Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 August 2016

Public Authority: Crown Prosecution Service
Address: Rose Court
2 Southwark Bridge
London
SE1 9HS

Decision (including any steps ordered)

1. The complainant has requested information regarding a charging decision in relation to an allegation of murder. The Crown Prosecution Service withheld the information under sections 30(1)(c) (criminal proceedings) and section 40(2) (third party personal information) of the FOIA.

2. The Commissioner's decision is that the Crown Prosecution Service has section 40(2) of the FOIA appropriately to the requested information.

3. The Commissioner does not require the Crown Prosecution Service to take any steps as a result of this decision notice.

Request and response

4. On 8 January 2015, the complainant wrote to the Crown Prosecution Service (CPS) and requested information in the following terms:

"Please provide copies of the charging decision taken in 1991 in relation to the allegation that [a named individual] murdered Mark Tildesley, who disappeared in June 1984.

Please disclose all documents surrounding the decision in 1991 not to charge Cooke with Mark Tildesley's murder."

5. The CPS responded on 5 February 2015. It explained that it had not been able to locate the charging decision but that a document

summarising that document was held and was exempt in full under:

section 30(1)(c) – investigations
section 40(2) – personal information
section 42(1) – legal professional privilege.

6. Following an internal review the CPS wrote to the complainant on 9 December 2015. It explained that it was still relying on sections 30(1)(c) and 40(2), but was no longer relying on section 42(1).

Scope of the case

7. The complainant contacted the Commissioner 9 December 2015 to complain about the way his request for information had been handled. He explained that the only person prosecuted for the crime alleged that a certain individual - a convicted paedophile and convicted killer - was among those who murdered Mark Tildesley.

8. The complainant also alleged that it was clear from information already in the public domain that the CPS had declined to prosecute this convicted killer because he was already in prison for the manslaughter of another boy. The complainant also pointed out that the named individual has subsequently pleaded guilty to a number of serious sexual offences.

9. The Commissioner will consider whether the CPS has applied sections 30(1)(c) and 40(2) appropriately and the way the CPS had handled the request.

Reasons for decision

Section 40 – personal data

10. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and its disclosure would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (DPA).

Is the information personal data?

11. The definition of personal data is set out in section 1 of the DPA:

" …data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or 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 intention of the data controller or any other person in respect of the individual."

12. The two main elements of personal data are that the information must 'relate' to a living individual and the individual must be identifiable. Information will relate to an individual if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

13. In this case, the CPS explained that it considered that the charging decision constituted the personal data of the named individual and that it would be unfair to disclose the information.

14. The Commissioner has considered the withheld information. He is satisfied that it constitutes information which falls within the definition of 'personal data' as set out in section (1) of the DPA as the information comprises personal data relating to the named individual and other individuals.

Is the information sensitive personal data?

15. Sensitive personal data is personal information which falls into one of the categories set out in section 2 of the DPA. Of relevance in this case is that section 2 relates to personal data consisting of information as to:

(g) the commission or alleged commission by him of any offence"

16. The Commissioner is satisfied that the withheld information in its entirety is sensitive personal data. This is because it relates to the named individual and the decision whether to charge him with murder and others who were identified in that decision.

17. In light of this finding Commissioner will go on to consider whether disclosure of the named individual's personal data would breach one of the data protection principles.

18. He will also consider whether disclosure of the personal data of the other third parties would breach one of the data protection principles.

Would disclosure breach one of the data protection principles?

19. The CPS explained that it considered that disclosure of the requested information would contravene the first data protection principle. The Commissioner agrees that the first data protection principle is relevant in this case.

Would disclosure contravene the first data protection principle?

20. The first principle deals with the privacy rights of individuals and the balance between those rights and other legitimate interests in processing personal data. It states:

    "Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

    (a) at least one of the conditions in Schedule 2 is met, and

    (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met".

21. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions and, in this case, one of the Schedule 3 conditions for sensitive personal data. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

Would it be fair to disclose the requested information?

22. When considering whether disclosure of personal information is fair, the Commissioner takes into account the following factors:

    - the individual's reasonable expectations of what would happen to their information:
    - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
    - the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

23. Under the first principle, the disclosure of the information must be fair to the data subject. Assessing fairness involves balancing the data subject's rights and freedoms against the legitimate interest in disclosure to the public.

24. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in its disclosure.

Has the data subject consented to the disclosure?

25. The Commissioner is not aware of anything to suggest that consent has been given for disclosure of the requested information by any party concerned.

Has the data subject actively put some or all of the requested information into the public domain?

26. Where the data subject has put some or all of the requested information into the public domain, the Commissioner considers that this weakens the argument that disclosure would be unfair.

27. In this case the Commissioner has not seen any evidence that any of the data subjects have actively put some or all of the requested information into the public domain.

Reasonable expectations

28. In order to reach a view on whether the disclosure of this information would be fair in this case, the Commissioner has placed specific emphasis on the nature of the information itself.

29. The requested information, if disclosed, would reveal information about the named individual and other individuals who were subject to police investigation, criminal prosecution or conviction. The Commissioner does not accept that disclosing this information would be fair and considers that it would be very likely to cause distress to the individuals involved or have an unfair impact on them.

Consequences of disclosure

30. In looking at the consequences of disclosure on the data subjects, the Commissioner has considered what they might be.

31. The CPS explained that it considered that disclosure of the information would have a significant impact. It explained that all of the individuals involved in criminal prosecutions, including witnesses and third parties, have a clear and strong expectation that their personal data will be held in confidence and not disclosed to the world at large under the FOI Act. It argued that this was especially true of sensitive personal data as it comprises information that individuals regard as the most private. Disclosure of this information into the public domain would therefore be likely to cause further distress to those individuals.

32. The consequences for the named individual would be to reopen a matter for which he was not charged.

Conclusion

33. The Commissioner considers that there is some legitimate public interest in the disclosure of the requested information. However, he notes that there is information in the public domain which explains why the named individual was not charged. The Commissioner considers that this meets the legitimate public interest.

34. The Commissioner notes that the requested information is considered to be 'sensitive' personal data in terms of the named individual. Disclosure of sensitive personal data must have justification, whatever the circumstances of the individual. It is clearly possible for the disclosure of sensitive personal data to be fair. Individuals who have been charged or convicted of crimes will often have to expect disclosure of some information about them and their actions, particularly during the judicial process and sometimes after it. However, in this case, the named individual was not charged with the murder of Mark Tildsley. Therefore, in the circumstances of this case the Commissioner accepts that it would be unfair to disclose the information requested, in terms of it being the named individual's personal data and would contravene the first data protection principle.

35. The Commissioner also finds that it would clearly be unfair to the other individuals concerned to disclose the withheld information related to them and to do so would contravene the first principle.

36. He has not gone on to consider whether disclosure is lawful or whether one of the Schedule 2 DPA conditions is met.

37. The Commissioner considers that the section 40(2) exemption is engaged and will therefore not consider the other exemption cited.

Other matters

38. The complainant requested an internal review on 5 February 2015 and the CPS did not respond until 9 December 2015.

39. Part VI of the section 45 Code of Practice makes it good practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information. He considers that the procedure should encourage a prompt determination of the complaint.

40. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner has decided that a reasonable

time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.

41. The Commissioner is very concerned about the length of time taken by the CPS to carry out the internal review and will keep under review its performance in other cases.

Right of appeal

42. 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

43. 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.

44. 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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