

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 November 2016

Public Authority: Ministry of Justice

Address: 102 Petty France

London

SW1H 9AJ

Decision (including any steps ordered)

1. The complainant has requested information about legal aid costs relating to defendants in a high profile murder trial. The Ministry of Justice ("MoJ") would neither confirm nor deny whether it held the requested information, citing the exclusion from that obligation at section 40(5) (personal information).
2. The Commissioner's decision is that the MoJ was entitled to rely on section 40(5) to neither confirm nor deny whether it held the requested information. The Commissioner requires no steps to be taken.

Background

3. The complainant submitted his request to the Legal Aid Agency ("LAA"). The LAA is an executive agency of the MoJ and falls within its remit for the purposes of the FOIA. The MoJ is therefore the appropriate public authority in this case.

Request and response

4. On 11 June 2016, the complainant wrote to the Ministry of Justice and requested information in the following terms:

" Please provide the total cost of legal aid for [redacted - identity of first defendant and details of court case]. In the total please include*

the cost of legal aid at the first trial.

** Please provide a breakdown of the costs. For example: Barrister for first crown court trial, barrister for second crown court trial, police station representation etc.*

** Please disclose if any costs are still to be paid.*

** Please disclose the amounts requested/submitted which are outstanding (whether or not these will be the actual amounts paid).*

** Please provide the total cost of legal aid for [redacted - identity of second defendant and details of court case]. In the total please include the cost of legal aid at the first trial.*

** Please provide a breakdown of the costs.*

** Please disclose if any costs are still to be paid.*

** Please disclose the amounts requested/submitted which are outstanding (whether or not these will be the actual amounts paid)."*

5. The MoJ responded on 8 July 2016. It refused to confirm or deny whether it held the requested information, citing section 40(5) of the FOIA.
6. Following an internal review, the MoJ wrote to the complainant on 5 August 2016. It upheld its decision to neither confirm nor deny whether it held the information under section 40(5).

Scope of the case

7. The complainant contacted the Commissioner on 5 August 2016 to complain about the way his request for information had been handled. He disputed the MoJ's application of section 40(5) of the FOIA. In particular, he did not agree that the requested information could be considered "personal data" as the defendants in the case had been granted anonymity since their arrest, and their identities are protected by a court order which remains in place. His request had referred to the defendants using the pseudonyms employed by the court during the hearing of the case.
8. The Commissioner considers the scope of this decision notice to be whether the MoJ was entitled to rely on section 40(5)(b)(i) to neither confirm nor deny whether it held the information.

Reasons for decision

9. Under section 1(1)(a) of the FOIA, a public authority is obliged to advise an applicant whether or not it holds the information they have requested. This is known as the "duty to confirm or deny". However, the duty to confirm or deny does not always apply; in certain circumstances, even confirming or denying that requested information is held can reveal information that falls under an exemption. A public authority may be able to use an exemption to refuse to confirm whether or not it holds information, if either confirming or denying would reveal exempt information in itself.
10. In this case, the MoJ argues that it is excluded from the duty to confirm or deny by virtue of section 40(5) of the FOIA.

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

11. Section 40(5) of FOIA states that the duty to confirm or deny whether or not 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 Data Protection Act 1998 ("the DPA").
12. 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 identified in the request, as it would reveal under the FOIA whether they had been recipients of legal aid.
13. Consideration of section 40(5)(b)(i) involves two steps: first, whether providing the confirmation or denial would indeed 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?

14. The complainant maintains that the request was for anonymised information, the defendants' identities having been protected by a court order which remains in place. He argued that as the defendants could not be identified by the public, the requested information was not personal data.
15. The first step for the Commissioner is therefore to determine whether the requested information, if held, constitutes personal data, as defined by the DPA. If it is not personal data, then section 40 cannot apply.
16. 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...".

