

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 January 2018

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 a named individual in connection with his possible employment during a specified timeframe. The MOJ refused to provide the requested information on the basis of section 40(2) of FOIA, although it released some related information outside of FOIA, on a discretionary basis.
2. The Commissioner's decision is that the MOJ was entitled to rely on section 40(2) of FOIA in relation to this request. However, by failing to issue its refusal notice within the statutory 20 working days' timescale, the MOJ breached section 17(1) of FOIA. The Commissioner requires no steps to be taken as a result of this decision.

Background

3. Although FOIA is applicant and purpose blind, the complainant told the Commissioner that he made his request following a First-tier Tribunal appeal decision¹ where the MOJ had cited the cost of compliance, section 12 of FOIA, in refusing the request.

¹[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1877/Price,%20Simon%20EA-2016-0123\(19.09.16\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1877/Price,%20Simon%20EA-2016-0123(19.09.16).pdf)

4. This previous request was for information about a named Rabbi's work in relation to Jewish prisoners and was refused on the basis that the MOJ would have to contact more than one hundred establishments in order to respond to the request, which it said would exceed the cost limit. In her decision, the judge said: *"Although there is a suggestion that there is information explaining why the request could not be fulfilled simply by asking [named Rabbi] whether he held the information requested, that explanation is not before me in either the agreed bundle or as a result of any closed material procedure"*.
5. At that Tribunal, the judge concluded that the basis on which the cost estimate inherent in section 12 of FOIA had been predicated was unreasonable. Whilst clarifying that this did not automatically mean that the cost of complying with the request in question would not exceed the appropriate limit, she ordered the MOJ to consider the request afresh.
6. Having read this appeal decision, and given the judge's comment set out above, the complainant in this case told the Commissioner he wished to ascertain whether the named Rabbi held the requested information on behalf of the MOJ; he therefore submitted a request as detailed below.
7. It is important to note that in *EA/2016/0123* the Tribunal accepted the appellant's submission that the named Rabbi is employed by the MOJ (paragraphs 18 to 19 of the judgment) without obtaining further evidence. The MOJ was not joined as a party to this appeal so did not respond to this point.
8. The Commissioner is aware through her involvement with the appeal case *EA/2016/0123* that, as ordered by the Tribunal, the MOJ has provided further information to both the appellant and herself as parties to that appeal. However, it is unclear whether or not this has been given 'outside' of the FOIA.
9. In light of its post-Tribunal provision of further information to the appellant, the Commissioner has contacted the MOJ and asked it to reconsider its response to the complainant in the case under consideration in this notice. On 19 December 2017, the MOJ replied to both the Commissioner and the complainant as follows:

"The MOJ still maintain that section 40(2) is applicable in relation to the information requested by [the complainant]. The above tribunal case [ie EA/2016/0123] does not alter what the MOJ wrote to the ICO in the letter dated 16 October 2017."

10. The Commissioner can neither locate the information provided post-Tribunal in the public domain nor has the MOJ consented to its release in relation to the current case.

Request and response

11. On 27 September 2016 the complainant wrote to the MOJ and requested information in the following terms:

"Can you please confirm whether, at any time during the period 2010-2015, [Rabbi's name redacted]:

(a) was an employee of MOJ and if so provide his job title

(b) had a contract with MOJ for the provision of faith advice or chaplaincy services or was employed by, or held office in, a body with such a contract. If so, could you provide the name of the contractor and the title of the contract.

Please note that this request does not seek information about any payments made to any individual or body."

12. The MOJ responded, late, on 12 January 2017. It refused to provide the requested information, citing section 40(2) personal information; however, it provided some information outside the FOIA about chaplains and faith advice.
13. The complainant requested an internal review on 20 January 2017. The MOJ provided its internal review, late, on 8 June 2017 in which it upheld its original position.

Scope of the case

14. The complainant contacted the Commissioner on 9 May 2017 to complain about the way his request for information had been handled.
15. Whilst he stated that he accepts the requested information is the named individual's personal data, the complainant does not believe disclosure of that information would be unfair because:
 - the information relates to the named Rabbi in his professional capacity and not his private life;
 - the Rabbi's role as a Prison Service Jewish Faith Advisor is a matter of public record;

- the Rabbi is a public facing figure holding a senior position;
 - the Rabbi is quoted in the press discussing his prison chaplaincy role;
 - disclosure of this information would not cause detriment to the Rabbi - it would generally be assumed that this role would be remunerated and no information about whether any such remuneration comes from the MOJ or any other source has been asked for;
 - the request does not seek information about any actual payments;
 - the information is necessary for the complainant to understand the implications of the appeal decision (*EA/2016/0123* referenced above).
16. The Commissioner has noted the complainant's comments and has considered whether the MOJ has properly relied on section 40(2) in refusing this request.

Reasons for decision

Section 40(2) – third party personal data

17. This exemption provides that any third party personal data is exempt from disclosure, if that disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act 1988 (the 'DPA'). The MOJ has cited section 40(2), which 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.
18. 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.

Is the information personal data?

19. The first step for the Commissioner to determine is whether the requested information constitutes personal data, (as defined by the 'DPA'). If it is not personal data, then section 40 cannot apply.

20. Section 1 of the DPA defines personal data as:

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

a) from these 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."

21. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable.

22. Information will relate to a person if it is about them, linked to them, is used to inform decisions affecting them or has them as its main focus.

