

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 February 2018

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

Decision (including any steps ordered)

1. The complainant requested information about the number of prisoner transfers to a specified prison over a two year period, broken down by month. The Ministry of Justice (the 'MOJ') refused to provide the requested information, citing section 40(2), the exemption for personal information, of FOIA.
2. The Commissioner's decision is that the MOJ was entitled to rely on section 40(2) of FOIA to refuse this request. She does not require the MOJ to take any steps.

Request and response

3. On 25 September 2017 the complainant wrote to the MOJ and requested information in the following terms:

"How many prisoners have transferred to Northern Ireland Prison Service (NIPS) from England and Wales in the last two years and the breakdown of months in which they transferred?"

4. The MOJ responded on 30 October 2017. It refused to provide the requested information, citing section 40(2) of FOIA, the exemption for personal information.
5. Following an internal review on 5 December 2017, the MOJ maintained its original position.

Background

6. The complainant has previously made a similar request which the Commissioner has investigated. The decision notice can be found on her website¹.

Scope of the case

7. The complainant contacted the Commissioner on 11 December 2017 to complain about the way his request for information had been handled. In his view, the information he requires is "*statistics*" not personal data.
8. The Commissioner has considered whether the MOJ is entitled to rely on section 40(2) of FOIA to refuse this request.

Reasons for decision

Section 40 personal information

9. The FOIA exists to place official information into the public domain. Once access to information is granted to one person under the FOIA, it is then considered 'public' information which can be communicated to any individual should a request be received. As an exemption, section 40 therefore operates to protect the rights of individuals in respect of their personal data.
10. 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 where the disclosure of that personal data would be in breach of any of the data protection principles.

Is the requested information personal data?

11. In order to rely on section 40(2) the requested information must constitute personal data as defined in section 1 of the Data Protection Act 1998 (the 'DPA'). For information to constitute personal data, it must relate to an individual, and that individual must be identifiable from that information, or from that information and other information in the possession of the data controller.
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¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2173045/fs50700610.pdf>

12. 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, has them as its main focus or impacts on them in any way.

13. The MOJ applied section 40(2) to this request. It told the complainant there had been a number of transfers pursuant to his request, stating:

"In the past two years a number of prisoners have been transferred from England and Wales to Northern Ireland but we are not able to give you an exact figure because if a request is made for information and the total figure amounts to five people or fewer, the MOJ must consider whether this could lead to the identification of individuals and whether disclosure of this information would be in breach of our statutory obligations under the Data Protection Act 1998. We believe that the release of this information would risk identification of the individuals concerned. For this reason MOJ has chosen not to provide an exact figure where the true number falls between one and five. However it should not be assumed that the actual figure represented falls at any particular point within this scale."

14. Additionally, the MOJ told the Commissioner that it considers that information about the movements of these prisoners relates to their private lives.

15. In the circumstances of this case, the Commissioner is mindful that the complainant, who is also a prisoner, may be able to identify the individuals. It is possible that releasing the actual low number involved here could potentially lead to their identities being disclosed if their movements had been confirmed. The Commissioner also notes that the complainant has requested a breakdown by month, which makes the potential for identification considerably more likely, particularly given the low actual total number of transfers.

16. A test used by both the Commissioner and the First-tier Tribunal in cases such as this 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 to have been anonymised.

17. The ICO's Code of Practice on Anonymisation² 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".

18. In summary, the motivated intruder test is that if the risk of identification is "reasonably likely" the information should be regarded as personal data.

19. Whilst the complainant has not asked for the names of the prisoners, he is aware that the actual number involved in the scenario he has outlined in his request is low. As he is a prisoner himself it is likely that he may therefore have a more detailed personal knowledge of the movement of individuals throughout the prison establishment.

20. It is also understood that the complainant may be requesting the information for his own personal reasons rather than to identify any party. However, it seems more likely than not that the complainant either knows the parties concerned, or is seeking the information requested in order to try to identify them. Given that he has requested a breakdown by month, this also adds weight to the likelihood that the complainant may personally be able to identify the prisoners involved.

21. The MOJ also said:

"Prisoners held in custody by Her Majesty's Prison and Probation Service and the Northern Ireland Prison Service's would have a reasonable expectation that their personal data should be protected. Personal information is only shared if it is considered necessary for the purpose of managing risk and only with those that need to know. The reason for this is not only to ensure compliance with data protection rules, but also to ensure that the risk management of an offender is not undermined, as the indiscriminate release of information can lead to the offender feeling more isolated, or being subject to the threat of reprisal or vigilante type actions. Where offenders face situations like this, there is a risk that they become less settled, lose contact with the agencies responsible for managing and supporting them, and

² <https://ico.org.uk/media/fororganisations/documents/1061/anonymisation-code.pdf>

experience the type of situations that could put them more at risk of offending."

22. Given these particular circumstances, the MOJ felt that confirming the actual number and months involved would potentially lead to the prisoners involved being identified by the complainant.
23. The Commissioner is therefore satisfied, that in the particular circumstances of this case, it is reasonably likely that a motivated intruder, ie the complainant himself, could identify the individuals concerned and that the requested information therefore constitutes the personal data of those individuals concerned within the meaning of section 1 of the DPA.
24. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle, which is the most relevant one in this case, states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focussed on the issue of fairness.
25. In considering fairness the Commissioner finds it useful to balance the reasonable expectation of the individuals, the potential consequences of the disclosure and whether there is a legitimate public interest in the disclosure of the information in question.
26. The MOJ has argued that those concerned would not be aware of the disclosure or that their data was to be disclosed in this manner. It said the individuals have not been asked whether they are willing to consent to the disclosure of their personal data.
27. The Commissioner notes that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions, and that individuals have a strong expectation that their personal data will be held in accordance with the DPA and not disclosed to the public. She is also mindful of the MOJ's view stated above about the risk management of offenders in conjunction with DPA compliance.
28. Given the nature of the request, and the subject matter, the Commissioner considers that disclosure in this case could lead to an intrusion into the private lives of the individuals concerned and the consequences of any disclosure of their personal data could cause damage and distress. The Commissioner therefore finds that the parties concerned will have no reasonable expectation that the MOJ will disclose their personal data. She therefore concludes that disclosure would be unfair.
29. Whilst section 40(2) is not a qualified exemption in the same way as some of the other exemptions in Part II of FOIA, 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. Therefore, despite the

reasonable expectations of individuals, it may still be fair to disclose the requested information. The question here is whether any legitimate public interest in disclosure outweighs the factors against disclosure covered above.

30. 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 disclosure must outweigh the public interest in protecting the rights and freedoms of the data subjects. The interest in disclosure must also 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.
31. The Commissioner has considered the complainant's legitimate interests against the rights and freedoms or legitimate interests of the individuals concerned. Whilst there may be some limited public interest in the disclosure of the details of prisoner transfers, the Commissioner does not find that this outweighs the interests of the individuals concerned.

Conclusion

32. The Commissioner finds that the requested information constitutes personal data, and has concluded that disclosure of that information would be unfair and unlawful, in the particular circumstances of this case. The finding of the Commissioner is that the exemption provided by section 40(2) is engaged and the MOJ was not obliged to disclose any information held.

Right of appeal

33. 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

34. 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.
35. 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

Deborah Clark
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