

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 10 March 2009

Public Authority: National Offender Management Service
(Ministry of Justice)
Address: 102 Petty France
London
SW1H 9AJ

Summary

The complainant asked the National Offender Management Service (NOMS) for information concerning whether a named person remains in prison, the location of that prison and, in the event that he is no longer in prison, the date of his re-release on licence. NOMS refused to disclose the requested information in reliance of section 40(3) of the Act. The Commissioner finds that NOMS breached section 17(1)(b) of the Act by failing to cite section 40(2)(b) as the appropriate exemption in refusing to supply the requested information. Notwithstanding this breach, however, the Commissioner is satisfied that NOMS was not obliged to supply the requested information in accordance with section 1(1)(b) of the Act by virtue of section 40(2). The Commissioner considers that the requested information is the sensitive personal data of the named person and finds none of the conditions of Schedule 3 of the Data Protection Act 1998 are met.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant wrote to the National Offender Management Service (NOMS) on 3 March 2006 asking to be informed:

'...whether [a named person] remains in prison, and if so, details of which prison, and if not the date of his re-release on licence, under the Freedom of Information Act'.*

* Hereafter referred to as 'the data subject'.

3. NOMS responded to the complainant on 28 March 2006. It refused to disclose the requested information stating that it was exempt under section 40(3) of the Act. The refusal notice added that the information was the personal information of another person and disclosure would breach the data protection principles. NOMS informed the complainant that he could seek an internal review of its decision if he was dissatisfied with its response.
4. On 2 May 2006 the complainant wrote to NOMS asking it to conduct an internal review of its decision not to disclose the information he had requested.
5. NOMS acknowledged the complainant's request for an internal review on 27 June 2006. On 15 August 2006 it informed the complainant that it had concluded its internal review and had upheld its decision to withhold the requested information by virtue of section 40(3). NOMS apologised for its delay in carrying out its review and for failing to confirm it held information relevant to the complainant's request. Its letter rebutted the arguments the complainant advanced against the application of section 40(3) to the requested information and informed him of his right to complain about its decision to the Information Commissioner.

The Investigation

Scope of the case

6. On 4 October 2006 the complainant contacted the Commissioner to complain about the NOMS decision to refuse to disclose the information he had requested.

Chronology

7. The Commissioner wrote to NOMS on 25 July 2007. He asked questions of NOMS relating to the application of section 40 and in particular whether disclosure of the requested information would contravene any of the data protection principles. NOMS was asked to expand on the arguments it had advanced to the complainant in support of withholding the requested information.
8. NOMS responded to the Commissioner's enquiries in a letter dated 22 August 2007. NOMS argued that disclosure of the requested information would be unfair to the data subject and would breach the first data protection principle. It also asserted that the information constitutes sensitive personal data as defined by section 2(h) of the Data Protection Act 1998 (DPA) and that none of the conditions necessary for processing that data contained within Schedule 3 of the DPA could be met. NOMS confirmed it generally refuses to disclose information concerning serving and ex-prisoners, including the name of the prison where a person served or is serving his sentence and his or her date of release. NOMS emphasised that it dealt with requests for information on a case-by-case basis, giving appropriate consideration to the fact and extent that relevant information is

already in the public domain and whether disclosure could be made in line with the provisions of the DPA relating to sensitive personal data.

9. The Commissioner wrote to NOMS again on 9 October 2008 and made further enquiries about the withheld information and the application of section 40(3).
10. On 29 December 2008 NOMS responded to the Commissioner's enquiries.

Background to the case

11. The nature of the withheld information is such that the Commissioner cannot comment on the facts of the case in detail as to do so would effectively put that information into the public domain. The Commissioner is able to provide the following information which is a matter of public record and appears in a publicly available law report.
12. The data subject was convicted of murder and was given a life sentence. He served nine years in prison until he was released under licence. Five years after his release the data subject was recalled to prison following the revocation of his licence.
13. The data subject applied for a writ of habeas corpus when he was returned to prison. He did not challenge the legality of the Secretary of State's decision to revoke his licence. His application was based on his contention that the decision was based on circumstances which had subsequently been demonstrated to be unjustified.
14. Habeas corpus is a legal action or writ through which a person can seek relief from the unlawful detention of him or herself or of another person.
15. The data subject's application for a writ of habeas corpus was rejected and he subsequently appealed that decision.
16. The Court of Appeal (Civil Division) rejected the data subject's appeal.

Analysis

Section 17- Refusal Notice

17. In its refusal notice and internal review NOMS cited section 40(3) as the reason for withholding the requested information. Subsection 3 refers to the first condition that needs to be satisfied in order for section 40(2)(b) to apply and only follows from the application of that subsection. In this case NOMS should have cited section 40(2)(b) and explained that this applied by virtue of section 40(3)(a)(i). In failing to specify section 40(2)(b) in its refusal notice NOMS breached section 17(1)(b). Section 17(1)(b) places an obligation on the public authority to specify in its refusal notice the exemption(s) it is applying.

