

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 7 March 2019

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about a press statement issued by the Ministry of Justice (MOJ) about a high profile prisoner. The MOJ disclosed some information but withheld information about the staff involved in preparing and authorising the press statement, on the grounds that it was exempt from disclosure under section 40 (personal information) of the FOIA.
2. The Commissioner's decision is that the MOJ was entitled to apply section 40 to withhold the names of the members of staff who prepared and authorised the statement, but that section 40 was not engaged in respect of the job titles of senior staff who authorised the issue of the statement.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose to the complainant the job titles of the senior staff who authorised the issue of the press statement.
4. The MOJ must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 5 August 2018, the complainant wrote to the MOJ and made a request for information in the following terms:

*"I refer you to the following online article:*

*<https://www.dailystar.co.uk/news/latest-...>*

*which says:*

*A spokesman said: "[redacted] was treated with the same fairness we aim to show all prisoners – he had access to visits, television and showers – and it is totally false to say he was held in 'solitary confinement'.*

*"He was initially placed into the Care & Separation Unit for less than 48 hours while an assessment of the risk to his safety was undertaken by prison staff.*

*He then joined the main prison population."*

### *REQUEST*

- 1. What is the name and position (i.e. prison governor, HMP Onley) of the 'spokesman' referred to above.*
  - 2. Provide a copy of the above press statement.*
  - 3. Provide a list of all the media outlets to whom the press statement above was sent and the time of same.*
  - 4. Provide the names and positions of all persons who authorised that the statement above could be sent.*
  - 5. After the successful appeal to the Court of Appeal, how much was the Crown ordered to pay for the appellant's legal costs.*
  - 6. Provide a copy of the application to the Attorney General for consent to bring contempt proceedings (in London)."*
6. The MOJ responded on 3 September 2018. In respect of part (1) of the request it explained that while the statement was issued under the heading of a "Prison Service Spokesperson", in practice it had been prepared by a number of press officers whose names could not be disclosed without breaching the lawfulness requirement of the Data Protection Act 2018 ("the DPA"). For part (4) of the request, it said the information was exempt under section 40(3)(a)(i) of the FOIA as its

disclosure would breach the first data protection principle of the DPA. It answered the remaining parts of the request. It also informed the complainant that the period of "*less than 48 hours*", referred to in the press statement, was incorrect and should in fact have read "*seven days*".

7. Following an internal review, the MOJ wrote to the complainant on 18 October 2018. It clarified that it was relying on section 40(2) to refuse to disclose the names requested at part (1) of the request, and the names and positions requested at part (4) of the request, and it upheld its application of that exemption.

## Scope of the case

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8. The complainant contacted the Commissioner on 18 October 2018 to complain about the way his request for information had been handled. He disputed the application of section 40 to withhold the information at parts (1) and (4) of the request.
9. The Commissioner has considered whether the MOJ was entitled to rely on section 40 to withhold the information requested at parts (1) (names only, positions having already been disclosed) and (4) (names and positions) of the request. Where the request has referred to a person's "*position*", the Commissioner has interpreted this as being their job title.

## Reasons for decision

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### Section 40 personal information

10. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
11. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation ('GDPR') ('the DP principles').

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) of the Data Protection Act 2018

12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

*Is the information personal data?*

14. Section 3(2) of the DPA defines personal data as:

*"any information relating to an identified or identifiable living individual".*

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
17. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
18. The Commissioner accepts that the full name and job title of an individual is information which fulfils the criteria set out above.
19. Furthermore, with reference to the identities of the staff responsible for authorising the issue of the press statement, the MOJ has explained that the job title for each person was unique to them. It said that nobody else held the same job title and so public disclosure of this information would render them identifiable, at the very least by their colleagues, and possibly externally, by other information in the public domain.
20. In the circumstances of this case, having considered the withheld information, which in both cases comprises the full names of members of MOJ staff, and in relation to part (4), their job titles, the Commissioner is satisfied that the information both relates to, and identifies, the staff concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
21. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under

the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

22. The most relevant DP principle in this case is principle (a).

*Would disclosure contravene principle (a)?*

23. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

24. 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 lawful, fair and transparent.

25. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) GDPR**

26. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.

27. The Commissioner considers that the lawful basis most applicable is basis (f), which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"*<sup>2</sup>.

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<sup>2</sup> Article 6(1) goes on to state that:-

*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read*

28. In considering the application of Article 6(1) (f) GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part test:-

i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

29. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

#### *Legitimate interests*

30. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

31. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

32. The complainant explained his reasons for requesting the information as follows:

*"This request is particularly important as the press statement was wrong.*

*Writing and issuing a press statement involves making decisions and putting political 'spin' on things.*

*The names of decision-makers should be disclosed. Particularly when the statement was wrong.*

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*as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

*There seems to be plenty of unnamed spokesperson*

*Are they entitled to anonymity?"*

33. The Commissioner accepts that there is a legitimate public interest in holding public authorities accountable for the accuracy of public statements they make. Where information prepared as part of a press release is subsequently shown to be incorrect, there is a legitimate interest in the public authority acknowledging this, and in understanding how the error came to be made, so that similar mistakes might be avoided in future.

*Is disclosure necessary?*

34. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
35. The MOJ has acknowledged that the press statement was incorrect, and has corrected it, and so, to some extent, the legitimate interest set out above has already been met.
36. The Commissioner considers that the disclosure of the names of the individuals who were responsible for preparing and authorising the press statement would add nothing further to the public's understanding of how and why the press statement came to be issued with incorrect information.
37. Having considered the facts of the case, the Commissioner is not satisfied that disclosure of the names is necessary to meet the legitimate interests identified above.
38. As the Commissioner has decided in this case that disclosure of the names is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test.
39. As disclosure of the names is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
40. Given the above conclusion that disclosure of the names would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
41. Turning to the job titles of the persons responsible for authorising the press statement for release, the Commissioner considers that there may



be some merit in disclosing this information, as it would give the public an indication of whether such responsibility rests at a suitably senior level and with the right business area of the MOJ.

42. Having considered the facts of the case, the Commissioner considers that disclosing the job titles of the persons responsible for authorising the press statement for release is necessary to meet the legitimate interests described above.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

43. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
44. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
45. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
46. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
47. The MOJ has explained to the Commissioner that disclosure of information capable of identifying the individuals, and the subsequent publicity of that information, could lead to this press statement being "personalised" and inappropriately associated with named officials by the public. This would undermine the ambition that press statements are issued on behalf of the Secretary of State for Justice and the Ministry of



Justice collectively, and are seen by the public as representing corporate comment on particular issues, rather than those of individual civil servants.

48. While this aim is understandable, the Commissioner does not consider that it relates to the interests which section 40 is designed to protect (the personal privacy of individuals).
49. The MOJ also considered that the public identification of the staff who authorised this press statement could lead to those staff being at risk of personal criticism or abuse from individuals who disagreed with or were unhappy with the press statement, or with the policy or operational information contained within it. It said this was a realistic concern in respect of press statements relating to high profile topics or individuals, as in this case.
50. The information under consideration for disclosure here is the job titles of the staff who authorised the press statement for release. To those in a position to identify them, the information would reveal that they had authorised the release of information which subsequently proved to be incorrect.
51. The Commissioner recognises that the pool of people likely to be able to identify the data subjects would be quite small – principally, their colleagues and anyone motivated to cross reference their job title with other information which might be in the public domain. Nevertheless, it is still reasonable to assume that this might cause the data subjects some personal embarrassment.
52. To the Commissioner's knowledge, this information is not already in the public domain (and the fact that the complainant is having to request it under FOIA would tend to bear this out). The fact that the press statement was incorrect would be likely to be known within the MOJ. However, the identities of the data subjects who authorised its release might not be.
53. With regard to the reasonable expectations of the data subjects, the Commissioner notes that the information is entirely to do with them in their professional capacity. This does not afford them as much protection as if the information related to their private lives.
54. The MOJ informed the Commissioner that the job titles relate to the most senior grade, Senior Civil Service (SCS) (or an equivalently senior position). The Commissioner has ascertained the following about SCS roles:

*"There are 4,000 plus in the Senior Civil Service (SCS), including many who work outside Whitehall, many specialists, and many who have been recruited direct from the private and voluntary sectors.*

*SCS jobs vary hugely, but usually include one or more of the following:*

- *agreeing strategic aims with Ministers, and communicating those aims to Grade 7s and others;*
- *agreeing and providing the financial and human resources needed to achieve those aims;*
- *deploying their greater knowledge and experience in support of Grade 7s;*
- *trouble-shooting;*
- *undertaking complex casework and project management, and*
- *acting as a personal adviser to Ministers"*<sup>3</sup>

55. It is clear from this that SCS staff have responsibility for decision-making at a senior level. The Commissioner's guidance on requests for information about public authority employees<sup>4</sup> makes it clear that senior employees should expect their posts to carry a greater level of accountability, since they are likely to be responsible for major policy decisions and the expenditure of public funds. Where public sector employees are at senior civil servant level, the guidance considers they should have a reasonable expectation that personal data held in relation to their professional lives may be disclosed and that they may be expected to absorb reasonable levels of scrutiny and criticism by virtue of the seniority of their position.

56. The Commissioner further notes the comments of the First-tier Tribunal in *Alasdair Roberts v the Information Commissioner and the Department for Business Innovation and Skills (EA/2009/0035)*:

*"In general terms we think that a senior civil servant (by which we mean someone at Grade 5 or above) would not have a reasonable expectation of anonymity in respect of any document, even one with*

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<sup>3</sup> [https://www.civilservant.org.uk/information-grades\\_and\\_roles.html](https://www.civilservant.org.uk/information-grades_and_roles.html)

<sup>4</sup> [https://ico.org.uk/media/for-organisations/documents/1187/section\\_40\\_requests\\_for\\_personal\\_data\\_about\\_employees.pdf](https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf)

*sensitive content (although even then there may be an occasional exception)."*<sup>5</sup>

57. Taking all the above into account, the Commissioner considers that while there may be some detriment to the data subjects, by way of personal embarrassment, in view of their seniority (and therefore, their reasonable expectations as to the level of public scrutiny their actions may be subject to) it is not of sufficient weight to overcome the benefits of disclosing the information that have been identified.
58. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest in disclosing the job titles to outweigh the data subjects' fundamental rights and freedoms, and that the disclosure of the information would be lawful.

#### *Fairness and transparency*

59. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under principle (a).
60. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, in general it is highly likely that disclosure will be fair for the same reasons. She is satisfied that this is so in this case.
61. The requirement for transparency is met because as a public authority, the MOJ is subject to the FOIA.

#### *The Commissioner's view*

62. The Commissioner has therefore decided that the MOJ was entitled to withhold the names of those who prepared the press statement and those who authorised its issue, under section 40(2), by way of section 40(3A)(a).
63. However, the Commissioner also decided that the MOJ has failed to demonstrate that the exemption at section 40(2) is engaged in respect of the job titles of those who authorised the issue of the press statement. To rectify this, the MOJ must therefore take the action set out in paragraph 3.

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<sup>5</sup> Paragraph 25

[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i394/Roberts\\_v\\_IC\\_&\\_DBIS\\_\(0035\)\\_Part\\_2\\_Decision\\_26-05-10\\_\(w\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i394/Roberts_v_IC_&_DBIS_(0035)_Part_2_Decision_26-05-10_(w).pdf)

## Right of appeal

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64. 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)

65. 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.

66. 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**  
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**SK9 5AF**