23. Clearly the subject here is named and both the complainant and the MOJ accept that the request relates to him personally. Having accepted that the request under consideration here is for the personal data of a living individual other than the applicant, the Commissioner must go on to consider whether disclosure of the requested information would contravene any of the data protection principles.

24. The Commissioner considers that the first data protection principle is relevant in the circumstances of this case.

Would confirmation or denial breach the first data protection principle?

25. The first data protection principle 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."

26. 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 one of the Schedule 3 conditions if relevant. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

27. The Commissioner has first considered whether disclosure would be fair. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.
28. In 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
 - any legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the individuals who are the data subjects.

Reasonable expectations

29. The Commissioner recognises that people have an instinctive expectation that the MOJ, in its role as a responsible data controller, will not disclose certain information and that it will respect their confidentiality.
30. It is noted that the complainant is of the view that the Rabbi is a public-facing figure holding a senior position whereas the MOJ has advised that the Rabbi's role is not high profile, nor is it public facing and that he would reasonably expect information held about him not to be disclosed to a third party.
31. The main issue under consideration here is the Rabbi's employment status and whether or not he has a contract of employment with the MOJ. Although there may be information about him in the public domain, which associates him with the prison service, the Commissioner is not satisfied that details regarding any actual employment status with the MOJ are in the public domain. Whilst it might be argued that any steps made as a consequence of the previous Tribunal case discussed above may have placed this information in the public domain, the Commissioner can find no evidence of this and the MOJ has indicated that this is not the case. Therefore, in respect of the named individual, the Commissioner is satisfied that he would have the reasonable expectation that details about his employment status would not be disclosed. She considers that information relating to an individual's employment details carries a strong general expectation of privacy for the party concerned.

Consequences of disclosure

32. As to the consequences of disclosure upon a data subject, the question in respect of fairness is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
33. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. She will also take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions.
34. The MOJ has not provided the Commissioner with any detailed explanation as to the possible consequences of disclosure. However, it has stated that as disclosure would be contrary to the named Rabbi's expectations and therefore unfair, it considers that disclosure would cause some distress to him.
35. The Commissioner is satisfied that the named Rabbi would have a reasonable expectation that the information in question would not be placed into the public domain by disclosure under FOIA. This is on the basis that there is already information in the public domain, including interviews with the Rabbi, where his role has been discussed and commented on, but the actual terms of any employment (if indeed there are any) have not. For example, if he is not a contracted employee of the MOJ he may not wish to have this detail disclosed. Therefore she considers that disclosure of this information would be an invasion of his privacy, and as such may cause him some distress.

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

36. Notwithstanding a data subject's reasonable expectations or any damage or distress caused, it may still be fair to disclose information if there is a more compelling public interest in doing so. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in disclosure of the withheld information.
37. 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 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 in disclosure of the information must outweigh the public interest in protecting the rights and freedoms of the data subject if disclosure is to be considered fair.

38. Further, the interest in disclosure 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.
39. The complainant in this case has argued that disclosure is necessary to help him understand the Tribunal's judgment in *EA/2016/0123*. However, even if the MOJ were to disclose all the requested information, he would not be in a position to appeal against the Tribunal's judgment or understand how it reached its position.
40. In carrying out the balancing exercise the public authority should weigh the factors identified above (whether the information is sensitive personal data; the consequences of disclosure for the data subject; and the reasonable expectations of the data subject) against any legitimate interest in disclosure. Each case will need to be considered on its own merits, and of course there will be circumstances where these factors are inter-related.
41. Personal data can only be disclosed if to do so would not breach the DPA principles. If the public authority discloses personal data in contravention of DPA principles, it is in breach of its duty as a data controller. This is not an exercise where the scales come down firmly on one side or the other. A proportionate approach should be considered, as there will be circumstances where the legitimate interest may be met by disclosure of some of the requested information.
42. The Commissioner notes that the complainant may have a personal interest in knowing the employment details of the data subject given his comments about why he submitted the request and him wanting to understand the Tribunal's determination behind the previous request (see paragraph 15 above). The Commissioner also accepts that there is a general public interest in terms of the transparency and accountability of public sector organisations. However, the Commissioner does not consider that in this case any legitimate public interest extends to the disclosure of the employment details requested by the complainant. In her view, the legitimate interest is already largely met by knowing the Rabbi's actual role and details regarding his employment status with the MOJ is a private matter.
43. In this case the Commissioner was satisfied that any information held would be the personal data of the named individual as he is the focus of the request.
44. She is satisfied that, although further information about the named Rabbi has been provided to another requester in the context of a Tribunal appeal, this information does not appear to be available in

the public domain, nor has the MOJ consented to its release in relation to the request under consideration in this notice.

45. Balancing the above, the Commissioner is satisfied that the data subject would have no reasonable expectation that the information in question would be disclosed to the world at large.

Conclusion

46. In light of the nature of the information and the reasonable expectations of the individual named in the request, the Commissioner is satisfied that disclosure of the requested information would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the named individual. She considers these arguments outweigh any legitimate interest in disclosure. She has therefore concluded that disclosure in this case would not be fair and would breach the first data protection principle. She therefore finds the exemption at section 40(2) to be engaged.

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

47. 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.

48. 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."

49. 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.

50. If, as in this case, the MOJ decides that information should be withheld, it 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

51. 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.

52. 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. As well as finding above that the MOJ is in breach of FOIA, the Commissioner has also made a record of the delays 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.

Right of appeal

54. 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

55. 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.
56. 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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