

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 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 the food items a particular prisoner was allowed to receive while in Wakefield prison.
2. The Ministry of Justice (MoJ) refused to confirm or deny whether it held the requested information citing section 40(5) of the FOIA (personal information).
3. The Commissioner's decision is that the MoJ was entitled to rely on section 40(5)(b)(i). She requires no steps to be taken as a result of this decision notice.

Request and response

4. Following earlier correspondence, the complainant wrote to the MoJ on or around 18 January 2016.
5. In order to assist with his request, the complainant told the MoJ:
"I am outlining my request as specifically as possible".
6. The complainant provided a 'preamble for information purposes' in which he set out the background to his request. In that preamble, he explained:

"In 2013/14 an orthodox Jewish prisoner named [name redacted] was located at HMP Wakefield... The authorities at HMP Wakefield were given instruction to allow [named individual] to receive items of kosher food not permitted to another orthodox Jewish prisoner".

7. The complainant then requested information in the following terms:

"1. Please provide the precise details of the instructions/directions that allowed an orthodox Jewish prisoner ([initials redacted]) at HMP Wakefield to receive kosher food

2. Please detail the items of kosher food that this prisoner was allowed to receive

3. Please state from who/where those instructions/directions originated

4. Please detail the representations the Jewish faith adviser at the Ministry of Justice receive from the family/shul of the prisoner in question?"

8. The MoJ responded on 10 February 2016. It refused to confirm or deny whether it held the requested information citing section 40(5) of the FOIA (personal information) as its basis for doing so.
9. Following an internal review the MoJ wrote to the complainant on 6 April 2016, upholding its original position, clarifying that it considers that section 40(5)(b)(i) of the FOIA applies.

Scope of the case

10. The complainant contacted the Commissioner on 11 April 2016 to complain about the way his request for information had been handled.

11. The complainant disputes that the requested information constitutes personal data. He told the Commissioner:

"No individual could be identified from the requested data. What I principally seek to know is what kosher food items he was allowed to receive: I know who he is: I want to know what he ate".

12. He also told the Commissioner:

"I do not identify [name redacted] in my request because the preamble was not part of the FOIA request".

13. The analysis below considers the MoJ's application of section 40(5) of the FOIA to the requested information.

14. Specifically, the Commissioner's analysis considers section 40(5)(b)(i) of the FOIA. 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, then it can rely on section 40(5)(b)(i) to refuse to confirm or deny whether or not it holds the requested information.

Reasons for decision

Section 40 personal information

15. Section 40(5) of the FOIA states that:

"The duty to confirm or deny –

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either-

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

16. 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?

17. On the issue of whether confirmation or denial in response to the complainant's request would involve the disclosure of personal data, the definition of personal data is given in section 1(1) of the Data Protection Act 1998 (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".

18. 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.

19. The complainant disputes that the requested information constitutes personal data. He told the Commissioner:

"... my request does not name or identify [name redacted]. In theory, the requested data could apply to me and any other orthodox Jewish prisoner in Wakefield".

20. In correspondence with the Commissioner however, the MoJ explained that, having named a specific individual in the preamble, the complainant, while not naming the individual in the request, does state the individual's initials in question one. It also observed that the wording of questions two and four of the request specify "*this prisoner*" and "*the prisoner in question*" respectively. The MoJ told the Commissioner:

"It is therefore evident that [the complainant]'s request is aimed at the individual named [in the preamble]".

21. Given the context of the request, 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 individual named in the preamble and whose initials are included in the request.

22. The Commissioner is satisfied that complying with section 1(1)(a) in this case would effectively confirm or deny whether the requested information is held in connection with that individual. Clearly the requested information would relate to that individual and so would be their 'personal data': there can be no doubt that information about whether or not a prisoner was given a specific diet, and on what basis, is 'personal data' of which he is the 'data subject' for the purposes of the DPA.

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

Is the information sensitive personal data?

24. The MoJ explained that it considered that if held, the requested information would also be sensitive personal data.
25. Sensitive personal data is personal information which falls into one of the categories set out in section 2 of the DPA. Of relevance in this case is that section 2 relates to personal data consisting of information as to:

"(c) his religious beliefs or other beliefs of a similar nature".

