

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 June 2019

Public Authority: Crown Prosecution Service
Address: 8th Floor
102 Petty France
London
SW1H 9EA

Decision (including any steps ordered)

1. The complainant requested information relating to staff compensation claims. The Crown Prosecution Service (CPS) refused to provide the requested information, citing section 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that the CPS was entitled to rely on section 40(2) of the FOIA to withhold the requested information.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 6 December 2018, the complainant wrote to the CPS and requested information in the following terms:

" Please disclose the amount paid in compensation in the financial years 2017/18 for personal injuries to CPS staff;
* Please disclose how many individual claims this represented;
* Please provide a breakdown showing the nature of the claim, how much compensation was paid in each case and the total known legal fees paid"*

5. The CPS responded on 2 January 2019. It provided some information within the scope of the request (the amount paid in compensation requested in part (1) of the request and the total legal fees requested at

part (3) of the request) but refused to provide the remainder. It cited the following exemption as its basis for doing so:

- section 40(2) personal information.
6. Following an internal review, the CPS wrote to the complainant on 20 February 2019 maintaining its original position.

Scope of the case

7. The complainant contacted the Commissioner on 20 February 2019 to complain about the way his request for information had been handled.
8. He told the Commissioner:

"The public interest in transparency surrounding accidents/injuries at work is overwhelming and disclosure shows the authority is willing to be open and transparent when things go wrong and there is a substantial cost to the public.

...

It must also be pointed out that releasing such information as a £15,000 compensation payment for a slip at work does not identify the individual involved".

9. In support of his position that the information should be provided, the complainant also argued that "numerous other authorities have released such information, in the interests of transparency".
10. However, the Commissioner does not consider that this sets an automatic precedent for disclosure under the FOIA. In the Commissioner's view, each case must be considered on its merits.
11. During the course of the Commissioner's investigation, the CPS confirmed its application of section 40(2) to the withheld information in the scope of parts (2) and (3) of the request, namely:
- how many individual claims the disclosed amount paid in compensation represented; and
 - a breakdown showing the nature of the claim(s) and how much compensation was paid in each case.
12. The CPS provided the Commissioner with a copy of the withheld information, information comprising the number of individual claims, a breakdown showing the nature of the claim and how much compensation was paid in each case.

13. The analysis below considers the CPS's application of section 40(2) of the FOIA to the withheld information.

Reasons for decision

Section 40 personal information

14. 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.
15. In this case, the relevant condition is contained in section 40(3A)(a). 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 ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
16. 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.
17. 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?

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

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

19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
20. 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.
21. 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.
22. In this case, the CPS told the complainant:

"In response to question two there have been less than ten staff compensation claims. ... It is necessary to anonymise this information to ensure individuals who have had a compensation claim cannot be identified".

23. In order to provide context to the request and response, the Commissioner asked the CPS how many people it employed. In response, the CPS told her:

"The CPS employs over 6000 staff members".

24. Nevertheless, it maintained that, in its view, due to the specific details, and narrow timeframe, of the request, disclosing the definitive number of individual claims could lead to the possible identification of the CPS staff member(s).

25. The Commissioner's guidance¹ states:

"The DPA defines personal data as any information relating to an identified or identifiable living individual. If an individual cannot be directly identified from the information, it may still be possible to identify them".

26. The Commissioner is satisfied that information about an individual's personal injury, and details of compensation paid, undoubtedly relates to them.
27. The second part of the test is whether an individual can be identified from the withheld information.
28. The complainant disputed that disclosure of the requested information would disclose personal details.
29. Having viewed the withheld information, the Commissioner accepts that the numbers within the scope of the request are low.
30. The Commissioner is also mindful that the issue to be considered in a case such as this is whether disclosure to a *member of the public* would breach the data protection principles.
31. She accepts that different members of the public may have different degrees of access to the 'other information' needed for re-identification to take place.

¹ <https://ico.org.uk/media/for-organisations/documents/2614720/personal-information-section-40-and-regulation-13-version-21.pdf>

32. A test used by both the Commissioner and the First-tier Tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.
33. The ICO's Code of Practice on Anonymisation² notes that:

"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".
34. In summary, the motivated intruder test is that if the risk of identification is reasonably likely, the information should be regarded as personal data.
35. The CPS argued that the withheld information:

"... could have the potential to have a high impact on an individual or organisation therefore it is likely to attract a 'motivated intruder'".
36. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to CPS staff member(s). She is satisfied that this information both relates to and identifies the staff member(s) concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
37. She has reached that conclusion on the basis that the focus of the information is the individual(s) who were paid compensation and that the information is clearly linked to those individual(s) because it is about the nature of the claim(s) and the amount of compensation paid.
38. In the circumstances of this case, the Commissioner is further satisfied that the individual(s) concerned would be reasonably likely to be identifiable from a combination of the requested information, the low number of individuals involved and other information which is likely to be in, or come into, the possession of others.
39. 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.

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

Would disclosure contravene principle (a)?

41. 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".

42. 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.

43. 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.

44. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

45. Information relating to special category data is given special status in the GDPR.

46. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health and data concerning a natural person's sex life or sexual orientation.

47. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include special category data. She has reached this conclusion on the basis that the request relates to the health of CPS staff, with regard to personal injuries they have suffered.

48. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.

49. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.

50. The Commissioner has seen no evidence or indication that the individual(s) concerned have specifically consented to this data being

disclosed to the world in response to the FOIA request or that they have deliberately made this data public.

51. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

Right of appeal

52. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

53. 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.
54. 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

Samantha Bracegirdle
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