

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 7 August 2017

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

#### Decision (including any steps ordered)

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1. The complainant has requested information about offenders who absconded from Ford Open Prison and any temporary release failures. The Ministry of Justice disclosed some information and withheld the remainder, citing the section 40(2) (personal data) exemption of FOIA.
2. The Commissioner's decision is that section 40(2) of FOIA applies to all of the withheld information. However, she considers that the Ministry of Justice has breached sections 10 (time for compliance) and 17 (refusal of a request) of FOIA.
3. The Commissioner does not require the Ministry of Justice to take any further steps as a result of this decision.

#### Request and response

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4. On 11 November 2015, the complainant wrote to the Ministry of Justice (MoJ) and requested information in the following terms:

*"The names, ages and convictions for which they had been imprisoned for all absconders and temporary release failures from Ford Open Prison, West Sussex, occurring between April 2014 and August 2015, where the prisoner is still unlawfully at large.*

*Please also provide the dates on which each absconded E.g. Joe Bloggs, 32, convicted of robbery, failed to return from temporary release on xxx date."*

5. The MoJ responded on 15 March 2016. It explained that it was disclosing some information for the period of 1 April 2004 - 31 March 2015 but was withholding information in relation to April 2014 - 14 August 2015 under sections 22(1) and 40(2) of FOIA.
6. Following an internal review the MoJ wrote to the complainant on 7 June 2016. It upheld its original decision.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 10 August 2016 to complain about the way her request for information had been handled. She explained that there was a clear public interest in identifying people who have absconded from or failed to return (FTR) to prison, in the interests of transparency but also, importantly, so the public can help police find them. The complainant also explained that their identity was clearly central to this legitimate policing aim.
8. Furthermore, the complainant argued that the risk of these absconders / TRFs committing further crime was arguably higher since they are on the run and having to live "under the radar". The complainant also explained that the purpose of preventing further crime applied.
9. The complainant pointed out that in its original response, the MoJ had argued that disclosure would present a "risk of harm to the victim" as a reason for not identifying certain absconders/FTRs. She explained that it was not clear exactly what the harm would be from simply knowing that the offender had absconded; the far greater risk of harm to the victim was the offender being at large, not the victim knowing that they were at large. Furthermore, the complainant argued that the victim would be best served by the offender being brought back to serve the remainder of their prison sentence. She pointed out that this was clearly more likely to happen if it was publicly known that offenders had absconded /FTR.
10. The complainant also explained that the MoJ had cited concerns about police investigations as a reason for withholding investigations. She argued that absconders/FTRs would know that police and other authorities knew they had absconded and therefore it was hard to see how making this public could have any impact. In addition, the complainant argued that the fact that prisoners had absconded/FTR was a clear matter of public interest due to the questions it raises about the effective and safe running of prisons; the identity of those involved was central to being able to report this in any meaningful way.
11. Furthermore, the complainant explained that she submitted a similar request last year, for the names of prisoners who had absconded/TRF

and were still at large at that point. Many of those who the MoJ named in 2015 remained at large in 2016 but it was now refusing to name them again. She pointed out that this had not been disputed by the MoJ or Sussex Police. The complainant argued that this inconsistency exposed the shortcomings of the decision-making.

12. The complainant also explained that the prisoners had committed a further offence by absconding from or failing to return to, prison. She argued that the Data Protection Act 1998 (DPA) was not intended to protect criminals and the purpose of detecting crime applies.
13. During the Commissioner's investigation, the MoJ explained that the information it had disclosed to the complainant covered 2004 to 2012, not to 2015. It also explained that it was no longer relying on section 22(1), therefore the Commissioner will not consider the application of this exemption.
14. The Commissioner will consider the application of the section 40(2) exemption. She will also consider the length of time taken to deal with the request.

## Reasons for decision

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### Section 40(2) – personal information

15. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and its disclosure would breach any of the data protection principles or section 10 of the DPA.

#### ***Is the information personal data?***

16. The definition of personal data is set out in section 1 of the DPA:

*" ...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."*

17. The two main elements of personal data are that the information must 'relate' to a living individual and the individual must be identifiable. Information will relate to an individual 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. In this case, the MoJ informed the complainant that it considered that the requested information constituted the personal data of the prisoners concerned and that it would be unfair to disclose it.
19. The Commissioner is satisfied that the requested information constitutes information which falls within the definition of 'personal data' as set out in section (1) of the DPA as it comprises personal data relating to identifiable individuals.

***Is the information sensitive personal data?***

20. 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. Of relevance in this case is that section 2 relates to personal data consisting of information as to:

*“(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.”*

21. The Commissioner is satisfied that the withheld information in its entirety is sensitive personal data. This is because it relates to offences committed by identifiable individuals.
22. In light of this finding Commissioner will go on to consider whether disclosure of the requested information would breach one of the data protection principles.

***Would disclosure breach one of the data protection principles?***

23. The MoJ told the complainant that it considered that disclosure of the requested information would contravene the first data protection principle. The Commissioner agrees that the first data protection principle is relevant in this case.

