

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 4 June 2013

**Public Authority:** Foreign and Commonwealth Office  
**Address:** King Charles Street  
London  
SW1A 2AH

#### Decision (including any steps ordered)

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1. The complainant requested information relating to the consular service provided to a British national arrested and convicted for an assault in Spain.
2. The Commissioner's decision is that the public authority was entitled to withhold the information requested on the basis of the exemption at section 40(2) FOIA.
3. The Commissioner does not require the public authority to take any steps.

#### Request and response

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4. On 4 November 2012 the complainant wrote to the public authority and requested information in the following terms:

*'Under the F.O.I act I request all correspondence (written & email) between the Foreign & Commonwealth Office and the British representative/s in Spain 2008 regarding the arrest, conviction and transfer of a British prisoner who on or around 13<sup>th</sup> July 2008 was convicted in a Barcelona [sic] court after spending 4 months on remand at Can Brians jail.*

*I further request copies of any other correspondence between the FCO and this persons [sic] family received or sent.*

*The media only reported the prisoners [sic] name as John D,*  
<http://www.dailyrecord.co.uk/news/scottish-news/celtic-thug-jailed-by-spanish-court-983778>

5. The public authority responded on 3 December 2012. It explained that it provided consular assistance to the individual in question and confirmed that it held relevant consular records in London and at the Consulate General in Barcelona. The public authority however claimed that the records were exempt from disclosure on the basis of the exemption at section 40(2) FOIA.
6. Following an internal review the public authority wrote to the complainant on 31 December 2012. It upheld the original decision not to disclose the relevant records.

### **Scope of the case**

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7. On 4 January 2013 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He explained that he had asked for the name of the individual referred to as John D, copies of emails or any other correspondence between the public authority and John D's family, received or sent.
8. The Commissioner considers the scope of the investigation is to determine whether the relevant consular records in London and at the Consulate General in Barcelona<sup>1</sup> withheld by the public authority was exempt from disclosure on the basis of section 40(2).

### **Reasons for decision**

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#### Section 40(2)

9. Information is exempt from disclosure on the basis of section 40(2) if it constitutes third party personal data (ie the personal data of an individual other than the person making the request) and either the first or second condition at section 40(3) is satisfied.

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<sup>1</sup> Hereinafter referred to interchangeably as 'the disputed information'

Is the disputed information third party personal data?

10. Personal data is defined in section 1 of the Data Protection Act 1998 (DPA) as:

*'.....data which relate to a living individual who can be identified from those data or from those data and other information which 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 intentions of the data controller or any person in respect of the individual.'*

11. By way of background, the public authority explained that John D, a British national was arrested in Barcelona, Spain in March 2008. He was tried and convicted in a Spanish Court for assault and subsequently sentenced to 4 years imprisonment. It explained that the disputed information detailed the action taken by officials on the consular desk in London and at the Consulate General in Barcelona to assist John D. The information also includes records of contact with John D's family. The public authority therefore claimed that the disputed information including the confirmation of John D's identity constitutes personal data relating to him and his case. The Commissioner notes that the disputed information also includes the judgement on the case.
12. The Commissioner is satisfied that John D can be identified from the disputed information. He could also be identified if the disputed information was combined with other publicly available information, for example, the report in Daily Record cited by the complainant in his request. The disputed information is, as described by the public authority, a detailed record of the activities of consular officials in relation to the case and a record of their contact with John D's family. It also reveals details of his arrest, trial and conviction.
13. The public authority also confirmed that the judgement on the case had not been published in Spain and was therefore not in the public domain. It explained that in Spain, only cases dealt with by the High Courts (not applicable in this case) are in the public domain and even then surnames, addresses and anything that may help identify the defendant, are withheld.
14. The Commissioner therefore accepts that the disputed information is the personal data of John D as it is information which relates to him and from which he could be identified.

Would the disclosure of the disputed information contravene any of the data protection principles?

15. As mentioned, for section 40(2) to apply, either the first or second condition in section 40(3) must be satisfied. The first condition in section 40(3) states that disclosure of personal data would contravene any of the data protection principles or section 10 of the DPA.
16. The public authority claimed that the disclosure of the disputed information would contravene the first data protection principle. It submitted that criminal convictions such as in this case are classified as sensitive personal data under the DPA and it would neither be fair nor lawful to disclose the disputed information which clearly relates to a criminal conviction. It also argued that disclosure will be a breach of John D's right to privacy enshrined in Article 8 of the European Convention on Human Rights.
17. The first data protection principle states:  
  
*'Personal data shall be processed fairly and lawfully and, in particular shall not be processed unless-*  
  
*At least one of the conditions in schedule 2 [DPA] is met...'*
18. The Commissioner first considered whether disclosure would contravene the fairness element of the first data protection principle. In considering whether a disclosure is fair, it is useful to balance the consequences of any disclosure and the reasonable expectations of the data subject with general principles of accountability and transparency.
19. In the Commissioner's view, given that his identity has not been revealed, the John D would reasonably expect that details of consular activities in relation to his case would not be made public. The Commissioner agrees that information relating to a criminal conviction as in this case is also sensitive personal data by virtue of section 2(g) of the DPA. As such, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information is likely to have a detrimental or distressing effect on John D, the Commissioner considers that it would be unfair to disclose the disputed information.
20. The Commissioner therefore finds that disclosing the disputed information would have been unfair and in contravention of the first data protection principle.
21. The Commissioner consequently finds that the exemption at section 40(2) was correctly engaged.

## Right of appeal

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22. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

23. 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.
24. 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**  
**Principal Policy Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**