

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 17 March 2016

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

#### Decision (including any steps ordered)

---

1. The complainant requested information relating to cost applications in *R v Coulson and Others* (also known as “the phone hacking trial”). The Ministry of Justice (the ‘MOJ’) refused to confirm or deny whether it held the requested information, citing sections 32(3), court records and 40(5), personal information of FOIA.
2. The Commissioner’s decision is that the MOJ has dealt with the requests correctly in that section 40(5) is engaged and so it is not required to confirm or deny whether it holds this information. In addition, the MOJ failed to provide its refusal to respond within the statutory 20 working days framework and thereby breached section 17(1) of FOIA. He does not require the MOJ to take any remedial steps to ensure compliance with FOIA.

#### Request and response

---

3. On 8 October 2014 the complainant wrote to the MOJ and requested information in the following terms:

*“I wish to know the following information regarding the costs from Central Funds applications made on behalf of Mrs. Rebekah Brookes, Mr Charles Brookes, Mrs Cheryl Carter, Mr, Mark Hanna, Mr. Stuart Kuttner, Mr. Clive Goodman and Mr. Ian Edmondson, heard at the Central Criminal Court before Mr. Justice Saunders between June 2014 and September 2014.*”

1. *What is the text of the correspondence between the Ministry of Justice and/or the Treasury Solicitors acting on its behalf and the Central Criminal Court and/or Mr. Justice Saunders regarding the appearance of the Ministry of Justice at the then proposed hearings to determine the Defendants' applications for costs from Central Funds?*
  2. *In particular, what is the text of the letter from the Ministry of Justice to the Central Criminal Court and/or Mr. Justice Saunders dated 6 August 2014?*
  3. *Were any Skeleton Arguments sent to the Central Criminal Court by the Ministry of Justice and/or the Treasury Solicitors acting on its behalf, regarding the then proposed hearings to determine the Defendants' applications for costs from Central Funds?*
  4. *If so, what is the text of those Skeleton Arguments?*
  5. *Was any correspondence and/or Skeleton Arguments sent to the Ministry of Justice by HM Attorney General's Office and/or the Treasury Solicitors and/or the "Advocate to the Court" appointed by HM Attorney General?*
  6. *If so, what is the text of that correspondence and/or Skeleton Arguments?*
  7. *What is the text of the correspondence and/or Skeleton Arguments between the Ministry of Justice and/or the Treasury Solicitors acting on its behalf and News UK and/or their legal representatives regarding the appearance of the Ministry of Justice at the then proposed hearings to determine the Defendants' applications for costs from Central Funds?*
  8. *If so, what is the name of their legal representatives?*
  9. *If so, what is the text of that correspondence and/or Skeleton Arguments?"*
4. The MOJ responded on 17 November 2014. It refused to confirm or deny whether it held the requested information, citing sections 32(3), court records and 40(5), personal information.
  5. Following an internal review the MOJ wrote to the complainant on 28 January 2015 and maintained its original position.

## Scope of the case

---

6. The complainant said he initially complained on 14 March 2015; however the Commissioner can find no record of having received such a complaint. He contacted the Commissioner on 19 October 2015 to complain again about the way his request for information had been handled, and provided a copy of his email of 14 March 2015. The Commissioner has therefore used his discretion and investigated this case although ordinarily it would be out of time.
7. The Commissioner has considered whether the MOJ was entitled to rely on the 'neither confirm nor deny' provision in sections 32(3) and 40(5) of FOIA in relation to this request. These subsections provide that it is not necessary to tell the requester whether the information requested is held if this information would be exempt under section 32(1) or section 40.

## Reasons for decision

---

8. The information in scope of the request relates to finances surrounding a number of high profile criminal trials. The individuals named in the request had a public profile and were acquitted of the charges faced. Information relating to this was readily available in the public domain at the time of the request, such as on the BBC website.<sup>1</sup>

## Reasons for decision

---

### Section 40(5) neither confirm nor deny in relation to personal information

9. Section 1 of FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:
  - (a) the duty to inform the applicant whether or not requested information is held and, if so,
  - (b) the duty to communicate that information to the applicant.

---

<sup>1</sup> <http://www.bbc.co.uk/news/uk-26272727>

10. Generally, the provisions in section 40 subsections 1 to 4 FOIA exempt personal data from disclosure. Section 40(5) of FOIA states that the duty to confirm or deny whether information is held does not arise if providing the public with that confirmation or denial would contravene any of the data protection principles set out in the Data Protection Act (the 'DPA').
11. In this case, as the request is for information about a named individual other than the complainant, the MOJ has relied on section 40(5)(b)(i) of FOIA.
12. The MOJ argued that confirming whether or not it holds the requested information would breach the data protection rights of the individuals named in the request, as it would reveal under FOIA whether they had each made claims for costs following acquittal in a Central Criminal Court case. Such an argument is relevant to the exemption contained at section 40(5)(b)(i).
13. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of personal data, and second, whether disclosure of that personal data would be in breach of any of the data protection principles.

*Is the information personal data?*

14. 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".*

15. Following its internal review the MOJ told the complainant:

*"If documents were held and released (subject to the redaction of personal data) then it would have implied information was held. For this reason, no consideration could be given to redacting 'personal data'. Similarly, no consideration could be given to the seniority of the persons involved."*

16. The Commissioner considers that the way in which the request is worded clearly indicates that the complainant is seeking information which can be linked with named individuals.

