

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 March 2011

Public Authority: Crown Prosecution Service
Address: 50 Ludgate Hill
London
EC4M 7EX

Summary

The complainant asked the Crown Prosecution Service (the “public authority”) to provide information relating to the prosecution of a named individual. The public authority refused to disclose this using the exemptions under sections 30, 40 and 42 of the Freedom of Information Act 2000 (the “Act”).

The Commissioner’s decision is that the exemption in section 40(2) is engaged for the entirety of the information and that disclosure would breach the Data Protection Act 1998 (the “DPA”). He has not therefore considered the other exemptions cited. The complaint is not upheld.

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.

Background

2. A related decision has already been made regarding this subject matter – FS50293914¹. A further decision is being made at the same time as

¹http://www.ico.gov.uk/~media/documents/decisionnotices/2010/FS_50293914.ashx

this case – FS50361398 – which is as a result of non-disclosure of the information requested in this related decision.

The request

3. On 1 October 2009 the complainant, a journalist, made a request (the 'original request') for the following information:

"I would like to see all of the papers that the Crown Prosecution Service holds relating to the prosecution during 1997 and 1998 of Nicholas John Griffin (dob 19.03.59). Mr Griffin was successfully prosecuted under the 1986 Public Order Act, with his trial taking place at Harrow Crown Court between April 27th and 30th 1998".

4. On 29 October 2009 the public authority confirmed that it held the information but stated that it was exempt under sections 30(1)(c), 30(2)(a)(ii), 40(2) and 42 of the Act. On 4 November 2009 the complainant sought an internal review, and on 20 January 2010 the public authority upheld its previous position.
5. The complainant complained to the Commissioner about this request on 28 January 2010. During the Commissioner's investigation of this earlier complaint the public authority changed its position and applied the exclusion in section 12 (the costs limit) to the request, stating that the information was contained in 29 boxes. Both the Commissioner and the complainant accepted this position and the complainant withdrew his complaint.
6. However, he still required the public authority to respond to an additional request which he had made for a schedule of the contents of these boxes. The Commissioner's decision FS50293914 focused on this additional request, which had previously not been responded to. In complying with the steps ordered in decision FS50293914 the public authority found that it had erred in its citing of section 12 in relation to the complainant's original request. On 27 September 2010 it advised him as follows:

"I write to advise that as we sought to look at the schedules for the material, as requested by the Information Commissioner [in the steps of Decision Notice FS50293914], it became clear that much of the material was not related to the case which was the subject of your original request. This was a genuine error and as a result of this, I have requested the Information Commissioner

re-examine your request regarding the exemptions under sections 30, 40 and 42. I confirm that S12 does not apply in this case. Please accept my apologies for the error".

7. The complainant has confirmed that he wishes to have his original request / complaint reinvestigated. This Notice therefore relates to that original request.

The investigation

Scope of the case

8. On 8 October 2010 the complainant clarified the extent of the complaint that was to be reinvestigated following the public authority's letter of 27 September 2010. As well as asking the Commissioner to consider the withholding of the information he also raised the following issues:

"We are concerned at the way the CPS has handled this case and ask the IC [Information Commissioner] to consider whether the CPS has properly fulfilled its obligations under the FOIA. In particular, at first instance the CPS rejected the request for information on the basis of a number of different exemptions. However, it is now clear that the CPS had not checked the documents and did not even know how many documents were involved. At no stage (at the initial refusal stage, nor at the later internal review stage) did the CPS state that there was any difficulty in locating or examining the documents and we had assumed that the refusal was a reasoned decision reached after looking at the documents ... and that the decision had been subject to a proper internal review."

"The initial reliance on the exemptions under ss 30, 40 and 42 could not have been based on any examination of the documents. The refusal to disclose was not based on any real appraisal of the information itself and it has resulted in considerable delay. We ask the IC to consider this important issue in the appraisal of this complaint".

9. Having viewed the withheld information, the Commissioner notes that it includes some information about the prosecution of an individual other than the one specified in the request. Information about this party has not been requested by the complainant so the Commissioner does not consider that it falls within the scope of the request.

