

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 December 2011

Public Authority: West Yorkshire Archive Service
Address: Newstead Road
Wakefield
West Yorkshire
WF1 2DE

Decision (including any steps ordered)

1. The complainant has requested records relating to a prosecution for a sexual offence which occurred in 1943.
2. The Commissioner's decision is that West Yorkshire Archive Service was correct to withhold the information under section 40(2) of the Act.

Request and response

3. On 16 February 2010 the complainant wrote to West Yorkshire Archive Service (WYAS) and requested information about records it held relating to a prosecution for a sexual offence which occurred in 1943. The Commissioner is not able to repeat the request specifically as it provides biographical information relating to the complainant, however she sought a disclosure of any relevant records held by the Archive Service from specific records.
4. WYAS responded on 17 March 2010. It stated that it did hold relevant information within its archives but that that information could not be disclosed because it contained the personal information of third parties and a disclosure of that information would breach the principles of the Data Protection Act 1998 (the 'DPA'). The information was therefore exempt under section 40 of the Act which exempts third party personal data where a disclosure would breach any of the data protection principles of the DPA.

5. Following an internal review requested on 7 February 2011 the WYAS wrote to the complainant on 17 February 2011. It upheld its initial decision for the same reasons.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way her request for information had been handled.
7. The Commissioner has considered whether the information held by WYAS should be disclosed to her.

Reasons for decision

8. Amongst other things, Section 40 of the Freedom of Information Act 2000 provides an exemption from the disclosure of personal 'data' where the information is the personal information of a third party and its disclosure would breach one of the data protection principles of the DPA.
9. The DPA defines personal data as data which relates to a living individual who can be identified from those data and other information which is in the possession of, or is likely to come into the possession of the data controller (i.e. in this case WYAS).
10. The first question which must be considered is whether the individual concerned is alive or not. If he is not then the DPA cannot apply, and so no breach of the principles could occur. The DPA only applies to living individuals.
11. The information in question is personal information of a individual which was recorded in 1943. It records details of a prosecution for a sexual offence which the individual was prosecuted for in that year.
12. WYAS has stated that the individual is a foreign national, posted in Britain during the war. It states that it does not know whether that individual is still alive or not.
13. 'The Code of Practice for Archivists and Records Managers under Section 51(4) of the Data Protection Act 1998' provide guidance to archivists and records managers as to how to approach an issue of data protection where it does not know whether the individual is alive or not.
14. The code says that where an archivist does not know whether an individual is alive they should assume that that person has a lifespan of 100 years.

15. WYAS states that it was able to establish the age of the individual concerned from the information it holds. It states that if he is alive today he will now be in his 80's.
16. The Commissioner is therefore satisfied that this falls within the 100 year period provided by the code of practice. WYAS was therefore correct to assume that the individual may still be alive. WYAS must therefore ensure that it only discloses the information in compliance with the individual's rights under the DPA

The first data protection principle

17. Having established that WYAS was correct to apply the provisions of the DPA to the information, the Commissioner must establish whether a disclosure of the information would breach one of the principles of the DPA.
18. The data protection principle primarily involved is the First Data Protection Principle. This requires personal information to be 'processed' (i.e. in this case disclosed) 'fairly' and 'lawfully'.
19. In deciding whether disclosure under the FOI Act is fair to the individual the Act requires the Commissioner to consider whether it is fair to disclose that information to '*any member of the public*' – i.e. a global disclosure to any one person who wants to see that information.
20. The question of what is 'fair' revolves around the expectations of the individual. This takes into account what he was told at the time that his information was obtained, but also bearing in mind all of the circumstances of the case at the time that the request was received.
21. As stated, the information in question is a record of the prosecution of the individual for a sexual offence. He would not have provided his information voluntarily but it would have been recorded as part of the prosecution. Given the nature of the information the Commissioner's view is that there is no possibility that the individual would have any expectation of such a disclosure to the whole world at this point in time.
22. Although it is possible that details of the offence were published or were heard in open court in 1943, the Commissioner considers it clear that the individual would not expect details of an offence he was found guilty of to be disclosed to the world 60 years after the event occurred.

The complainant's rights under the Human Rights Act

23. The third party is potentially the father of the complainant. Solicitors for the complainant therefore argued that rights under Article 7 and 8 of the

Human Rights Act provide strong rights which require that the information should be disclosed.

24. They referred to European Court of Human Rights judgements which found that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality.
25. Even if the Commissioner were able to accept that a disclosure of the information to the complainant may possibly be fair because of her potential links to the third party, he is unable to accept that that argument would extend to a disclosure of the information to "any member of the public" as needs to be considered under the Act.
26. Requests under the FOI Act are also treated as 'applicant blind'. This means that the Commissioner cannot take into account the complainant's personal interest in receiving the information when making his decision. He is therefore unable to consider the complainant's personal reasons for requesting the information, albeit that he recognises that these may significantly strengthen the complainant's arguments that the information should be disclosed to her generally.
27. WYAS also stated that it may be barred from disclosing details of the prosecution under other legislation. It stated that the individual may have rights under the Sexual Offences (Amendment Act) 1992 for his identity to be withheld. Rights under this Act prohibit the publication of the identity of both the victim and the offender during their lifetime.
28. This is relevant because of the requirement for a disclosure to be 'lawful' in the first data protection principle. If a disclosure would be prohibited in law then the first data protection principle would be breached by any unlawful disclosure of the information. This provision would also strengthen the third party's expectation that his information would not be disclosed.
29. The Commissioner is therefore satisfied that if WYAS disclosed this information it would breach the first principle of the DPA. Therefore section 40 of the FOI Act is applicable to the information.
30. WYAS are not therefore required to disclose the information to the complainant under the FOI Act.

Other Matters

31. The Commissioner recognises the exceptional circumstances of this case and that this is not a desirable outcome for the complainant. The

complainant is simply attempting to ascertain her father's identity and has argued that this may be the only way that she can do that. The Commissioner therefore recognises a very strong private interest in information being disclosed to her.

32. The central reason why he is unable to find that the information should be disclosed to the complainant in this case is the global nature of disclosures under the FOI Act. This is compounded by the sensitive nature of the withheld information itself.
33. The Commissioner has therefore provided advice separately to this decision notice, which explains how the complainant may be able to obtain this information outside of her rights under the Act. This will however be dependent upon the circumstances of the case which she can present to WYAS and on WYAS's judgement based on those circumstances.

Right of appeal

34. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

35. 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.
36. 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

Gerrard Tracey
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