

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 January 2017

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

Decision (including any steps ordered)

1. The complainant requested information from the Ministry of Justice (the 'MOJ') about the Joint Asset Recovery Database. Following clarification of the request, the MOJ provided the information it held with redactions for personal information under section 40(2) of FOIA. It said it did not hold the remainder of the requested information.
2. The Commissioner's decision is that, on the balance of probabilities, the MOJ has provided the information it holds, subject to the redactions made under section 40(2) of FOIA, which she finds to be engaged. She does not require the MOJ to take any steps to comply with the legislation.

Request and response

3. On 9 November 2015 the complainant wrote to the MOJ and requested information in the following terms:
 - "1. Does the Joint Asset Recovery Database (JARD) include recovery orders made by HMRC where VAT returns were refused due to fraud/suspicion of fraud?"*
 - "2. Does the JARD list include recoveries/payment refusals made by Tribunals against companies and individuals?"*
 - "3. Does the JARD list include civil recovery orders made under part 5 of Proceeds of Crime Act 2002 (POCA)?"*

4. Does the JARD list include criminal recovery orders made under part 2 of POCA?

5. Can you provide me with a copy of the JARD list with names and recovered amounts from 01/01/2005 to 31/10/15?

6. If you cannot comply with question 5 can you provide specific reasons including section of legislations?

7. If you cannot comply with question 5, are you able to clarify recoveries against a list I have?"

4. The MOJ wrote to the complainant on 1 December 2015 to ask him to clarify parts of his request. He provided clarification on 19 January 2016 as follows:

"1. A company or an individual registered for VAT can reclaim VAT when they purchase items on the quarterly or monthly VAT returns. If HMRC believes there has been a fraud or suspected of one, Input VAT can be refused, thereby recovering any potential losses.

2(a) I am referring to civil orders made by VAT tribunals against companies and individuals.

(b) Payment refusal – A VAT tribunal can refuse payment for a company or individual due to various reasons including fraud/suspected fraud. I am trying to establish if these form part of JARD list in order to comply with Article 1 of the First Protocol of the ECHR (double recovery).

4. Criminal recovery orders under Part 2 of POCA is a Confiscation order following a criminal conviction."

5. On 22 February 2016 the MOJ responded to the clarified request. It said it did not hold the information for parts 1, 2 and 3. It did not respond to part 4. For part 5, it provided a spreadsheet with names and dates of birth redacted under section 40(2) of FOIA, personal information. As it had responded to part 5, it referenced that parts 6 and 7 were no longer applicable; a point which the complainant subsequently accepted.
6. Following the Commissioner's intervention, the MOJ provided its internal review result on 26 July 2016. It upheld its original position but accepted it should have made it clear that JARD is not owned by MOJ (HMCTS) in relation to parts 1 to 3, and that it should have responded to part 4 by providing advice and assistance in accordance with section 16 of FOIA. It now said that a link to the Home Office website should have been provided because it may hold the information as it has *"the policy lead/or responsibility for the issue enquired about"*.

7. The MOJ also said that parts 5 to 7 of the request should have been answered as for parts 1 to 4, but clarified that it had been able to provide some data owned by the Home Office, but accessible to the MOJ, in response to part 5.

Scope of the case

8. The complainant contacted the Commissioner on 1 June 2016 to complain about the way his request for information had been handled. His initial complaint was about the internal review, which had not been completed by the MOJ.
9. Having received the internal review following the Commissioner's intervention, the complainant remained dissatisfied and wished to continue with his complaint in respect of all parts of his request. He told the Commissioner:

"The MOJ, CPS and other agencies are contributors to this database although owned by the Home Office. There are no records disclosed related to questions 1, 2 & 3 which effectively makes information so far purely criminal recovery orders (default response to question 4). In effect, evidence given recently by the HMRC to the Public Accounts Committee and courts related to Article 1 of the First Protocol of the ECHR is likely to be incorrect if the database only contains criminal recovery orders.

Disclosures related to question 5 is [sic] incomplete and does not contain names. Since the whole database is criminal recovery orders, there are no reasons to withhold them as they are already public records. I have attached an extract from disclosures with names added. These were obtained mostly from the HMRC, CPS, NCA and news websites. I do not believe Section 40(2) of the FOIA should apply."

