

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2013

Public Authority: The Legal Services Commission
Address: 8th Floor
102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information about payments in respect of high cost criminal cases. The Legal Services Commission (LSC) provided some information within the scope of the request but refused to disclose the remainder citing section 40(2) of FOIA, personal information.
2. The Commissioner's decision is that the LSC correctly applied the section 40 exemption. He requires no remedial steps to be taken.

Request and response

3. On 17 August 2012, the complainant made the following request for information under the FOIA:

"Please provide me with the following information:

1. *The names of the five law firms which received the highest total payments in respect of Very High Cost Criminal cases in each of the financial years 2010/11 and 2011/12.*
2. *For each of these firms, a full list of the Very High Cost Criminal cases in respect of which these payments were made, listing the defendants represented by the relevant firms in each case.*
3. *The sums of money paid in respect of each case listed in response to the question above."*

4. The Commissioner understands that crime VHCCs are criminal cases with an expected trial length of 41 days or over and that are managed under individual case contracts by the LSC's Complex Crime Unit.
5. The LSC responded on 17 September 2012, confirming that it holds the requested information. It provided the complainant with a response in relation to part (1) of the request, describing the information it disclosed as "*an anonymous list of case costs*". The information the LSC provided comprised the names of the relevant five law firms for each of the requested years together with details of the payments made by the LSC to those firms.
6. However, with respect to parts (2) and (3) of the request, the LSC refused to provide that information citing section 40(2), the personal information exemption. The LSC told the complainant that it considers that the withheld information constitutes sensitive personal information on the basis that it relates to criminal matters.
7. The LSC provided an internal review on 15 October 2012 in which it maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner on 19 October 2012 to complain about the way his request for information had been handled.
9. In the context of the request in this case, the Commissioner understands the information at issue is information about particular criminal cases, specifically the names of the defendants in those cases and the sums of public money - legal aid payments - paid in respect of each case. (Legal aid in England and Wales is administered by the LSC).
10. The complainant told the Commissioner that he disputes the LSC's view that the requested information is personal data. He also expressed the view that there is an overwhelming public interest in the disclosure of the recipients of legal aid payments "*because this is an ongoing matter of public and political debate*".
11. The Commissioner considers the scope of his investigation to be the LSC's application of section 40(2).

Reasons for decision

Section 40 personal information

12. Section 40 of FOIA 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 Data Protection Act (DPA).

13. The LSC told the complainant:

"We are unable to give you the more detailed information requested for questions 2 and 3 on the basis that we would breach the Data Protection Act if we were to name the defendants and the sums paid on their individual cases".

14. It also told him:

".. the receipt of legal aid is considered to be personal data as it implies something about a person's financial status. The LSC therefore considers section 40(2) of the FOI Act when it gets requests about legal aid for specific named individuals. This section of the FOI Act states that if personal information is requested by a third party and to release that information would breach the Data Protection Act then the information is exempt from disclosure.

Furthermore, as the information that you have requested here relates to criminal matters it is defined as sensitive personal data and is bound by even stricter rules under the DPA".

Is the information personal data?

15. Personal data is defined in section 1(1) of the DPA as:

"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."

16. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them,

has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.

17. The requested information in this case comprises the names of defendants and the sums of money paid in their individual cases – in other words the associated legal aid payments made in relation to criminal proceedings involving those defendants.
18. The Commissioner acknowledges that, in its correspondence with the complainant, the LSC referred to a previous occasion when he has considered the matter of whether legal aid constitutes personal data¹. In that case – albeit one in which the legal aid related to civil, rather than criminal, proceedings - the Commissioner considered that:

"the costs incurred by an individual in pursuing legal proceedings is information relating to that individual...".

19. Having considered the withheld information in this case, the Commissioner is satisfied that, in the context of the request, the withheld information constitutes information that falls within the definition of 'personal data' as set out in section 1(1) of the Data Protection Act 1998.
20. He has reached this conclusion on the basis that the names of the defendants in the criminal cases within the scope of the request relate to a living person other than the requester.
21. With respect to the sums of money, as noted above, the Commissioner has found on a previous occasion that legal aid is information relating to an individual.

Is the information sensitive personal data?

