

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 December 2021

Public Authority: Department of Justice Northern Ireland

Address: Information Services Division

Block 4

Knockview Buildings

Ballymiscaw

Stormont

Belfast

BT4 3SL

Decision (including any steps ordered)

1. The complainant has requested information from Legal Services Agency Northern Ireland ("LSANI") about sums of legal aid granted to a specific individual in relation to two legal hearings.
2. LSANI stated that it would neither confirm nor deny that it holds the requested information, citing section 40(5B)(a)(i) of the FOIA.
3. The Commissioner's decision is that LSANI is entitled to rely on section 40(5) to neither confirm nor deny that it holds the information.
4. The Commissioner does not require LSANI to take any further steps.

Nomenclature

5. LSANI is an executive agency of the Department of Justice (Northern Ireland) ("DoJ"). The DoJ is ultimately the relevant public authority in this case, however, as LSANI has its own FOI unit, and as both the complainant and the Commissioner have corresponded with LSANI during the course of the request and complaint, the Commissioner will refer to LSANI for the purposes of this notice.

Request and response

6. On 2 April 2021, the complainant wrote to LSANI and requested information in the following terms:

"REQUEST FOR INFORMATION UNDER FREEDOM OF INFORMATION OR OTHER DISCLOSURE TYPE LEGISLATION OR SCHEMES FOR CASES [case reference's redacted]

...A detailed or summary (as is held by LSA or by Taxing Master) of the amount of public funds paid thus far to:

*I. [personal data redacted] legal team,
II. NIGALA, and
III. amounts that were disallowed."*

7. LSANI responded on 27 April 2021. It stated that it would neither confirm nor deny that it holds the requested information, citing section 40(5B)(a)(i) of the FOIA.
8. On 28 April 2021, the complainant requested that LSANI carried out an internal review.
9. Following an internal review LSANI wrote to the complainant on 7 May 2021. It stated that it had correctly applied the exemption at section 40(5B)(a)(i) of the FOIA, and therefore upheld its original position.

Scope of the case

10. The complainant contacted the Commissioner on 7 May 2021 to complain about the way their request for information had been handled.
11. The Commissioner considers the scope of his investigation is to establish whether LSANI is entitled to rely on section 40(5B)(a)(i) of the FOIA, to neither confirm nor deny that it holds information falling within the scope of the request.
12. As the Commissioner is also the regulator of data protection legislation, he has decided that he has sufficient information to reach a decision in this case, based on the initial response and internal review arguments, along with his own expertise, without seeking further arguments from LSANI.

Reasons for decision

13. Section 1(1)(a) of the FOIA provides that where a public authority receives a request for information, it is obliged to tell the applicant whether or not it holds that information. This is commonly known as the duty to confirm or deny.
14. However, the duty to confirm or deny does not always apply. In certain circumstances, confirming or denying that the information is held could in itself disclose information which would otherwise fall under an exemption.
15. Section 40(5B)(a)(i) of the FOIA provides that the duty to confirm or deny does not arise if to confirm or deny alone would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulations (GDPR).
16. Therefore, for LSANI to be entitled to rely on section 40(5B)(a)(i) of the FOIA to neither confirm nor deny that it holds information falling within the scope of the request the following two criteria must be met:
 - Confirming or denying that the requested information is held would constitute the disclosure of a third party's personal data;
 - and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

17. Section 3(2) of the DPA 2018 defines personal data as:

"any information relating to an identified or identifiable living individual".

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.
19. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

20. The Commissioner has previously considered the issue of whether legal aid constitutes personal data¹, 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.
21. The Commissioner is satisfied that if LSANI were to either confirm or deny that it holds the requested information, it would involve the disclosure of personal data. The first criterion set out is therefore met.
22. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent LSANI from refusing to confirm whether it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.

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

23. The Commissioner considers that the most relevant data protection principle is principle (a).

24. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

25. In the case of a request for information under the FOIA, processing of personal data occurs when it is disclosed in response to the request. This means that the information can only be disclosed – or as in this case, the public authority can only confirm whether or not it holds the requested information – if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair and be transparent.

Lawful processing: Article 6(1) GDPR

26. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

¹ Please see, for example, https://ico.org.uk/media/action-weve-taken/decisionnotices/2006/383306/DECISION_NOTICE_FS50076855.pdf

27. The Commissioner considers that the condition most applicable on the facts of this case would be that set out in Article 6(1)(f) of the GDPR, which states that:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".

28. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA it is necessary to consider the following three-part test:

- (i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- (ii) **Necessity test:** Whether confirming or denying that the requested information is held is necessary to meet the legitimate interest in question;
- (iii) **Balancing test:** Whether the above legitimate interest(s) override the interests or fundamental rights and freedoms of the data subject.

29. The Commissioner considers that the test of "necessity" under part (ii) must be met before the balancing test under part (iii) is applied.

Legitimate interests

30. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOIA request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sake as well as case specific interests.
31. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
32. In this case, the complainant states that he seeks the disclosure of the requested information as he suspects that legal aid has been used fraudulently to cover private law matters, and that it is in the public interest to know if public funds are being misused.

Necessity test

33. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures; so, confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
34. The Commissioner is aware that LSANI does not routinely publish the amounts of legal aid granted to individuals in family law cases. Furthermore, the Commissioner is also aware that LSANI has avenues in place dedicated to the reporting and investigating of suspected legal aid fraud², whereby any personal data involved in the matter would only be made available to the appropriate personnel within the Counter Fraud Team for the purpose of conducting an investigation into the alleged fraud and determining if any wrongdoing has occurred, rather than being disclosed to the world at large.
35. He is, therefore, satisfied that to confirm or deny that the information is held would not be necessary in this case, and that there are less intrusive means of achieving the legitimate aims identified.

Balancing test

36. As the Commissioner has found in this case that confirmation or denial is not necessary to achieve the identified legitimate interest, he has not gone on to consider the balance of the legitimate interests against the data subject's interests, fundamental rights and freedoms.
37. As confirmation or denial has not been found to be necessary, there is no lawful basis for processing, and it therefore does not meet the requirements of principle (a).

Fairness/Transparency

38. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that he does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and/or transparent.

² Reporting suspected legal aid fraud to LSANI - <https://www.justice-ni.gov.uk/contacts/lsani-contact-details>

39. The Commissioner has determined that the public authority correctly refused to confirm whether or not it held the requested information on the basis of section 40(5B)(a)(i) of the FOIA.

Right of appeal

40. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. 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.
42. 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

Catherine Fletcher
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