

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 October 2013

Public Authority: The Serious Fraud Office
Address: 2-4 Cockspur Street
London
SW1Y 5BS

Decision (including any steps ordered)

1. The complainant requested information about whether the Serious Fraud Office (the SFO) has investigated a named individual in connection with criminal activity. The SFO refused to confirm or deny whether it held the requested information, citing several exemptions, including section 40(5). The Information Commissioner's decision is that the SFO correctly applied section 40(5)(b)(i) to the request. Consequently, he has not considered the application of further exemptions.

Request and response

2. On 8 June 2013, the complainant wrote to the Serious Fraud Office and made the following request for information (the Commissioner has redacted the identity of the individual named in the request):

"Please could you kindly advise whether you hold information relating to [redacted]:

1. *Does the SFO hold any information relating to [redacted] involvement in money laundering?*
2. *[redacted] links to the collection of extortion*
3. *[redacted] links to terrorism*
4. *Has the SFO passed any information relating to the links of [redacted] to terrorism/money laundering/extortion to the Scotland Yard/Government departments? Does it hold letters/documents which can be released in this matter.*

5. Has the SFO received any letters from any other British department/ foreign government/ British MPs/ Met Police concerning [redacted]? If so can these be released? Does it hold letters/documents which can be released in this matter?

6. Has the SFO ever investigated [redacted] for any criminal activity?"

3. The SFO responded on 5 July 2013. It would neither confirm nor deny whether it held information described in the request, citing sections 40(5), 23(5), 24(2), 27(4), 30(3) and 31(3) of the FOIA.
4. Following an internal review the SFO wrote to the complainant on 23 July 2013. It upheld the decision set out in its letter of 5 July 2013.

Scope of the case

5. The complainant contacted the Commissioner on 25 July 2013 to complain about the SFO's response.
6. The SFO specified that section 40(5) applied in respect of each of the questions in the request, while the remaining exemptions applied only in respect of questions 1-5. The Commissioner has therefore considered whether the SFO was entitled to rely upon section 40(5) to neither confirm nor deny whether it held the information described in each of the questions. He has not considered the applicability of the remaining exemptions.

Reasons for decision

7. Section 40(5) states:

"The duty to confirm or deny-

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either-

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

8. Section 40(5)(b)(i) provides that the duty to confirm or deny does not arise in relation to information that falls, or would fall if it were held, within the scope of section 40(2) of the Act. Section 40(2) provides that information which is not the personal data of the applicant and is data as defined in section 1(1) of the Data Protection Act 1998 ("the DPA") is exempt from disclosure if disclosure would contravene any of the data protection principles. This exemption is absolute and therefore requires no consideration of the public interest.
9. The SFO cited section 40(5) of the Act to refuse to confirm or deny whether it held information relevant to the complainant's request. The SFO argued that section 40(5)(b)(i) applies because it would contravene the first data protection principle of the DPA if the SFO were to provide confirmation or denial as to whether it holds the information described in the request.
10. The first data protection principle of the DPA 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 is met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."
11. The term "personal data" is defined by section 1(1) of the DPA. "Personal data" means data which relate to a living individual who can be identified from those data or from data in the possession, or likely to come into the possession, of the data controller (in this case, the SFO).
12. The Commissioner has considered the nature of the complainant's request. In view of the wording of the request and the information it seeks access to, he is satisfied that the requested information, if held, would be the personal data of the individual named in the request.
13. The SFO claimed that the personal data, if held, would constitute *sensitive* personal data, as set out in section 2 of the DPA. This defines sensitive personal data as personal data relating to, amongst other things, the commission or alleged commission of a criminal offence, by the data subject. The Commissioner has examined this claim.
14. In this case, the request asks for information related to any criminal investigations which may or may not have been carried out, involving the named individual. Therefore the Commissioner is satisfied that given the wording and focus of the request, any information that falls within it (if it were held) would be intrinsically linked to the commission or

alleged commission of a criminal offence by the named individual, and would therefore constitute sensitive personal data about them.

Would complying with the duty to confirm or deny contravene the first data protection principle?

15. Having established that the information, if held, would constitute sensitive personal data, the Commissioner has examined whether the duty to confirm or deny under section 1(1)(a) of the FOIA would conflict with the requirements of the first principle of the DPA.
16. The first principle of the DPA requires that personal data be processed fairly and lawfully and that:
 - at least one of the conditions in Schedule 2 is met, and
 - in the case of sensitive personal data, at least one of the conditions in Schedule 3 is met.
17. Since the requested information in this case, if held, would fall under the definition of sensitive personal data, the Commissioner has firstly considered whether one of the conditions in Schedule 3 can be met. He has considered Schedule 3 first because if none of its conditions can be met, the processing would breach the first data protection principle.
18. Having considered the conditions listed in Schedule 3, together with the additional conditions listed in The Data Protection (Processing of Sensitive Personal Data) Order 2000¹, the Commissioner has concluded that none of these conditions can be met. Accordingly, the Commissioner believes that for the SFO to confirm or deny whether it held any information which fell under the scope of the request would, of itself, be a breach of the first principle of the DPA.
19. Since no Schedule 3 condition can be met, it is unnecessary for the Commissioner to go on to consider whether a Schedule 2 condition applies or whether confirmation or denial would be fair or lawful.
20. Accordingly, the Commissioner therefore finds that the SFO was entitled to rely on section 40(5)(b)(i) to neither confirm nor deny whether it held information of the description specified in the request and that it was not obliged to respond in accordance with the duty imposed by section 1(1)(a).

¹ <http://www.legislation.gov.uk/uksi/2000/417/contents/made>

Right of appeal

21. 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

22. 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.
23. 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

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