17. The Commissioner considers that to comply with section 1(1)(a) of the FOIA (ie to either confirm or deny holding the information) would inevitably put into the public domain the existence or otherwise of information about the named individuals, which in turn would constitute disclosure of information that would relate to them.
18. Therefore, the Commissioner considers that to confirm or deny whether the requested information is held would in itself constitute a disclosure of personal data.

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

19. In the case under consideration here, the MOJ told the Commissioner:

*"Any information, if held, released on a subject would fall under the remit of personal data as defined by section 1 of the Data Protection Act 1998 and, if held, would breach this Act. This exemption is absolute and therefore the MOJ deem its application obligatory and for that reason to release information under section 40 would be unlawful."*

20. When considering the first principle the Commissioner will generally look to balance the reasonable expectations of the data subject(s) with the consequences of compliance with the request, and general principles of accountability and transparency.
21. The first data protection principle requires that personal data is processed fairly and lawfully and that one of the conditions in schedule 2 of the DPA is met in order to disclose personal data.
22. When considering this it is important to note that when a request is received under the FOIA, a public authority must consider the request as if it has been received from any member of the public; it is not able to take into account any private or personal reasons which the requester may have for requesting the information. Nor can the MOJ take into account any prior knowledge that the requestor has about the issues that lie behind the request. Further to this, disclosures under the FOIA are intended to be global in nature and so the MOJ must consider a disclosure to the whole world rather than to a specific requester.

*Reasonable expectations*

23. In this case, the MOJ has argued that a private citizen has the right for their identity to be protected. It said that the threshold for releasing an

individual's personal data after being acquitted is higher and that releasing any data may cause distress and harm to the individual(s). The MOJ referenced decision notice *FS50576722*<sup>2</sup> which outlined that individuals acquitted of the charges faced would experience distress if any further information was to be disclosed under FOIA at a later date – significantly beyond the time when the mainstream media had ceased reporting on the case.

24. Whilst previous decision notices are not legally binding, the Commissioner notes the parallels between that case and the current case. He is satisfied that the data subjects would reasonably expect that their personal data, if held, would not be disclosed.

*Consequences of disclosure*

25. Although the MOJ did not submit any specific arguments in relation to the consequences of disclosure, the Commissioner considers that such a disclosure would cause the named individuals unwarranted distress, particularly as the information, if held, would reveal that they had been involved in criminal trials.

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

26. The Commissioner appreciates that there is a general public interest in accountability and transparency, and that the public is entitled to be informed about criminal trials and the finances involved. 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. Further, in this case, the named individuals have been acquitted of the charges faced.
27. The MOJ advised that the individuals have withdrawn from public life since the conclusion of court proceedings which means they are no longer in the public eye, making them private citizens. The MOJ said it had considered the balance between the right to know versus the right to personal privacy and conclude that the disclosure of documents, if held, after a passage of time would be unfair to a private citizen, particularly one who has been acquitted of the charges faced. The MOJ

---

<sup>2</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1431920/fs\\_50576722.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1431920/fs_50576722.pdf)

commented that whilst a data subject may consider it fair and reasonable for their personal data to be processed accordingly during a court proceeding, given that the proceedings were widely reported in the national media at the time, it did not consider that the data subject would consider the disclosure of information surrounding their case to be fair one year after their acquittal.

28. The Commissioner is aware that the complainant may have 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 interests of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.

### *Conclusion*

29. 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.
30. With due regard to the reasonable expectations of the data subjects, 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.
31. 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 holds the information requested by the complainant.
32. As the Commissioner has found section 40(5) is engaged, he has not considered the MOJ's reliance on section 32(3) in relation to this request.

### **Procedural issues – section 17(1) breach – late refusal notice**

33. Section 1(1) of FOIA states:

*(1) Any person making a request for information to a public authority is entitled –*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if that is the case, to have that information communicated to him.*

34. Section 10 of FOIA states:

*(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.*

...

*(3) If, and to the extent that –*

*(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or*

*(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,*

*the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.*

35. Section 17(1) of FOIA states:

*(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –*

*(a) states that fact,*

*(b) specifies the exemption in question, and*

*(c) states (if that would not otherwise be apparent) why the exemption applies.*

36. The MOJ has an obligation to provide a requester with a refusal notice within 20 working days of receipt of the request. The MOJ failed to issue its refusal notice within the statutory timeframe, thereby breaching section 17(1) of FOIA.

## **Other matters**

---

37. As well as finding above that the MOJ is in breach of the FOIA, the Commissioner has also made a record of the delay in this case. This may form evidence in future enforcement action against the MOJ should evidence from other cases suggest that there are systemic issues within the MOJ that are causing delays.



38. In its internal review result the MOJ states: "*Outside the scope of the Act, it may help if I explain why a 'neither confirm nor deny' response applies even when a court case has been widely reported in the media. While courts are a public buildings, and hearings take place in 'open court', information of the type you have requested should not be disclosed under section 32 (court records) and section 40 (personal data) and these exemptions do not allow any public interest considerations to be considered*". The MOJ continued by adding further information, presumably 'outside of the Act'. The Commissioner does not agree that this 'is outside of the Act' in that the information given relates directly to matters being considered in relation to FOIA. The Commissioner considers this to be part of the MOJ's duties under section 16.

## Right of appeal

---

39. 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)

40. 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.
41. 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**