

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 July 2015

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested certain information following his appeal of a previous FOIA request to the First Tier Tribunal. The Ministry of Justice (the 'MOJ') initially refused to provide the requested information on the basis of section 21 (information reasonably accessible by other means), but later relied on section 32 (court records).
2. The Commissioner's decision is that the MOJ has correctly relied on section 32(1)(a) to withhold the requested information. He does not require the MOJ to take any steps.

Background

3. The complainant had made a previous request for a copy of a Contact Order, which the Commissioner has considered under reference *FS50536902*¹.
4. The complainant disputes the content of the Order; however the Commissioner's remit is not concerned with the quality of the information itself, but rather with whether the recorded information relevant to his request has been provided.

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2014/994964/fs_50536902.pdf

5. In that decision notice, the Commissioner found that section 40(5)(a) of FOIA should have been applied to the request. Under section 40(5)(a), a public authority does not have to confirm or deny that it holds information that is the personal data of the requester. The Commissioner considered that the way in which that request was worded clearly indicated that the complaint was seeking his own personal data. The Commissioner found that to confirm or deny holding the information would inevitably put into the public domain information about the existence of a Contact Order concerning the complainant.
6. The complainant appealed this decision to the First-tier Tribunal (the 'FTT') which subsequently upheld the Commissioner's application of section 40(5)(a). It is against this background that the complainant submitted his request which is the subject of this notice.

Request and response

7. On 21 October 2014 the complainant wrote to the MOJ and requested information in the following terms:

"In his Decision Notice dated 20.10.14 NJ Warren makes a statement at point 6 of his Decision Notice that beggars belief. I trust that the Tribunal is able to produce proof in the form of quotable sections from documents produced by myself to ICO or Tribunal that confirm the assertions of NJ Warren that it was "obvious" that I had copies of the documents under discussion.

I make a request for the relevant documents under The Freedom of Information Act with the usual timescales for response from HMCTS."

8. The MOJ responded on 6 November 2015. It refused to provide the information relying on section 21(2) of FOIA, information reasonably accessible to applicant by other means. It stated that the relevant documents are *"according to paragraph 6 of Judge Warren's decision, your original request for information and your request for an internal review. They are documents that you produced yourself and copies were included in the hearing bundle, a copy of which was sent to you"*.
9. Following an internal review the MOJ wrote to the complainant on 3 December 2015. It said that it no longer wished to rely on section 21 of FOIA because for it to apply, the information has to be available to everyone as FOIA is accessible to the world at large. This point is considered further under 'Other matters' below.

10. Instead, the MOJ now wished to rely on section 32(1)(a), court records, to withhold the requested information. Additionally, the MOJ provided advice and assistance in accordance with section 16 of FOIA and advised the complainant that he could make a subject access request under the Data Protection Act 1998 ('DPA') for his personal data.

Scope of the case

11. The complainant contacted the Commissioner on 4 December 2014 to complain about the way his request for information had been handled. He originally submitted his complaint under the DPA which led to a number of email exchanges, finally culminating in the case being set up as an FOIA complaint on 10 March 2015.
12. The Commissioner sought clarification from the complainant as to the grounds of his complaint, having formed an initial view that the documents to which Judge Warren had referred are the complainant's internal review request and the review outcome. This was based on the judge's wording in paragraph 6 of the appeal outcome, specifically "*This is obvious from the terms of his request for review and from the review decision, a copy of which he acknowledges as having received in his complaint to the ICO*".
13. The complainant confirmed he had been provided with a copy of the Court Order and the covering letter in response to his previous request. He believes that the Council responsible for the school and the MOJ are involved in a 'cover up' because, in his view, the Order does not reflect what he was told during the hearing at the school in 2013.
14. The Commissioner is not able to consider the quality of the recorded information provided. As he advised the complainant, he does not intend to revisit the subject matter of his previous request which has also been considered by the FTT. The issue for the Commissioner in this case is to consider whether the MOJ is entitled to rely on section 32(1)(a) to withhold the information requested by the complainant on 21 October 2014 (as set out in paragraph 10 of this notice).

Reasons for decision

15. The Commissioner has viewed the withheld information in this case, which the MOJ has recently confirmed as being the complainant's previous FOIA request for information (4 December 2013) and the school's internal review outcome (21 January 2014). This partly conflicts with what the MOJ told the complainant in its response of 6 November

2014; in that the MOJ said the relevant documents are the complainant's original request for information and his request for an internal review. This again differs to the wording in the FTT appeal decision which describes the documents as being the complainant's "*request for review and from the review decision*".