***Would disclosure contravene the first data protection principle?***

24. The first principle deals with the privacy rights of individuals and the balance between those rights and other legitimate interests in processing personal data. It 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”.*

25. 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 this case, one of the Schedule 3 conditions for sensitive personal data. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

***Would it be fair to disclose the requested information?***

26. 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); and
  - the balance between the rights and freedoms of the data subject and the legitimate interests of the public.
27. Under the first principle, the disclosure of the information must be fair to the data subject. Assessing fairness involves balancing the data subject’s rights and freedoms against the legitimate interest in disclosure to the public.
28. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in its disclosure.

***Have the data subjects consented to the disclosure?***

29. The Commissioner is not aware of anything to suggest that consent has been given for disclosure of the requested information by any of the data subjects.

***Have the data subjects actively put some or all of the requested information into the public domain?***

30. Where the data subject has put some or all of the requested information into the public domain, the Commissioner considers that this weakens the argument that disclosure would be unfair.

31. In this case the Commissioner has not seen any evidence that any of the data subjects have actively put some or all of the requested information into the public domain.

### ***Reasonable expectations***

32. In order to reach a view on whether the disclosure of this information would be fair in this case, the Commissioner has placed specific emphasis on the nature of the information itself.
33. The requested information, if disclosed, would reveal information about individuals who had committed offences. The Commissioner does not accept that disclosing this information would be fair and considers that it would be very likely to cause distress to the individuals involved or have an unfair impact on them.
34. The Commissioner notes the complainant's arguments regarding how disclosing the requested information might help to apprehend the prisoners.
35. The MoJ explained that in relation to the withheld information, it had consulted with both the police and the National Offender Management Service (NOMS) victim policy team. It also explained that the name of an unlawfully at large prisoner may not have been previously released, or even if the name had already been disclosed, that may predate by some considerable time, the re-publication in, or by way of, a response to a FOIA request.
36. The MoJ also explained that some of these prisoners may have been returned to custody and therefore no longer be at large. In addition, the MoJ also explained that when considering whether to disclose the information it had also taken into account the victims of the crimes and their well-being.

### ***Consequences of disclosure***

37. In looking at the consequences of disclosure on the data subjects, the Commissioner has considered what they might be.
38. The MoJ explained that it considered that disclosure of the information could impact on any police investigations being carried out. It argued that if the police were searching for an offender, publication of their name may cause prisoners to go into hiding, making apprehension more difficult.
39. In addition, the MoJ explained that if a victim has opted into the National Probation Service (NPS) Victim Contact Service (VCS) (which is available to victims of certain offences), they will normally be advised if a prisoner has absconded or failed to return to custody. If victims

cannot be contacted or do not qualify for this scheme, finding out that a prisoner is unlawfully at large could cause considerable distress and anxiety, especially in cases where the VCS has serious concerns that a victim is vulnerable.

40. Furthermore, the MoJ also argued that automatic disclosure of names could lead to the creation of unjustified concern in communities and the targeting of those individuals or their families by the general public, the media or the local community.

### ***Conclusion***

41. The Commissioner considers that there is some legitimate public interest in the disclosure of the requested information, especially as it concerns prisoners who have absconded from prison or not returned to custody. However, the Commissioner notes the MoJ's explanation regarding the effects of disclosure, including the impact on police investigations. She also notes the MoJ's explanation about consulting with both the police and NOMS regarding the withheld information.
42. The Commissioner also notes that the requested information is considered to be 'sensitive' personal data in terms of the prisoners. Disclosure of sensitive personal data must have justification, whatever the circumstances of the individual. It is clearly possible for the disclosure of sensitive personal data to be fair. Individuals who have been charged or convicted of crimes will often have to expect disclosure of some information about them and their actions, particularly during the judicial process and sometimes after it. However, in the circumstances of this case the Commissioner accepts that it would be unfair to disclose the information requested, in terms of it being the prisoners' personal information and to do so would contravene the first data protection principle.
43. She has not gone on to consider whether disclosure is lawful or whether one of the Schedule 2 DPA conditions is met.
44. The Commissioner considers that the section 40(2) exemption is engaged.
45. The Commissioner notes that the complainant is a journalist and has referred to the DPA. The Commissioner considers that FOIA is purpose-blind and therefore that the complainant's role as journalist is not relevant as what is being considered is disclosure under the FOIA.

### **Procedural matters**

46. The complainant submitted her request on 11 November 2015 and the MoJ responded on 15 March 2016.



## **Section 10 – time for compliance**

47. Section 10(1) provides that a public authority has to respond to a request promptly and no later than the twentieth working day following the date of receipt.

## **Section 17 – refusal of a request**

48. Section 17(1) provides that if a public authority is going to withhold information, it must inform the applicant of this within the time for compliance provided for in section 10(1).
49. The Commissioner notes that the MoJ failed to provide a refusal notice within the 20 working day limit therefore she considers that it has breached both sections 10(1) and 17(1).



## Right of appeal

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50. 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)

51. 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.
52. 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**  
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