26. The MoJ told the complainant:

"The MoJ considers that the information requested would constitute sensitive personal data, as it would identify if a prisoner was given a specific diet due to his religion".

27. The MoJ confirmed its view that section 2(c) of the DPA is relevant in its submission to the Commissioner.

28. In contrast, the complainant told the Commissioner that the MoJ's claim that to comply with his request would identify if a prisoner was given a special diet due to his religion:

"... is a complete nonsense. I am sure that the general public are fully aware that all prisoners of different religious persuasions receive the meals appropriate to their religion...So it is a fact readily available to the 'world at large' that all prisoners receive the food appropriate for their religion".

29. The Commissioner acknowledges that it may well be in the public domain that the prison service caters for prisoners with a wide variety of religious, cultural and medical dietary needs.

30. However, the Commissioner is mindful of the wording of the request in this case. Having concluded that the requested information constitutes personal data, the Commissioner is further satisfied that if held, the requested information in its entirety would be sensitive personal data. This is because it relates to the religious beliefs of an individual.

31. Having accepted that the request is for sensitive personal data of a living individual other than the applicant, the Commissioner will go on to consider whether confirming or denying if the information is held would contravene any of the data protection principles.

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

Would confirmation or denial breach the first data protection principle?

33. 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”.

34. 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, in this case, one of the Schedule 3 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

35. The Commissioner has first considered whether disclosure would be fair.

36. When 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);
- 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.

37. In correspondence with the Commissioner, the MoJ confirmed its view that confirming or denying whether it holds the requested information would be unfair as it would disclose an identifiable individual's sensitive personal data to the world at large, namely whether or not they were provided with food that relates to their religious beliefs.

Reasonable expectations

38. In correspondence with the Commissioner, the MoJ explained that prisoners are under no obligation to declare their religion but that any religion declared is treated in confidence.

39. In this case, the Commissioner is satisfied that the data subject would have the reasonable expectation that their sensitive personal data, if held, would not be disclosed.

Consequences of disclosure

40. 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.
41. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. She will also take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions.
42. In this case, mindful of the wording of the request, the MoJ told the complainant that confirming whether or not it holds the requested information:
- “would be likely to cause unwarranted distress”.*
43. The Commissioner recognises that people have an instinctive expectation that the MoJ, in its role as a responsible data controller, will not disclose certain information about them and that they will respect their confidentiality.
44. Furthermore, the Commissioner considers that, in most cases, the very nature of sensitive personal data means it is more likely that disclosing it will be unfair. The reasonable expectation of the data subject is that such information would not be disclosed and that the consequences of any disclosure could be damaging or distressing to them.
45. The Commissioner has noted above that the information in this case, if held, falls under section 2(c) of the DPA. As such, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves.
46. Given the nature of the request, and the sensitivity of the subject matter, the Commissioner considers that disclosure in this case could lead to an intrusion into the private life of the individual concerned and the consequences of any disclosure could cause damage and distress to the party concerned.

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

47. 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.
48. The Commissioner would stress that this is a different balancing exercise than 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.
49. In correspondence with the MoJ, the complainant said:
- "... it is overwhelmingly in the public interest that there is transparency in this matter in order that any accusation of corruption or preferential treatment is negated and that the request receives a full and detailed response".*
50. The Commissioner appreciates that there is a general public interest in accountability and transparency. On the other hand 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 who would be affected by confirming or denying that the requested information is held.
51. The Commissioner understands that the complainant has a personal interest in the request. However, with respect to the legitimate interest in disclosure, the interest 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.

Conclusion

52. 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.

53. With due regard to the reasonable expectations of the data subject, and the potential impact on them if the existence of their personal data were to be confirmed or denied, 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. She considers these arguments outweigh any legitimate interest in disclosure.
54. 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. She considers that the exemption provided by section 40(5)(b)(i) is engaged and that, in this case, the MoJ was not obliged to confirm or deny whether it held the information requested by the complainant.
55. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, it has not been necessary to go on to consider whether this is lawful or whether one of the schedule 2 or schedule 3 DPA conditions is met.

Right of appeal

56. 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

57. 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.
58. 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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