Section 40 (Personal Information)

18. Section 40(2) provides an exemption for information which is the personal data of any third party, that is a person other than the requestor and holder of the information, where disclosure would breach any of the data protection principles contained in the Data Protection Act 1998.

19. In order to rely on the exemption provided by section 40, the requested information must constitute personal data as defined by the DPA. Section 1(1) of the DPA states:

'Personal data means data which relate to a living individual who can be identified –

- a) from those data, or*
- b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'

20. In his complaint to the Commissioner the complainant stated that he accepted that the requested information was the data subject's personal data. The Commissioner agrees with the complainant. He also agrees with NOMS that the information is also 'sensitive personal data'.

21. Section 2 of the DPA defines sensitive personal data as information as to:

- a) 'the racial and ethnic origin of the data subject,*
- b) his political opinions,*
- c) his religious beliefs or other beliefs of a similar nature,*
- d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),*
- e) his physical or mental health condition,*
- f) his sexual life,*
- g) the commission or allege commission by him of any offence, or*
- h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.'*

22. The Commissioner considers that the requested information satisfies the definition of sensitive personal data under section 2(g) and (h).

The first data protection principle

23. NOMS' reliance on section 40(3) is based on its assertion that disclosure of the requested information would contravene the first data protection principle.

24. The first data protection principle requires that personal data is processed fairly and lawfully, and that:
 - at least one of the of the conditions in Schedule 2 of the DPA is met, and
 - in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
25. The Commissioner agrees that the relevant principle here is the first principle and has considered whether one of the conditions in Schedule 3 is met. He has considered the conditions in Schedule 3 first as he believes that these conditions are more difficult to meet than those contained in Schedule 2.
26. The conditions contained within Schedule 3 can be found in the Legal Annex at the end of this notice.
27. In his submissions to the Commissioner the complainant asserted that the following three conditions are met:

Condition 3 – The processing is necessary (a) in order to protect the vital interests of the data subject or another person, in a case where (i) consent cannot be given by or on behalf of the data subject.

Condition 6 – The processing (c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.

Condition 7 – The processing is necessary for the administration of justice.
28. The complainant asserts that condition 3 is met because it is in the data subject's vital interests that he is able to be contacted by academics, journalists and others, so that they may assist him.
29. The Commissioner rejects this argument and finds that condition 3 is not met: It is not necessary to a person's vital interests, for the public at large to know whether or not he remains in prison and if so, the location of that prison, nor does the Act provide enhanced right of access to information to any group or class of person. He considers that a person's vital interests are those which are essential to life and consequently he finds that disclosure of the requested information under the Act cannot be said to satisfy the 'necessary' element contained within this condition. Because the Commissioner finds that the necessary element of condition 3 is not met, he has not gone on to consider whether the data subject could or could not consent to the processing of his personal data.
30. The Commissioner is satisfied that the data subject's interests have been, and are, safeguarded. He is drawn to this conclusion because the law report, which brought the data subject's case to the attention of the complainant, shows that he had access to legal representation at the time of his recall to prison. The Commissioner considers that the data subject's access to legal representation provided the necessary protection to his vital interests. There is no evidence to suggest that the data subject had been denied access to legal representation at

any time during the period of his release on licence or following his return to prison.

31. The Commissioner has determined that condition 6 of Schedule 3 is not met. Again he would point out the data subject had full access to legal representation throughout the period of his release from prison and his subsequent return, and was therefore capable of establishing, exercising and defending his legal rights.
32. In relation to condition 7, the complainant asserts that it is a long standing principle that justice, particularly in the area of a criminal proceeding, must occur openly and that it is illogical to argue that the public has the right to know whether a person is convicted of a crime, what the sentence for that crime is, and in the case of a life sentence, what the minimum penal element is, but not to know how long is served in custody additional to the minimum penal element or where the sentence is served.
33. The data subject's trial was held in open court and his sentence is a matter of public record. The data subject's application for a writ of habeas corpus and his appeal against its refusal are also in the public domain.
34. The Commissioner understands that in cases where the sentence was passed before 8 October 2001, existing adult mandatory life prisoners were given a punishment part to their sentence at a hearing before a High Court judge and that the punishment part was set in open court. Once the punishment part of the sentence had been served, the Parole Board, sitting as a tribunal, would then decide whether the prisoner should be released on life licence. The prisoner has the right to be present at the Parole Board hearing and to be represented. Parole Board meetings are not open to the public. If the decision of the Parole Board is that the prisoner should not be released on life licence, the prisoner has the right to be seen again no more than two years after the decision. Where the Secretary of State revokes a life licence he may do so on the recommendation of the Parole Board. Where it appears expedient to revoke a life licence, the Secretary of State may do so before referring the matter to the Parole Board. Any additional time served by a prisoner is not routinely published.
35. The Commissioner finds nothing in the facts of this case to suggest that disclosure of the withheld information, under this Act, would be 'necessary' for the 'administration' of justice: rather than, for instance, public confidence in the administration of justice. He agrees with NOMS that it is necessary for NOMS and other recognised agencies to process this information for the administration of justice. He does not agree with the complainant that disclosure of the withheld information to the public is processing which is necessary for the administration of justice.
36. There is established public policy on controlling access to the records of those who have been involved in the criminal justice system. This is demonstrated by the creation of the Criminal Records Bureau.
37. The Commissioner has decided that none of the conditions in Schedule 3 of the Data Protection Act are satisfied and consequently to disclose this information would breach the first data protection principle. Having decided that none of the

