

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 August 2022

Public Authority: Crown Prosecution Service
Address: 102 Petty France
London
SW1H 9EA

Decision (including any steps ordered)

1. The complainant requested information from the Crown Prosecution Service ("the CPS") as a follow up to a previous request relating to the outcome of CPS review and reasons, as well as the name of the Court which dealt with a specific case. The CPS provided some information in the form of a table in response to part one of the request but withheld the information for part two under section 40(2) (personal information) of FOIA.
2. The Commissioner's decision is that the information in part two of the request is the personal data of third parties and is exempt under section 40(2) (personal information) of FOIA.
3. The Commissioner does not require the CPS to take any steps.

Request and response

4. On 13 September 2021, the complainant contacted the CPS and requested information in the following terms:

"On 13 September 2021, CPS provided a list of private prosecution cases it reviewed in response to FOI request 10012. This request references the cases by the year and bullet point number they were assigned in that list.

1. Please provide the outcome of the CPS review and the reason for cases 1-10 in 2020-2021
 2. Please also provide the name of the relevant court for case 9 in 2020-2021."
5. The CPS responded on 18 October 2021 and explained the process it follows when dealing with the specific type of cases within the scope of the request and explained this was not definitive and would be updated from time to time. They refused the requested information for part two citing section 40(2) of FOIA to do so.
6. On 26 October 2021, the complainant requested an internal review for part two of their request.
7. The CPS responded on 17 November 2021, upholding its original decision to withhold the requested information under Section 40(2) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 17 November 2021 to complain about the way their request for information had been handled.
9. The Commissioner considers the scope of this case to be to determine if the CPS is entitled to rely on section 40(2) of FOIA to withhold the requested information (third party data).

Reasons for decision

Section 40 personal information

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 one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
11. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then section 40 of FOIA cannot apply.

Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

"any information relating to an identified or identifiable living individual."
14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

16. 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.
17. The information withheld under section 40(2) of FOIA is that of the name of the Court a specific case (as referenced) regarding an individual's private prosecution and where the hearing took place.
18. The name of the Court in itself is not considered personal data, however, when combined with other specific information, may lead to the identification of individual(s) who may have attended a hearing on a specific day or date range, the purpose of the hearing can also be relevant in helping to identify attendees of the Court.
19. In the circumstances of this case, having considered the sample of withheld information, the Commissioner is satisfied that the information relates to data subject(s), that is individuals and/or employees of the Court. He is satisfied that this information both relates to and identifies the data subject(s) concerned.
20. When considering the possibility of identification, the Commissioner applies the "Motivated Intruder Test." This test starts with a hypothesis that there exists a person who wishes to identify the individual(s) covered by the disputed information. The person is willing to devote a considerable amount of time and resources to the process of identification. They may have some inside knowledge (i.e., information not already in the public domain) but will not resort to illegality – they are determined but not reckless. The Commissioner looks to see how such a person would go about identifying the individual(s) involved.
21. The Commissioner has considered the CPS's view that when combined with other information relating to the date range and location, it is possible given the very specific nature of point two that identification of individual attendees could be made. The Commissioner's view is that the request is sufficiently specific to enable the complainant or a third party to use the requested information together with any other information publicly available, to identify living individuals and thereby resulting in disclosure of personal data.
22. It is also possible, given the specific circumstances of the request, the complainant may hold additional information to be able to identify the individual data subject(s). This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
23. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under

FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

24. Article 5(1)(a) of the UK 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 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 lawful, fair, and transparent.

26. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

27. Article 6(1) of the UK 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” lawful bases for processing listed in the Article applies.

28. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“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”².

² Article 6(1) goes on to state that: -

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.”

However, section 40(8) of FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that: -

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of

29. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under 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 disclosure of the information is necessary to meet the legitimate interest in question.
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
30. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

31. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
32. In this case the requester has a personal interest in disclosure of the withheld information to allow scrutiny of the CPS and ensure the CPS has followed its own guidance and procedures and its wider obligations of openness and transparency.
33. The requester has stated that: "By refusing to provide details of where private prosecutions are occurring, the CPS is blocking independent reporting on those prosecutions." And "The CPS makes decisions about the propriety of such cases, but then blocks any checking of those decisions by refusing to share information that would allow independent
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the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted"

reporting -- transparency in the judicial system. The provision of information about court proceedings strengthens general transparency in the courts, which underpins public confidence in the judicial system.”

34. The CPS acknowledges that the legitimate interest is that of openness and transparency, as well as an understanding of how decisions are made within the CPS. However, in consideration of disclosure they argued that given the specific information requested, along with the information already disclosed in the public domain, there would be a high probability of individual(s) being identifiable. They also argued that information about any private prosecutions brought before the Court would clearly identify those individuals involved and to the extent that they would be distinguishable from other individuals.
35. The CPS cannot identify a further legitimate interest in the public or applicant having access to the specific withheld personal information, other than the fact a prosecution hearing took place.
36. The Commissioner considers that disclosure of the withheld information, could further public debate or contribute towards the openness, transparency, and accountability of the CPS.
37. As the Commissioner does consider there is a legitimate interest in openness and transparency of the CPS, he has therefore gone on to consider whether disclosure was necessary.

Is disclosure necessary?

38. ‘Necessary’ means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
39. It is clear there would appear to be no other means for the complainant to obtain the detail of the information they requested other than through release of the requested information. However, this must be balanced against the subject’s rights to have their personal data protected.

Balance between legitimate interests and the data subject’s interests’ fundamental rights and freedoms

40. It is necessary to balance the legitimate interests in disclosure against the data subject’s interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the

information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

41. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
42. In the Commissioner's view, a key issue is whether the individual(s) concerned has a reasonable expectation their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to someone in their professional role or to them as individuals, and the purpose for which they provided their personal data.
43. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
44. The Commissioner considers that disclosure of this information would be disproportionately intrusive to the individual(s) as it would reveal information about those seeking a judicial outcome through a private prosecution, which is not otherwise in the public domain (accept in limited circumstances or for a limited period of time).
45. The law provides that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate.
46. Whilst the Commissioner understands the complainant's wish to obtain this information and the wider public interest in openness and transparency in the CPS, he is mindful that disclosure under FOIA is disclosure to the world at large and not just to the requester.
47. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms in this case. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

48. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to consider whether disclosure would be fair or transparent.

The Commissioner's view

49. The Commissioner has therefore decided that the CPS was entitled to withhold some of the information that includes third party personal data under section 40(2), by way of section 40(3A)(a).

Right of appeal

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@justice.gov.uk

Website: 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

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