16. However, all three of the foregoing cite the internal review outcome (dated 21 January 2014) as information which indicates that the complainant had received the relevant information in response to his earlier request. It is evident from this document that the complainant had been provided with a copy of the Court Order and that he was also provided with a copy of a covering letter which had since been located.
17. The Commissioner has reviewed the wording of both the complainant's previous request and his internal review request. In his request for internal review the complainant refers to "*the document sent*", namely a copy of the Court Order, whereas the original request only asks for that Court Order and how the school came to be in possession of it.
18. The Commissioner's view, which reflects that of the judge in the FTT appeal hearing, is that the relevant withheld documents comprise the complainant's request for internal review and the internal review result.

Section 32 - court records

19. The Commissioner has considered the MOJ's application of section 32 to the information withheld by virtue of that exemption.
20. Section 32(1)(a) states that information is exempt if it is held only by virtue of being contained in any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter.
21. There are two main tests in considering whether information falls within this exemption. First, is the requested information contained within a document filed with a court in relation to a particular cause or matter? Secondly, is this information held by the relevant public authority only by virtue of being held in such a document?
22. On 29 May 2015 the MOJ informed the Commissioner that it held information in the scope of the request. It explained that the relevant documents were supplied to the FTT by the complainant for the purposes of appeal proceedings against the ICO's decision notice *FS50536902*. It confirmed that neither the FTT nor the MOJ had created the information and that there was no reason to hold it other than for the purposes of proceedings.

23. From his examination of the withheld documents the Commissioner is satisfied that the information is held only by virtue of being contained in a document as described in section 32(1)(a). He therefore finds that the section 32(1)(a) exemption is engaged. As this is an absolute exemption the Commissioner there is no consideration of the public interest.

Other matters

24. The Commissioner has published guidance on section 21² on his website. Subsection (1) describes the fundamental principle underlying section 21, which is that, in order to be exempt, information must be reasonably accessible to the applicant. Unlike consideration of most other exemptions in FOIA, this allows a public authority to take the individual circumstances of the applicant into account. Note the importance of the phrase "to the applicant" – in effect a distinction is being made between information that is reasonably accessible to the **particular applicant and information that is available to the general public** (emphasis added). In order for section 21 to apply there should be another existing, clear mechanism by which the particular applicant can reasonably access the information outside of FOIA. For example, some people will have access to certain information by means of other legislation, such as the access rights afforded to specific persons under the Access to Health Records Act 1990.
25. An assessment of whether the section 21 exemption can be successfully applied will be dependent on whether or not requested information is reasonably accessible to the particular applicant who requested it. However, this is not to say that all the specific circumstances of an individual requester can override the test of reasonable accessibility. For example, in cases where information is only available by inspection, it may still be possible to regard this information as being reasonably accessible to all applicants on the basis that it is reasonable that information is only available in a certain location. That is to say, although section 21 allows a public authority to consider the circumstances of the individual applicant, it is important to note that the use of the word "reasonable" qualifies what information can be considered to be "accessible" to the applicant.

² <https://ico.org.uk/media/for-organisations/documents/1203/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf>

26. In the circumstances of this case, the Commissioner considers that the information withheld by virtue of section 32 can be considered to be the complainant's personal information as it relates to proceedings involving the complainant, namely his appeal hearing. Therefore, the MOJ could also have relied on section 40(1) to withhold the information.
27. The definition of personal data is set out in section 1(1) of the Data Protection Act 1998 (DPA). This provides that, for information to be personal data, it must relate to an individual and that individual must be identifiable from that information.
28. 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.
29. Having considered the withheld information provided to him by the MOJ during the course of his investigation, the Commissioner is satisfied that, in the context of the request, the withheld information constitutes information that falls within the definition of 'personal data'.
30. Furthermore, in the Commissioner's view, given the context and the wording of the request, it is clear that the complainant is requesting his own personal data. He has reached this conclusion on the basis that the withheld information relates to court proceedings and that the complainant is the focus of those proceedings.
31. As one might expect, the information also includes the personal data of other individuals, for example those involved in the administration of the proceedings.
32. Where requested information constitutes the personal data of more than one individual, then all individuals are data subjects for the purposes of section 40. However, in situations like this, where a request is made by one of the data subjects, the Commissioner's approach is to consider the information under the section 40(1) exemption.
33. The Commissioner is satisfied that the requested information comprises information from which the requester can be identified. The Commissioner considers that it is appropriate that any decision as to whether or not a data subject is entitled to be provided with their personal data should be made in accordance with the DPA.
34. Therefore an applicant wishing to access their own personal data will still be able to pursue this right under the DPA. In this respect, he is satisfied that the MOJ explained clearly to the complainant what information it required from him in order to proceed with a subject access request ('SAR'). Furthermore, the Commissioner is aware that

the complainant submitted a SAR for the court case file on 29 September 2014. He was advised by the MOJ that he needed to pay the requisite £10 fee and provide ID. The MOJ has not received either from the complainant and is therefore unable to process his SAR.

Right of appeal

35. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

36. 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.
37. 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
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