22. Sensitive personal data is personal data which falls into one of the categories set out in section 2 of the DPA. In this case, the information sought relates to defendants' names and legal aid payments in respect of criminal proceedings. The Commissioner therefore considers that the relevant categories in this instance are:

2. In this Act "sensitive personal data" means personal data consisting of information as to -

¹ FS50076855

*"g) the commission or alleged commission by him of any offence;
and*

*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".*

23. The personal data in question is clearly information "as to" the fact that the individuals receiving the VHCC payments have been charged with criminal offences. The personal data is also directly connected to the proceedings for the alleged offences.

Will disclosure breach one of the Data Protection principles?

24. Having accepted that the information requested constitutes the personal data, and the sensitive personal data, of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles.

25. He considers that the most relevant principle in this case is the first principle, which states that:

"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".

26. The LSC has stated that disclosure of the information would breach the first data protection principle. The first data protection principle requires that the processing of personal data is fair and lawful, and that at least one of the conditions in schedule 2 is met; and, in the case of sensitive personal data, that at least one of the conditions in schedule 3 is met.

27. In other words, in a case such as this involving sensitive personal data, both requirements - fair and lawful processing and a schedule 3 condition - must be satisfied to ensure compliance with the first data protection principle. If any one of the requirements cannot be satisfied, processing will not be in accordance with that principle.

28. The Commissioner has first considered whether disclosure satisfies one of the specific conditions before moving on to the general consideration of fairness and lawfulness. He considers that, in the context of disclosure under FOIA, it is unlikely that any of the Schedule 3 conditions will be satisfied unless there is explicit consent for the disclosure (condition 1) or the information has already been made public

by the individual concerned (condition 5). This is because the other conditions concern disclosure for a stated purpose and so cannot be relevant to disclosure under FOIA.

Schedule 3 condition 1 - explicit consent

29. In this case, the LSC confirmed that it had not consulted the individuals concerned. However, it told the Commissioner that, in its view, it would be unlikely that they would grant consent for disclosure.
30. In the absence of explicit consent, the Commissioner finds that condition 1 is not satisfied in this case.

Schedule 3 condition 5 - information already made public by the individual

31. Where the data subject themselves has put some or all of the requested information into the public domain, the Commissioner considers this weakens the argument against disclosure.

32. The Commissioner notes the complainant's argument that:

"in virtually every case, if not all, the fact that a defendant has been granted legal aid ... will have been stated in court in public. It can hardly be classed therefore as 'personal data'".

33. The complainant also told the Commissioner:

"I would argue that the Legal Services Commission should have a duty to disclose any information which it knows has been already revealed in a public court, as well as the type of additional information about the total sums paid that I have sought".

34. In considering this matter, the Commissioner has taken into account that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions. In other words, he must consider whether it is appropriate to release the material sought to the general public.
35. The Commissioner acknowledges that where offences are prosecuted in open court, personal data (of any kind and including sensitive personal data) will be disclosed to those in attendance. It may consequently be reported in the media and will be recorded and transcribed.
36. However, in the Commissioner's view, while the individuals in question would have realised that their personal information would have been disclosed in court, this is a far more restricted disclosure than disclosure to the general public under FOIA, and not what the individuals would have envisaged.

37. In this case, he has seen no evidence that the individuals themselves have actively put some or all of the requested information into the public domain. He therefore finds that condition 5 is not satisfied in this case.

38. In bringing his complaint to the Commissioner's attention, the complainant said:

"I also contest the LSC's refusal to answer my request fully because of the contradiction between its claim in this case that it cannot take the public interest factor into account and the fact that it has released such information in cases involving terrorism suspects and murderers on public interest grounds".

39. The Commissioner recognises that, on occasions, the LSC proactively publishes information about legally aided cases. The Commissioner is mindful, however, that in considering disclosure the LSC may be able to rely on different conditions within the DPA, for example Schedule 3 paragraph 7, conditions which cannot be triggered by an FOI disclosure.

40. Having considered the relevant Schedule 3 provisions in this case, namely conditions 1 and 5, the Commissioner has concluded that neither apply. As the Commissioner has not found that a schedule 3 condition can be met, he has not gone on to consider the questions of fairness and lawfulness.

41. In the absence of a schedule 3 condition the Commissioner finds that the LSC correctly applied the section 40 exemption in this case.

Right of appeal

42. 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

43. 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.
44. 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

Steve Wood
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