17. 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.
18. The MoJ told the Commissioner that it considers that the information relates to the defendants in the case specified in the request. The defendants are referred to using the pseudonyms used by the court. The MoJ explained that although a court order was in place, the identities of the defendants have been circulated on the internet, in breach of that order. It believed that there was a strong likelihood that the requested information, if it were held, could be matched up with information which is readily available online and would form information about the financial circumstances of each defendant.
19. In cases where it is claimed that anonymised information may nevertheless be capable of identifying an individual, a test used by both the Commissioner and the First-tier Tribunal is to assess whether a "motivated intruder" would be able to recognise an individual if he or she was intent on doing so. The "motivated intruder" is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of re-identification of an individual from information which, on the face of it, appears anonymised.
20. The ICO's Code of Practice on Anonymisation¹ notes that:

"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".

¹ <https://ico.org.uk/media/fororganisations/documents/1061/anonymisation-code.pdf>

21. In summary, the motivated intruder test is that if the risk of identification is *reasonably likely* the information should be regarded as personal data.
22. The requested information in this case relates to the defence costs of two defendants in a particular court case. Having had regard to the MoJ's comments about the circulation of their true identities online, the Commissioner carried out an internet search using information from the request and was able to ascertain the identities of both defendants in a matter of minutes. The Commissioner further notes that the complainant is a journalist and she considers it likely that, if he is not already aware of their identities, he will be aware that the names are in circulation on the internet. The Commissioner therefore considers that the risk of identification of the defendants is reasonably likely and that therefore the requested information, if held, constitutes their personal data.
23. The Commissioner has previously considered the issue of whether legal aid constitutes personal data² and has found 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.
24. The Commissioner notes that the way in which this request is worded indicates that the complainant is seeking financial information which is linked to two identifiable individuals.
25. The Commissioner therefore 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 as to whether the defendants had received legal aid. This would constitute a disclosure of information that would relate to them.
26. Therefore, the Commissioner is satisfied that to confirm or deny whether the requested information is held would in itself constitute a disclosure of personal data.

² See, for example, https://ico.org.uk/media/action-weve-taken/decisionnotices/2006/383306/DECISION_NOTICE_FS50076855.pdf and https://ico.org.uk/media/action-weve-taken/decisionnotices/2015/1431920/fs_50576722.pdf

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

27. The next step is to address whether disclosure of the personal data (in this case, the confirmation or denial that information is held) would be in breach of any of the data protection principles.
28. The data protection principles are set out in Schedule 1 of the DPA. The first 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. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.
29. 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 MoJ explained that these include, for example, whether the case is particularly high-profile, has impacted on legal aid policy, whether the data subjects are public figures and if there is a legitimate public interest in the information being disclosed.
30. The MoJ has acknowledged that, in some cases, the disclosure of the amount of legal aid paid to individuals, and by extension confirmation that they received legal aid, would be fair and lawful. The Commissioner endorses this view and points to the approach taken in, for example FS50441223³ (where the Commissioner required the disclosure of legal aid information) as indicative that each request for legal aid related information should be considered on an individual basis.
31. In this case, however, having considered all the relevant factors, including the personal circumstances of the defendants, the MoJ has concluded that it would not be fair to disclose the requested information.

Would disclosure be fair?

32. The Commissioner's considerations below have focussed on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of disclosure against the legitimate public interest in disclosing information.

³ https://ico.org.uk/media/action-weve-taken/decision-notices/2012/767244/fs_50441223.pdf

Reasonable expectations

33. 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. She considers that the expectations of an individual will vary according to the particular circumstances of that individual.
34. The MoJ told the Commissioner that recipients of legal aid have no reasonable expectation of their case details being disclosed. It pointed to the privacy notices on the legal aid application forms which state that such information is confidential. It provided information to the Commissioner which confirmed that the defendants were considered vulnerable individuals. They did not hold any official position, post or significant public profile that would lead them to expect greater levels of transparency.
35. The Commissioner is therefore satisfied that the data subjects in this case would have the reasonable expectation that their personal data, if held, would not be disclosed.

