

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 10 September 2015

**Public Authority:** Ministry of Justice

**Address:** 102 Petty France  
London  
SW1H 9AJ

#### Decision (including any steps ordered)

---

1. The complainant requested information relating to telephone calls made to a named third party. The Ministry of Justice (MoJ) refused to confirm or deny whether it held the requested information citing section 40(5) of FOIA (personal information).
2. The Commissioner's decision is that the MOJ was entitled to rely on section 40(5)(b)(i). He requires no steps to be taken as a result of this decision notice.

#### Request and response

---

3. On 25 March 2015 the complainant made the following request for information under the FOIA:

*"Please provide dates of all calls made by HMP Dartmoor to [name redacted] the mother of my son's victim for the period January 15 2014 to February 06 2014.*

*Please provide the prison records that show the purpose of the calls and a summary of what was discussed".*

4. MoJ responded on 23 April 2015. It refused to confirm or deny whether it held the requested information citing section 40(5) of FOIA (personal information).

5. The complainant requested an internal review on 16 May 2015. MoJ sent him the outcome of its internal review on 4 June 2015 upholding its original position.

## Scope of the case

---

6. The complainant contacted the Commissioner on 4 June 2015 to complain about the way his request for information had been handled.
7. The analysis below considers MoJ's application of section 40(5) FOIA to the requested information.
8. Specifically, the Commissioner's analysis considers section 40(5)(b)(i) FOIA. The consequence of section 40(5)(b)(i) is that if a public authority receives a request for information which, if it were held, would be the personal data of a third party (or parties), then it can rely on section 40(5)(b)(i), to refuse to confirm or deny whether or not it holds the requested information.

## Reasons for decision

---

### Section 40(5)

9. Section 40(5) of the FOIA states that:

*"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 that 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)."*

10. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of personal data, and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.

*Is the information personal data?*

11. On the issue of whether confirmation or denial in response to the complainant's request would involve the disclosure of personal data, the definition of personal data is given in section 1(1) of the DPA:

*"personal data' means data which relate to a living individual who can be identified:*

*(a) from those data, or*

*(b) from those data and any other information which is in the possession of, or is likely to come into the possession of, the data controller".*

12. MoJ told the complainant it was satisfied that he had requested personal data relating to a third party. In correspondence with the Commissioner, MoJ confirmed its view that the requested information, if held, would constitute the personal information of the individual named in the request.
13. MoJ explained that to confirm or deny whether the requested information is held would result in disclosure of personal data in that it would disclose whether or not any calls were made to the named third party.
14. The Commissioner considers that to confirm or deny whether information was held relating to a telephone call made to a named individual would reveal their personal data, in other words would reveal that a call had been made, as it is unlikely that MoJ would hold any recorded information which confirms that no calls have been made to an individual.
15. The Commissioner is satisfied that complying with section 1(1)(a) in this case would effectively confirm or deny whether the requested information is held in connection with the individual named in the request. Clearly this information would relate to that individual and so would be their 'personal data'.

*Would confirmation or denial breach one of the data protection principles?*

16. The next step is to address whether disclosure of the personal data - in this case the confirmation or denial that information is held - would be in breach of any of the data protection principles.
17. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focussed on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of disclosure against the legitimate public interest in disclosing information.
18. In correspondence with the Commissioner, MoJ confirmed its view that confirming or denying whether it holds the requested information would be unfair as it would disclose the named individual's personal data to the world at large, namely whether or not there were any telephone calls between her and HMP Dartmoor during the dates specified.

*Reasonable expectations*

19. In this case, the Commissioner is satisfied that the data subject would have the reasonable expectation that their personal data, if held, would not be disclosed.

*Consequences of disclosure*

20. MoJ told the complainant that confirming whether or not it holds the requested information:

*"would be likely to cause unwarranted distress".*

21. The complainant disputes that disclosure of the date of a telephone call will cause any damage or distress.
22. However, the Commissioner accepts that an individual would be likely to feel distressed if MoJ confirmed whether or not information of the type requested was held.

*General principles of accountability, transparency and legitimate public interest in disclosure*

23. The Commissioner appreciates that there is a general public interest in accountability and transparency. On the other hand the Commissioner recognises that this legitimate interest must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests

of any individual who would be affected by confirming or denying that the requested information is held.

24. The Commissioner understands that the complainant has a personal interest in the request. However, with respect to the legitimate interest in disclosure, the interest must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.

### *Conclusion*

25. In considering whether the exemption contained within section 40(5)(b)(i) was correctly applied, the Commissioner has taken into account that disclosure under the FOIA should be considered in its widest sense – which is to the public at large.
26. With due regard to the reasonable expectations of the data subject, and the potential impact on them if the existence of their personal data were to be confirmed or denied, the Commissioner considers that it would be unfair to do so.
27. The Commissioner has therefore concluded that confirmation or denial as to whether the requested personal data is held would be in breach of the first data protection principle. He considers that the exemption provided by section 40(5)(b)(i) is engaged and that, in this case, the MOJ was therefore not obliged to confirm or deny whether it held the information requested by the complainant.

## 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

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.

**Signed .....**

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