Chronology

10. On 4 October 2010 the Commissioner advised the public authority that he was re-opening the complainant's original complaint to investigate. He asked it to provide him with a copy of the withheld information and also to confirm whether or not it was relying on the exemptions which were originally applied. This was acknowledged on 6 October 2010.
11. On 2 November 2010 the public authority advised the Commissioner that it had posted copies of the withheld information to him.
12. On 10 November 2010, having not received the information, the Commissioner called the public authority to ask for further details in case it had gone astray. On the same day the public authority responded stating that *"the parcel has not left this building yet"*. On 11 November 2010 the public authority advised the Commissioner that it had posted two parcels for his attention, with a covering letter, and asked that he acknowledge their receipt.
13. On 15 November 2010 the Commissioner received, and acknowledged, the information. The covering letter did not offer any further details regarding the citing of exemptions so the Commissioner has considered the arguments made in the original refusal notice and internal review decision.

Analysis

Exemptions

Section 40(2) – personal information

14. The Commissioner has first considered the public authority's citing of the exemption in section 40(2). Whilst the public authority has not made the case that the entire information in question constitutes the personal data of the specified individual, stating only that the 'majority' is, the Commissioner considers it appropriate to exercise his discretion to consider whether it does constitute the individual's personal data in its entirety. In general, where it appears that information may be personal data and that the disclosure of this may be in breach of any of the data protection principles, the Commissioner will consider whether to exercise his discretion to consider section 40(2) even if this has not been cited by the public authority, or has been cited but in relation to different information. This approach is considered appropriate given

the Commissioner's twin responsibilities under the Freedom of Information and Data Protection Acts.

15. 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".

16. The exemption provided by section 40(2) is an absolute exemption in combination with section 40(3)(a)(i) or 40(3)(b). This is where disclosure of information which falls under the definition of personal data contained in section 1(1) of the Data Protection Act 1998 (DPA) would breach any of the data protection principles.

Is the information personal data?

17. Section 1(1) of the Data Protection Act 1998 (the DPA) provides the following definition of personal data:

"'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."

18. This provides two criteria that must be fulfilled for information to constitute personal data; the information must relate to an individual, and that individual must be identifiable either from that information directly, or from that information combined with other information available to the holder of that information.

19. The complainant raised with the Commissioner a number of factors which he considered to be relevant in this regard: the specified individual had a high public profile; the trial arose precisely because of his publication of his opinions (the complainant considered that this indicated the individual's consent to disclosure of those opinions); and disclosure would be fair owing to expectation and the fact that the case was heard in open court.

20. Having viewed the withheld information, the Commissioner considers it clear that the information in question here relates to the specified individual in that it relates to a criminal investigation concerning him. The Commissioner has therefore concluded that because the information in question relates to the specified individual, and that he would be directly identifiable from this information, this is therefore his 'personal data' according to the definition given in section 1(1) of the DPA. Whether the information is of a 'public' or 'private' nature is not an issue which needs to be considered when determining whether or not the information is actually 'personal data'. The relevance of whether or not the information is of a 'public' or 'private' nature is a separate issue which the Commissioner may consider when determining the fairness of disclosure once he has determined that information is 'personal data'.
21. Given the nature of this information, the Commissioner has also gone on to consider whether this information is 'sensitive personal data'.

Is the information sensitive personal data?

22. Section 2(g) of the DPA provides that personal data consisting of information as to the commission or alleged commission by the subject of an offence is sensitive. Furthermore, section 2(b) also provides that someone's political opinions are also sensitive. The Commissioner considers it clear that both descriptions can be applied to the information in question and so this is, therefore, sensitive personal data.
23. Turning to whether the disclosure of this information would breach any of the data protection principles, the Commissioner has focused here on the first data protection principle, which requires that personal data be processed fairly and lawfully. On the issue of whether disclosure would be 'fair', disclosure via the Act effectively renders information publicly available. This means that the first data protection principle will be satisfied only if it is fair to the specified individual to disclose his sensitive personal data into the public domain.
24. The complainant has made reference to 'open justice' and has drawn the Commissioner's attention to a publication on the public authority's website² entitled: *"Protocol for working together: Chief Police Officers, Chief Crown Prosecutors and the Media"*. The complainant has stated that, according to this publication, the public authority is:

² <http://www.cps.gov.uk/publications/agencies/mediaprotocol.html#a01>

"under an obligation to ('should') release sections of transcripts of interviews/statements as read in court to the media (and thereby to the public)".

25. However, the Commissioner understands that the publication is a 'protocol'. It is not legally binding but rather an 'agreement' written for a specific purpose outside the terms of the Act. Furthermore, he notes that it states:

"Everything that follows is subject to the Data Protection Act 1998 (DPA), the Freedom of Information Act 2000 (FOIA) and Article 10 of the European Convention on Human Rights which guarantees the right to impart and receive information".