conditions in Schedule 3 can be met, the Commissioner has not gone on to consider whether any of the conditions in Schedule 2 can be met.

The Decision

38. The Commissioner's decision is that NOMS breached section 17(1)(b) of the Act by failing to specify section 40(2) as the correct exemption in its refusal notice.
39. Notwithstanding its breach of section 17(1)(b), the Commissioner is satisfied that NOMS was not obliged to supply the requested information in accordance with section 1(1)(b) of the Act by virtue of section 40(2). He is further satisfied that subsection 3(a)(i) of section 40 applied and disclosure of the requested information would breach the first data protection principle.

Steps Required

40. The Commissioner requires no steps to be taken.

Other matters

41. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
42. The complainant drew the Commissioner's attention to the time taken by NOMS to conduct an internal review of its decision. The Commissioner notes that it took more than three months for the internal review to be conducted.
43. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his 'Good Practice Guidance No 5', published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. Whilst he recognises that in this case the delay occurred before the publication of his guidance on the matter, the Commissioner remains concerned that it took over three months for an internal review to be completed.

Right of Appeal

44. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 10th day of March 2009

Signed

**Nicole Duncan
Head of FOI Complaints**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

The Freedom of Information Act 2000

General right of access to information held by public authorities

Section (1) provides that –

“Any person making a request for information to a public authority is entitled

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

Personal information

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

The Data Protection Act 1998
Schedule 1 Part 1
The first principle

- 1 Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—
- (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Schedule 3

Conditions relevant for purposes of the first principle: processing of sensitive personal data

- 1 The data subject has given his explicit consent to the processing of the personal data.
- 2 (1) The processing is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment.
- (2) The Secretary of State may by order—
- (a) exclude the application of sub-paragraph (1) in such cases as may be specified, or
 - (b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.
- 3 The processing is necessary—
- (a) in order to protect the vital interests of the data subject or another person, in a case where—
 - (i) consent cannot be given by or on behalf of the data subject, or
 - (ii) the data controller cannot reasonably be expected to obtain the consent of the data subject, or
 - (b) in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld.
- 4 The processing—
- (a) is carried out in the course of its legitimate activities by any body or association which—
 - (i) is not established or conducted for profit, and
 - (ii) exists for political, philosophical, religious or trade-union purposes,
 - (b) is carried out with appropriate safeguards for the rights and freedoms of data subjects,
 - (c) relates only to individuals who either are members of the body or association or have regular contact with it in connection with its purposes, and

(d) does not involve disclosure of the personal data to a third party without the consent of the data subject.

5 The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.

6 The processing—

(a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),

(b) is necessary for the purpose of obtaining legal advice, or

(c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.

7 (1) The processing is necessary—

(a) for the administration of justice,

(b) for the exercise of any functions conferred on any person by or under an enactment, or

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department.

(2) The Secretary of State may by order—

(a) exclude the application of sub-paragraph (1) in such cases as may be specified, or

(b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.

8 (1) The processing is necessary for medical purposes and is undertaken by—

(a) a health professional, or

(b) a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a health professional.

(2) In this paragraph “medical purposes” includes the purposes of preventative medicine, medical diagnosis, medical research, the provision of care and treatment and the management of healthcare services.

9 (1) The processing—

(a) is of sensitive personal data consisting of information as to racial or ethnic origin,

(b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins, with a view to enabling such equality to be promoted or maintained, and

(c) is carried out with appropriate safeguards for the rights and freedoms of data subjects.

(2) The Secretary of State may by order specify circumstances in which processing falling within sub-paragraph (1)(a) and (b) is, or is not, to be taken for the purposes of sub-paragraph (1)(c) to be carried out with appropriate safeguards for the rights and freedoms of data subjects.

10 The personal data are processed in circumstances specified in an order made by the Secretary of State for the purposes of this paragraph.

Reference: FS50136719



Information Commissioner's Office

This legal annex does not contain the provisions of The Data Protection (Processing of Sensitive Personal Data) Order 2000. Details of this order can be found at:

www.opsi.gov.uk/si/si2000/20000417.htm