Consequences of disclosure

36. As outlined in paragraph 34, the Commissioner accepts that the defendants are considered vulnerable individuals.
37. The MoJ told the Commissioner that disclosure, even in the form of confirmation or denial, would cause some damage or distress to the defendants and to their family and to the victim's family, as this would be likely to lead to further public scrutiny. This is because when information is disclosed under the FOIA it is effectively disclosed to the world at large and not only to the requester.
38. The MoJ said that media interest in the case had largely dissipated since the defendants had been sentenced. It considered that disclosure of the requested information would be likely to revive mainstream media reporting. Based upon the historic coverage of this matter, MoJ expected that any further reporting was likely to be of a highly negative nature towards the defendants.
39. Such further coverage would be likely to cause distress to the defendants (who are now adapting to serving their sentences), their families (who the trial judge noted had been subject to harassment during the criminal proceedings), and the family of the victim, who it is assumed will have interpreted the conviction and sentencing of the defendants as the conclusion of public and media interest.

40. The Commissioner acknowledges that if the matter is re-opened in the mainstream media there is a strong likelihood of damage or distress being caused to the different parties identified by the MoJ.

The legitimate public interest

41. 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 requested 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.
42. The complainant argued that knowing whether the individuals identified in the request received public funding for their defence, and if so, how much, is in the public interest.
43. Responding to the complainant's observation that the LAA has disclosed information about legal aid in other cases, the MoJ told the Commissioner that it dealt with each such request on a case by case basis. It acknowledged that there had been extensive and detailed media coverage of the case, but having assessed this coverage it could not identify any speculation or commentary regarding whether legal aid had been granted for the defence, in the public domain.
44. It said that this was in sharp contrast to the circumstances detailed in, for instance, FS50563489⁴ (where disclosure had been required). In that case, the amount of public money afforded for use by the defendant (who was already in the public eye by his own volition, due to his conspicuous receipt of state benefits) was a central pillar of the public and media interest in his case, which naturally extended to the awarding of legal aid.
45. It considered that the nature of the public interest in that case can be clearly distinguished from the case the complainant is enquiring about.
46. 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 MoJ acknowledged this, but stated that it makes detailed information available regarding legal aid expenditure each quarter when its regular statistics are published.

⁴ https://ico.org.uk/media/action-weve-taken/decision-notice/2015/1431729/fs_50563489.pdf

47. The Commissioner also notes that the case had been subject to significant press and public interest. However, the Commissioner considers that the points made about the resultant damage and distress caused by this media interest are also pertinent here.
48. The Commissioner recognises that the issue of legal aid, who qualifies and how much they receive is a matter of legitimate public debate, and also that disclosure is more likely to be in the public interest when it would augment the public's understanding of the legal aid system. On this point, the MoJ provided to the Commissioner information (which cannot be reproduced here without disclosing information which is itself, exempt information) which she is satisfied demonstrates that disclosure of the requested information would not advance any debate on 'who' is eligible for legal aid, nor would it serve to provide the public with information on the legal aid scheme which is not otherwise accessible.

Conclusion

49. 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.
50. 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.
51. 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. The Commissioner has carried out a search of the internet, as has the MoJ, and was unable to find any information with regard to whether or not the defendants were in receipt of legal aid at their trial. A confirmation or denial in the circumstances of this case would therefore reveal to the general public information which is not already in the public domain.
52. 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 she accepts that there is a limited legitimate interest in the disclosure of this information, she does not consider that this outweighs these other factors.
53. The Commissioner has therefore concluded that confirmation or denial as to whether the requested information is held would constitute a disclosure of personal data which would be in breach of the first data protection principle. She considers that the exemption at section 40(5)(b)(i) is engaged and that, in this case, the balance of the public

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interest favours maintaining the exemption so that the MoJ was not obliged to confirm or deny whether it held the information requested by the complainant.

Right of appeal

54. 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

55. 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.
56. 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

Samantha Bracegirdle
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