10. The Commissioner has therefore considered whether the MOJ holds any further requested information beyond that disclosed.
11. For part 4 of the request, the MOJ told the Commissioner that 'criminal recovery orders' are confiscation orders following a criminal conviction meaning that the MOJ (HMCTS) holds the data.
12. By way of explanation HMCTS said it has legislative responsibility as the 'enforcement authority' to ensure that confiscation orders are collected and enforced appropriately. Confiscation data is recorded on JARD so it is therefore necessary for confiscation enforcement staff to have access to the data held on the system and to be able to update it. HMCTS explained that its staff do not have access to any other data held on the

system that is not relevant to the areas of business for which they are responsible.

13. She has also considered whether the MOJ is entitled to rely on section 40(2) for the redactions it made to the information disclosed in response to part 5 of the request. As the complainant has only asked for the names in his request (and not dates of birth which have also been redacted), the Commissioner has therefore only considered whether the MOJ is entitled to rely on section 40(2) in relation to the names of those issued with confiscation orders.

Reasons for decision

Section 1 – general right of access

14. Section 1 of FOIA states that:

“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.”

15. The task for the Commissioner here is to determine whether, on the balance of probabilities, the MOJ holds any information relevant to the request which it has not disclosed to the complainant. Applying the civil test of the balance of probabilities is in line with the approach taken by the Tribunal when it has considered the issue of whether information is held in past cases.
16. As part of her ‘information not held’ investigation, the Commissioner asked the MOJ about the searches it had undertaken in order to respond to the complainant’s request.
17. In reply, the MOJ explained that the request was handled by the Enforcement section in Her Majesty’s Courts & Tribunals Service (‘HMCTS’) on behalf of the MOJ. By way of background, the MOJ explained that JARD is a multi-agency government database owned by the Home Office which covers England and Wales. It is a central database which improves intelligence across agency and geographical boundaries. The National Crime Agency ‘manage’ JARD. The Home Office ‘owns’ proceeds of crime legislation and therefore any amendments to the legislation sit within its jurisdiction.
18. JARD holds data on many different areas of proceeds of crimes including confiscation, cash forfeitures and restraint orders. The MOJ explained

that JARD is accessed by the various agencies involved in obtaining and enforcing matters relating to proceeds of crimes, each with different access levels. It said that because not all operational agencies have an interest in every area, JARD access is restricted to those areas relevant to each agency.

19. The MOJ advised that the information for parts 1, 2 and 3 of the request is not held by itself because there is no legal or business requirement for it to be held. It explained that HMCTS' access to JARD *"is strictly limited to confiscation orders once they have been made at the Crown Court"*.
20. Due to its restricted access, HMCTS said it cannot speculate as to what data is held on JARD, as it is not directly responsible for these areas of work.
21. The MOJ reiterated that it does not 'own' JARD nor is it responsible for managing the database. While the MOJ is aware that other data is held on JARD, it does not have access to that data and it advised the complainant to make enquiries with those agencies responsible for the data he requires. It confirmed that it had provided the complainant with a weblink to the Home Office¹ because the Home Office 'owns' JARD and may hold further information as it has the policy lead/or responsibility for the data he requires.
22. In relation to part 5 of the request, HMCTS confirmed that it holds information in relation to confiscation orders only. This was provided to the complainant on a spreadsheet, with details of the date the confiscation order was made, the court making the order, the original order amount, current order amount, interest accrued and total payments. The names and dates of birth of the parties involved were withheld under section 40(2), which the Commissioner will go on to consider later in this notice.
23. For parts 6 and 7, HMCTS explained that, apart from the confiscation order information provided subject to section 40(2), it does not hold the requested information because there is no legal or business requirement for it to be held. It reiterated that HMCTS access to JARD is strictly limited to confiscation orders once they have been made at the Crown Court.
24. The Commissioner is satisfied that the MOJ (via HMCTS) only has restricted access to JARD as it is not the database 'owner'. It is therefore only able to consider the requested information it can access itself.

