

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 September 2022

Public Authority: Ministry of Justice

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information relating to a named individual. The Ministry of Justice (MoJ) neither confirmed nor denied holding some of the requested information and refused to provide the remainder, citing section 40(2) (personal information) of FOIA.
2. The Commissioner investigated its application of section 40(2) to the information withheld by virtue of that exemption.
3. The Commissioner's decision is that the information was correctly withheld.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 28 January 2022, the complainant wrote to the MoJ and requested information in the following terms:

"1.How much have you/the state paid to victims of [name redacted], a trans-woman, resulting from [name redacted] assaulting female inmates of New Hall prison in West Yorkshire.

The background to the request is in this Guardian story, [reference to Guardian newspaper article from 2018]

The article says this,

"It is believed the decision to place [named redacted] in a women's prison was made only at the first level – by a local case board. [Name 2 redacted] says the board should have taken into account all offending history but failed to do so."

2. Provide the decision allowing [name redacted] to go New Hall prison".

6. The request was made using 'whatdotheyknow'.
7. The MoJ responded on 22 February 2022. It neither confirmed nor denied holding information within the scope of part (1) of the request, citing section 40(5B)(a)(i) (personal information) of FOIA. It refused to provide the information requested at part (2) of the request citing section 40(2) of FOIA.
8. Following an internal review the MoJ wrote to the complainant on 17 March 2022 maintaining its position and, for the avoidance of doubt, clarifying that while information within the scope of part (2) of the request is held, it is exempt from disclosure.

Scope of the case

9. The complainant contacted the Commissioner on 17 March 2022 to complain about the way his request for information had been handled. He told the Commissioner:

"There is a legitimate interest in the information being released".

10. The Commissioner is mindful that while the MoJ neither confirmed nor denied holding information within the scope of part (1) of the request, it confirmed it held information within the scope of part (2) of the request but refused to disclose it.
11. The decision to neither confirm nor deny is separate from a decision not to disclose information.
12. The Commissioner is aware that the complainant is an experienced user of the legislation. Accordingly, taking into account his comments about the legitimate interest in disclosure, when the Commissioner wrote to the complainant setting out the scope of his investigation, he explained that the scope of his investigation would be to look at whether the MoJ is entitled to rely on section 40(2) as a basis for refusing to provide the information within the scope of part (2) of the request.
13. He asked the complainant to contact him if there were other matters that he considered should be addressed.

14. The complainant responded, saying:

“There is an exemption under DPA 18 [Data Protection Act 2018] for purposes of journalism regarding improper conduct or crime. The information would have been released and therefore **published** at WDTK.com, this meets the relevant journalism test”.

15. He also told the Commissioner:

“Putting a convicted male sex offender in a women's prison was reckless, and a failure by the MoJ”.

16. In light of the above, the analysis below considers the MoJ’s application of section 40(2) to the information within the scope of part (2) of the request.

17. The Commissioner has addressed the matter raised by the complainant about an exemption under DPA 18 in ‘Other matters’ below.

Reasons for decision

Section 40 - personal information

18. 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.

19. 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’).

20. 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.

21. 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.

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

Is the information personal data?

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

“any information relating to an identified or identifiable living individual”.

23. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

24. 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.

25. 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.

26. In its submission to the Commissioner, the MoJ confirmed that information regarding the decision to move the individual named in the request to HMP New Hall is their personal data. It told the Commissioner:

“The information is linked to them, has biographical significance to them, is used to inform decisions affecting them and has them as its main focus. They are clearly identifiable through this information due to the nature of the request being specific to them”.

27. In the circumstances of this case, the Commissioner is satisfied that the information relates to the individual named in the request. He is satisfied that this information both relates to and identifies the individual concerned. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.

28. 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.

29. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

30. 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”.

31. In the case of a 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.
32. 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.
33. In addition, if the requested data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the UK GDPR.

Is the information criminal offence data?

34. Information relating to criminal convictions and offences is given special status in the UK GDPR.
35. Article 10 of the UK GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:
 - (a) The alleged commission of offences by the data subject; or
 - (b) Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.
36. Having considered the wording of the request, the Commissioner finds that the requested information does include criminal offence data. He has reached this conclusion on the basis that the requested information relates to sentencing, in this case the decision about where the individual named in the request serves their sentence.
37. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.
38. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
39. The Commissioner has seen no evidence or indication that the individual concerned has specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.

40. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and so this information is exempt under section 40(2) of FOIA.

Other matters

41. The Commissioner notes that the complainant considers that there is an exemption under the DPA that is relevant in this case.
42. The Commissioner's guidance entitled 'Guide to the UK General Data Protection Regulation (UK GDPR)' includes a section on exemptions.
43. With respect to the exemption referred to by the complainant, the Commissioner's guidance sets out the criteria that must be satisfied for the exemption to apply.
44. It is for a data controller, in this case the MoJ, to apply the DPA exemptions and as it has not chosen to do so, it is immaterial to this case.

Right of appeal

45. 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

46. 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.
47. 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

**Laura Tomkinson
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