

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 August 2017

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

Decision (including any steps ordered)

1. The complainant has requested information about prisoners who have absconded from prison. The Ministry of Justice withheld the information, citing the section 40(2) (personal information) exemption of FOIA.
2. The Commissioner's decision is that the Ministry of Justice has applied section 40(2) of FOIA appropriately.
3. The Commissioner does not require the Ministry of Justice to take any steps as a result of this decision.

Request and response

4. On 18 April 2016 the complainant wrote to the Ministry of Justice (MoJ) and requested information in the following terms:

"Could you provide the name, date of birth, address, term of imprisonment, sentencing date and more details on the offences for each of the individuals in table 3 (pasted below) —

STANDFORD HILL 07/04/2005 Conspiracy to defraud

EAST SUTTON PARK 09/04/2005 Import/Export drugs

EAST SUTTON PARK 09/04/2005 Import/Export drugs

<i>STANDFORD HILL</i>	<i>19/05/2005 Possess offensive weapon</i>
<i>STANDFORD HILL</i>	<i>26/11/2005 Deception</i>
<i>EAST SUTTON PARK</i>	<i>28/11/2005 Customs evasion</i>
<i>STANDFORD HILL</i>	<i>02/12/2005 Deception</i>
<i>STANDFORD HILL</i>	<i>03/12/2005 Trespass with intent</i>
<i>STANDFORD HILL</i>	<i>01/03/2006 Assist illegal immigrants</i>
<i>EAST SUTTON PARK</i>	<i>16/09/2006 Manslaughter</i>
<i>STANDFORD HILL</i>	<i>19/03/2008 Contempt of court</i>
<i>STANDFORD HILL</i>	<i>02/06/2008 Burglary</i>
<i>STANDFORD HILL</i>	<i>11/11/2008 Posses firearm with intent</i>
<i>STANDFORD HILL</i>	<i>02/12/2008 Burglary."</i>

5. The MoJ responded on 3 May 2016. It acknowledged that the present request was made in response to information it had disclosed previously to the complainant, regarding the number of absconders from prisons in Kent still unlawfully at large from the period 2005/06-2014/15.
6. The MoJ explained that in relation to the present request, it was withholding the requested information, citing the section 40(2) (personal information) exemption.
7. Following an internal review the MoJ wrote to the complainant on 22 July 2016. It upheld its original decision.

Scope of the case

8. The complainant contacted the Commissioner on 9 August 2016 to complain about the way his request for information had been handled. He explained that he considered that publishing the requested information was in the public interest. He also referred to section 32 of the Data Protection Act 1998 (DPA) which he considers is relevant as he is a journalist.
 9. The complainant also explained that he considered that disclosure would help in the recapture of prisoners unlawfully at large, some of whom are clearly dangerous. He also explained that he would have accepted limited information: name, age (if known) and sentencing date etc. The complainant also explained that he considered that the MoJ's decision to withhold the information was a misuse of the DPA.
 10. The Commissioner will therefore consider the MoJ's application of section 40(2) and also the length of time taken to deal with the request.
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Reasons for decision

11. 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 DPA.

Is the information personal data?

12. 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."

13. 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.
14. In this case, the MoJ told the complainant that it considered that the requested information constituted the personal information of the prisoners concerned and that it would be unfair to disclose it.
15. The Commissioner notes that the complainant has asked for the name, date of birth, address, term of imprisonment, sentencing date and more details on the offences for each individual. She is satisfied that this 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 identifiable individuals.

Is the information sensitive personal data?

16. Sensitive personal data is defined in section 2 of the DPA. It 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, or

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings."

17. The Commissioner is satisfied that the withheld information in its entirety is sensitive personal data. This is because it relates to offences committed by identifiable individuals.
18. In light of this finding Commissioner will go on to consider whether disclosure of the information would breach one of the data protection principles.

Would disclosure breach one of the data protection principles?

19. The MoJ told the complainant 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 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 of the data subjects.

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 individuals who had committed offences. 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.
30. The Commissioner notes the complainant's point about how disclosing the information might help to apprehend prisoners who have absconded.

31. The MoJ acknowledged that in some circumstances it does disclose the personal details of prisoners who have absconded. However, this only takes place following consultation with the police and victim support if a victim has signed up to be kept informed of such events. It argued that the automatic disclosure of personal details of prisoners would, in fact, have the effect of impeding an investigation. The MoJ also explained that some of the prisoners may have been returned to custody and be no longer at large. Furthermore, addresses held for these prisoners may be inaccurate as they could be out of date and release of this data would pose a risk to those living at that address.
32. The MoJ also explained that when considering whether to disclose the information, it had also taken into consideration the victims of and their well-being.

Consequences of disclosure

33. In looking at the consequences of disclosure on the data subjects, the Commissioner has considered what they might be.
34. The MoJ explained that it considered that disclosure of the information would have a detrimental effect. It also explained that it is generally accepted by society that information about a person's criminal record should be given some protection in order to allow prisoners to re-enter society after they have served their prison sentence and undergone period of rehabilitation. The MoJ also explained that it was possible that disclosure of personal details of the prisoners could lead to the targeting of them once they had served their sentence. In addition, it argued that prisoners' families could be targeted as a result of disclosure.
35. The MoJ also explained that disclosure may also have the effect of making the recapture of a prisoner more difficult.

Conclusion

36. The Commissioner considers that there is some legitimate public interest in the disclosure of the requested information, especially as it deals with prisoners who have absconded from prison. However, she also considers that disclosure could impact on any police investigations, making it more difficult to trace prisoners who absconded from prison. She also accepts that their families could be targeted.
37. The Commissioner therefore accepts that disclosure could have an impact. She therefore considers that the legitimate public interest favours non-disclosure of the withheld information.
38. The Commissioner notes that the requested information is considered to be 'sensitive' personal data in terms of the prisoners. 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 the circumstances of this case the Commissioner accepts that it would be unfair to disclose the information requested, in terms of it being the prisoners' personal data and to do so would contravene the first data protection principle.

39. She has not gone on to consider whether disclosure is lawful or whether one of the Schedule 2 DPA conditions is met.
40. The Commissioner considers that the section 40(2) exemption is engaged.
41. The Commissioner notes that the complainant states he is a journalist and has referred to section 32 of the DPA. The Commissioner considers that FOIA is purpose-blind and therefore that the complainant's role as journalist is not relevant as what is being considered is disclosure under the FOIA. Furthermore, the Commissioner's view is that section 32 DPA is not relevant to cases under FOIA.

Other matters

42. The complainant requested an internal review on 6 May 2016. The MoJ responded on 22 July 2016.
 43. Part VI of the section 45 Code of Practice (the code) 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.
 44. While no explicit timescale is laid down in the code, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of receipt 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.
 45. The Commissioner is concerned that it took over 20 working days for the internal review to be completed. The delay has been noted by her as part of her work in monitoring the performance of the MoJ.
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Right of appeal

46. 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

47. 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.

48. 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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