

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 June 2011

Public Authority: Crown Prosecution Service
Address: Rose Court
2 Southwark Bridge
London
SE1 9HS

Summary

The complainant requested information concerning nine cases in which the defendants were convicted of crimes, including murder and manslaughter, relating to the deaths of disabled people. The public authority refused the requests, citing the exemptions provided by sections 30(1)(c) (information held by the public authority for the purposes of any criminal proceedings which it has the power to conduct) and 40(2) (personal information). The Commissioner finds that the public authority cited the exemption provided by section 40(2) correctly and it is not required to disclose the information.

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 made requests on 15 and 16 July 2010 for the charging decision and the prosecutor's opening statement in relation to nine cases in which the defendants were convicted of murder, manslaughter and other offences and the victims were thought to be disabled. The public authority responded to these requests on 11 August 2010. The requests were refused, with the public authority citing the exemptions provided by sections 30(1)(c) (information held by the public authority

for the purposes of any criminal proceedings which it has the power to conduct) and 40(2) (personal information).

3. The complainant responded to this and requested an internal review. The public authority responded with the outcome of the internal review on 22 September 2010. The refusal of the requests was upheld.

The Investigation

Scope of the case

4. The complainant contacted the Commissioner's office in connection with these requests on 8 October 2010. At this stage the complainant indicated that she was dissatisfied with the refusal of her requests.
5. The complainant initially requested additional information as well as prosecutor opening statements and charging decisions. At the commencement of the investigation of this case, the complainant was contacted and it was noted that she had referred to restricting her requests to prosecutor opening statements and charging decisions when requesting an internal review. In light of this, the complainant was asked to respond confirming whether her complaint related to the original wording of her requests, or to the refined versions mentioned when requesting an internal review.
6. The complainant responded to this on 26 January 2011 and confirmed that her complaint related to the refined versions of her requests. This Notice therefore covers only the requests for prosecutor opening statements and charging decisions.

Chronology

7. The Commissioner's office contacted the public authority in connection with this case on 28 January 2011. The scope of this case was set out and the public authority was asked to respond with a copy of the information withheld from the complainant and with further explanations for the refusal of the requests.
8. The public authority responded with further reasoning for the refusal of the request on 4 March 2011. Following this it supplied to the Commissioner's office the charging decision in relation to each case identified by the complainant in her requests and the prosecutor opening statements for a sample of these cases.

9. At this stage the public authority specified that it was citing section 40(2) in relation to the charging decisions, but apparently not in relation to the prosecutor opening statements.

Background

10. The requests are for 'charging decisions' and 'prosecutor opening statements'. The withheld information supplied by the public authority to the Commissioner's office shows that the information identified by the public authority as falling within the scope of the requests for charging decisions are forms which record the decision as to what offence the defendants were to be charged with, some of which also set out background to the charges.
11. The information supplied by the public authority as examples of prosecution opening statements varies; some of these examples are apparently draft wording for Counsel to use in court, whilst other examples are notes apparently prepared for Counsel setting out the background in the case in question. The Commissioner believes that those documents that apparently provide a script for Counsel to use in court conform most closely to an objective reading of the complainant's request than do the other examples provided by the public authority of the information falling within the scope of this request. In respect to the prosecutor opening statements, the analysis below is based on the content of the documents supplied to the Commissioner's office by the public authority that appear to most closely conform to the complainant's request.

Analysis

Exemptions

Section 40

12. The Commissioner has first considered the public authority's citing of the exemption provided by section 40(2). Whilst the public authority has not consistently made the case that the entire information in question constitutes personal data, suggesting in correspondence with the Commissioner's office that this exemption was cited only in relation to charging decisions, the Commissioner considers it appropriate to exercise his discretion to consider whether all of the information in question may constitute personal data. In general, where it appears that information may be personal data and that the disclosure may be in breach of any of the data protection principles, the Commissioner may

exercise his discretion as to whether 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.