¹ <https://www.gov.uk/government/organisations/home-office>

Conclusion

25. From the information provided, the Commissioner has concluded, on the balance of probabilities, that the MOJ does not hold any further requested information.

Section 40(2) – personal information

26. The MOJ relied on section 40(2) in relation to the spreadsheet it provided in response to part 5 of the request (see paragraph 22 of this notice).
27. During the investigation, the complainant submitted the following arguments to the Commissioner:

"Disclosures related to question 5 is incomplete [sic] and does not contain names. Since the whole database is criminal recovery orders, there are no reasons to withhold them as they are already public records. I have attached an extract from disclosures with names added. These were obtained mostly from the HMRC, CPS, NCA and news websites. I do not believe Section 40(2) of the FOIA should apply.

It does not make sense for me to search the internet to populate names of the whole table."

As the complainant has only challenged the withholding of names this is all that the Commissioner will consider.

28. The extract referred to by the complainant above is a spreadsheet which he seems to have compiled himself; it is not something which the Commissioner has located online. Although it is not clear where the complainant found this data, some of this appears to have been sourced from 'official' sources, although none of it appears to have been sourced from the MOJ.
29. From her own searches on the internet the Commissioner found a small number of the names redacted by the MOJ under section 40(2) were available in the public domain on the Crown Prosecution Service's (the 'CPS') website having been disclosed in relation to an FOIA request made in 2012. Newspaper articles also allude to further information having been disclosed by the CPS although this was not readily found. However, as she had found some related information, the Commissioner asked the MOJ if it knew why some names relating to confiscation orders are in the public domain.
30. In reply, the MOJ said that the CPS may choose to publish some of the data because it handles the prosecution side of cases. The MOJ

highlighted that because the CPS has different interests in the cases, it would take different disclosure considerations into account.

31. The MOJ said that as it does not itself publish this information *"it would be very resource intensive to check all the names and see if any have been [disclosed]. We also will not know the reasons for the disclosure and will still need to consider our obligations under the Data Protection Act and the risks of disclosure."*
32. The Commissioner here notes that such a task would also serve very little purpose at it would be likely only to result in the MOJ considering disclosure of that information which is already available to the complainant elsewhere, albeit from other sources.
33. Furthermore, the Commissioner also notes the complainant's contention that this type of information is already in the public domain as it has been considered at Court and is therefore in the public arena.
34. It is against this background that the Commissioner has considered the MOJ's reliance on section 40(2) to the names in the spreadsheet it provided to the complainant for part 5 of his request.
35. Section 40(2) provides an exemption for information that is the personal data of an individual aside from the requester, and where the disclosure of that personal data would be in breach of any of the data protection principles. Consideration of this exemption is a two-stage process. First, the information must constitute the personal data of a third party and, secondly, disclosure of that personal data must be in breach of at least one of the data protection principles.
36. The definition of personal data is given in section 1(1) of the Data Protection Act 1998 ('DPA') as follows:

"'personal data' means 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".*
37. The withheld information consists of the names of individuals who have been issued with a confiscation order; this clearly both identifies and relates to individuals other than the complainant. That information is, therefore, the personal data of those individuals according to section 1(1) of the DPA.

38. Further, the Commissioner considers the information in question to be sensitive personal data in line with section 2(g) of the DPA which covers the "*commission or alleged commission by him of any offence*" because the individuals have been deemed liable for the repayment of monies procured through illegal activities.
39. The next step is to consider whether disclosure of the names of those individuals would be in breach of any of the data protection principles. The Commissioner has focussed here on the first data protection principle, which requires that personal data is processed fairly and lawfully, and in particular as to whether disclosure would be, in general, fair.
40. In forming a conclusion on this point, the Commissioner has taken into account what the reasonable expectations of the data subjects would be, as well as any consequences that disclosure may have for them. She has also considered whether there is any legitimate public interest in the disclosure of this information.
41. The MOJ has argued that those concerned would not be aware of the disclosure or that their data was to be disclosed in this manner. It said the individuals have not been asked whether they are willing to consent to the disclosure of their personal data.
42. Whilst she has no evidence to suggest that disclosure would result in the individuals concerned being subjected to adverse publicity, she does accept that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions, and that individuals have a strong expectation that their personal data will be held in accordance with the DPA and not disclosed to the public.
43. The Commissioner notes the complainant's contention that the information is already in the public domain as it relates to matters which have been through the Court process. However, the Commissioner has previously determined that disclosure of personal information at Court for the purposes of criminal proceedings does not mean that the information subsequently remains in the public domain; the information is necessarily processed as part of Court proceedings and the assurance of a fair trial and it is only in the public domain for the duration of the hearing. Additionally, in her guidance on "Information in the Public Domain²", the Commissioner advises that even if the information is revealed in open Court and enters the public domain at the time, this

