 40(2) of the FOIA by way of section 40(3)(a)(i).
56. As the Commissioner has concluded that the disclosure of this information would be unfair, and therefore be in breach of the first principle of the DPA, she has not gone on to consider whether there is a Schedule 2 or Schedule 3 condition for processing the information in question.

Conclusion - other living individuals identifiable from the Report

57. Dealing next with the other living individuals identifiable from the Report, the Commissioner is satisfied that those individuals would have no reasonable expectation that the information in question would be disclosed to the world at large and that the loss of privacy could cause unwarranted distress. Nor has she seen any evidence to indicate that there is a sufficient wider legitimate public interest which would outweigh the rights and freedoms of the data subjects and support further disclosure.
58. Taking the above into account, the Commissioner is satisfied that it would be unfair to those individuals to release the requested information under the FOIA.
59. The Commissioner is therefore satisfied that the MoJ was entitled to withhold the information under section 40(2) by way of section 40(3)(a)(i).
60. As the Commissioner has concluded that the disclosure of this information would be unfair, and therefore be in breach of the first principle of the DPA, she has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

Other exemptions

61. As the Commissioner has concluded that the MoJ correctly applied section 40(2), she has not gone on to consider the other exemption cited by the MoJ in this case.

Right of appeal

62. 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

63. 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.
64. 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

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