13. Section 40(2) provides an exemption for information that constitutes the personal data of any individual aside from the requester and where the disclosure of that personal data would be in breach of any of the data protection principles. This section is set out in full in the attached legal annex, as are all other sections of the Act referred to in this Notice. Consideration of this exemption is a two-stage process: first, the information in question must constitute the personal data of an individual aside from the requester; secondly, the disclosure of that personal data must be in breach of at least one of the data protection principles.

Is the information personal data?

14. 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."

15. 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.
16. Having viewed the withheld information, the Commissioner considers it clear that the information in question here relates to the individuals specified in the requests in that it relates to a criminal investigation concerning them. As this information refers directly to these individuals by name, it is clear that these individuals are also identifiable from this information. The Commissioner has therefore concluded that because the information in question relates to the specified individuals, and that they would be directly identifiable from this information, this information is personal data according to the definition given in section 1(1) of the DPA.

Is the information sensitive personal data?

17. Given the nature of this information, the Commissioner has also gone on to consider whether this information is 'sensitive personal data'. 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. The Commissioner considers it clear that this description applies to the information in question and so this is, therefore, sensitive personal data.

Would disclosure be in breach of any of the data protection principles?

18. 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 data subjects to disclose their sensitive personal data into the public domain.
19. The complainant has argued that the information in question should be disclosed in response to her requests as the information requested is routinely disclosed to the media. However, 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 or that this means that a member of the public should necessarily be able to obtain information disclosed by the public authority to the media.
20. The complainant has cited examples of where information similar to that requested in this case has been disclosed to her. In relation to these and any other discretionary disclosures made by the public authority, the Commissioner would stress that section 40(2) provides a class-based exemption. This means that, if the information conforms to the class described in section 40(2), it is exempt. This continues to be the case, regardless of any discretionary disclosures of similar information.
21. The complainant has also argued that at least some of the information requested would be recorded in court transcripts, which are publicly available, albeit for a fee. The complainant believes that it is unfair that this information is available only to those with the means to pay for it. However, whilst the public authority has not cited section 21(1) of the Act, this section provides an exemption for information that is available through other means that via the Act. Section 21(2)(a) is specific that this exemption will continue to apply where information is available only upon payment. Rather than being a valid argument in favour of

disclosure, that this information may be available through a request for court transcripts in fact indicates that this information may be subject to an alternative exemption.

22. The information in question here is the subjects' '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 subjects of this information. 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.
23. Notwithstanding the data subjects' 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. The Commissioner acknowledges that there is some legitimate public interest in disclosure due to the seriousness and nature of the crimes. There is evidence of some public debate as to whether the disability of the victims was a factor that led to victimisation and whether this should have been taken into account in the criminal justice process. The Commissioner accepts that this was a legitimate debate and could be used as a valid argument that disclosure would be fair.
24. However, the Commissioner notes that even if it were fair to disclose some of the information, this may not lead to disclosure as the information is sensitive personal data, which means that at least one of the conditions in Schedule 3 of the DPA must also be satisfied to enable disclosure. The majority of the conditions set out in DPA Schedule 3 relate to disclosures made for specific purposes and so are not relevant to disclosures made via the Act. The remaining conditions that may be relevant to the Act are that the data subject has explicitly consented to disclosure, or that the information has previously been deliberately placed in the public domain by the data subject. The Commissioner is aware of no evidence that suggests that either of these conditions is met in this case and so concludes that no condition from DPA Schedule 3 would be met through disclosure.
25. The Commissioner considers all of the information in question to be sensitive personal data 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 therefore engaged in relation to all of the information.

Section 30

26. As the above conclusion relates to the entirety of the information in question, it has not been necessary to also go on to consider section 30(1)(c).

The Decision

27. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that it applied the exemption provided by section 40(2) correctly.

Right of Appeal

28. 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

29. 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.
30. 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 21st day of June 2011

Signed

**Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 30(1) provides that –

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-

1. whether a person should be charged with an offence, or
2. whether a person charged with an offence is guilty of it,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(c) any criminal proceedings which the authority has power to conduct.”

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.”