² <https://ico.org.uk/media/for-organisations/documents/1204/information-in-the-public-domain-foi-eir-guidance.pdf>

does not mean that it remains there forever. Whilst it may briefly enter the public domain in theory, in practice its availability is very short-lived unless it is publicised by the media. The Commissioner does not therefore accept that information imparted as part of a Court hearing can be determined as always remaining in the public domain.

44. Whilst it is apparent that the CPS has placed a small number of the 'worst offenders' names into the public domain, this does not cover the full data that has been requested by the complainant from the MOJ. The MOJ itself does not publish any names and was unaware of the CPS's limited publication or any justification for it. Furthermore, as specified in her guidance on the application of section 40, the Commissioner does not require public authorities to carry out an exhaustive search of all possible public domain sources in order to establish what information is already available and she would not have expected the MOJ to have known about this limited disclosure made by another public authority.
45. Although other bodies may have had some reasons for disclosing some of the requested names, the MOJ itself does not routinely disclose this information. Therefore, whilst the CPS may have previously determined it fair to disclose some details about the largest debtors (and it should be noted that the Commissioner has not had to consider whether or not it was fair of it to do so), this has only been a very limited and specific disclosure; that information is available to the general public and, by definition, to the complainant too. The full range of information requested is not available.
46. Given the nature of the request, and the sensitivity of the subject matter, the Commissioner considers that disclosure in this case could lead to an intrusion into the private lives of the individuals concerned and the consequences of any disclosure of this sensitive personal data could cause damage and distress. The Commissioner therefore finds that the parties concerned will have no reasonable expectation that the MOJ will disclose their personal data. She therefore concludes that disclosure would be unfair.
47. Whilst section 40(2) is not a qualified exemption in the same way as some of the other exemptions in Part II of FOIA, 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. Therefore, despite the reasonable expectations of individuals, it may still be fair to disclose the requested information. The question here is whether any legitimate public interest in disclosure outweighs the factors against disclosure covered above.
48. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting

an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest must outweigh the public interest in protecting the rights and freedoms of the data subjects. The interest in disclosure must also 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.

49. The Commissioner notes that some of the requested information is already available to the complainant, albeit from a different public authority. As such, the public interest is already met to some degree as information is already available. The Commissioner also notes that other details about the orders has been provided by the MOJ such as dates, amounts and payments, again meeting the public interest to a large degree.
50. Both the MOJ and the Commissioner have considered the complainant's legitimate interests against the rights and freedoms or legitimate interests of the individuals concerned. Whilst there is some limited interest in the disclosure of the names, the Commissioner does not find that this outweighs the interests of the individuals concerned.

Conclusion

51. The Commissioner finds that the requested information in part 5 of the request constitutes sensitive personal data, and has concluded that disclosure of that information would be unfair and unlawful. Section 40(2) is therefore engaged.

Other matters

52. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As she has made clear in her '*Good Practice Guidance No 5*', the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by 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. The Commissioner is concerned that in this case, it took over 95 working days for an internal review to be completed, despite the publication of her guidance on the matter.

53. Although the Commissioner asked the MOJ to explain why the internal review was so delayed, it did not provide any response.
54. As the CPS has placed some of the information the complainant is seeking into the public domain, the Commissioner would suggest that he may wish to submit his request (or part thereof) to the CPS. In addition, as the JARD is 'owned' by the Home Office and accessed by a number of agencies, he may wish to direct further requests to those public authorities.

Right of appeal

55. 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

56. 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.
57. 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

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