26. The Commissioner thereby understands that, unlike the emphasis placed by the complainant, disclosure is not 'guaranteed'. He also notes that the protocol states that information may be released to *the media*, which would, in the Commissioner's view, be a disclosure outside of the Act. Furthermore, the protocol states that disclosure of prosecution materials to the media will only be: "*after consideration by the Crown Prosecution Service in consultation with the police and relevant victims, witnesses and family members...*". The Commissioner is not aware of any such consultation having taken place; however, even if it had, it would have been undertaken as a separate measure outside of the Act for a disclosure made outside the terms of the Act.
27. Therefore, although the Commissioner understands that discretionary disclosure may be provided to the media by the public authority, he does not agree that it has any direct bearing on a request being made under the Act. The Act is 'person blind' and an ordinary member of the public would not be able to approach the public authority in an attempt to obtain information under the terms of the protocol cited by the complainant.
28. The complainant has also referred to the expectation of those involved in the trial as it was heard in 'open court', the assumption therefore being that any parties involved were fully aware that their personal contributions to the trial would be heard in public. The Commissioner here refers to another of his cases, reference FS50076855, which concerned the awarding of legal aid costs. Although this case did not actually relate to the details of an actual prosecution, the relevant Decision Notice explains at paragraph 26: "*disclosures that are required as part of the court proceedings are, in practice, only disclosures to a limited audience*". The Commissioner continues to hold this view. The fact that information may have been heard in 'open court' cannot be relied on to assume that future disclosure is fair. The

information gathering for a trial is undertaken for that specific purpose and in the interests of justice. It is only processed by the justice system for that one specific purpose. The Commissioner is of the opinion that the expectation of those involved is that any of their personal data will only be used for that purpose and not that it may subsequently be released in its entirety to the public at large.

29. The information in question here is the specified individual's 'sensitive personal data'. As such, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves. Due to the sensitivity of this information, the Commissioner believes that disclosure of this into the public domain would be likely to cause unwarranted prejudice to the individual and it would be unfair to put significant detail about his trial back into the public domain. The Commissioner considers that there is an important difference between limited disclosure of information to affected parties and the wider disclosure of information under the Act. Therefore, the Commissioner concludes that disclosure of this information would be unfair and in breach of the first data protection principle.
30. Notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach. The Commissioner acknowledges that there is some legitimate public interest in disclosure and that the individual remained a controversial figure in British Politics at the time the request was made and public debate about the legality of his activities and of his political party was still taking place. The Commissioner accepts this was a legitimate debate but having considered the information he does not believe that there is a pressing enough case to disclose information from a Court case over 10 years ago, which would only be of limited value to public debate.
31. The Commissioner notes that even if it was fair to disclose some of the information this would not lead to disclosure as the information is sensitive personal data and one of conditions in schedule 3 of the DPA must also be satisfied to enable disclosure (the Commissioner has also considered further conditions specified in statutory orders). The Commissioner also finds that none of the conditions are satisfied, in considering these schedules the Commissioner has taken an 'applicant blind' approach and the identity of the requester as a journalist is not relevant.

32. The Commissioner considers all of the information in question is the sensitive personal data of the specified individual and, in view of the above, that disclosure of this information would be unfair and in breach of the first data protection principle. The exemption provided by section 40(2) is correctly engaged in relation to all the information. The Commissioner has therefore not found it necessary to consider the other exemptions which the public authority relied upon.

The Decision

33. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps required

34. The Commissioner requires no steps to be taken.

Other matters

35. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

Application of exemptions

36. From its earlier responses it appears to the Commissioner that the public authority never actually looked at the withheld information before applying exemptions. This has resulted in unnecessary delays and also in its misleading the Commissioner during the earlier stages of his investigation. Although on this occasion the Commissioner has agreed with the public authority's original position that the information was properly exempt, this would seem to have only been 'best guessed' by the public authority rather than properly considered. On this occasion it was a well gauged 'guess' but, in future, the Commissioner would always expect a public authority to actually look at the withheld information prior to considering its application of any exemption.

Time for internal review

37. The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority failed to provide the outcome of the review within this time frame. The public authority should ensure that internal reviews are carried out promptly in future.

Right of Appeal

38. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 28th day of March 2011

Signed

Steve Wood
Head of Policy Delivery

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

Legal annex

Freedom of Information Act 2000

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-

- (c) 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

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.”

Data Protection Act 1998

Sensitive personal data.

In this Act “sensitive personal data” means personal data consisting of information as to—

- (a) the racial or 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 or condition,
- (f) his sexual life,
- (g) the commission or alleged 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.