

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 5 May 2015

**Public Authority:** Disclosure and Barring Service  
**Address:** Shannon Court  
Princes Dock  
Liverpool  
L3 1QY

#### Decision (including any steps ordered)

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1. The complainant requested information from the Disclosure and Barring Service (DBS) in relation to an individual who had been convicted of offences. DBS refused to confirm or deny whether it held this information and cited the exemption provided by section 40(5) (personal information) of the FOIA.
2. The Commissioner's decision is that DBS cited section 40(5) correctly and so it was not obliged to confirm or deny whether it held the information requested by the complainant.

#### Request and response

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3. On 2 March 2015, the complainant wrote to DBS and requested information in the following terms:  
*"Please provide copies of all prohibition orders/barrings relating to [name redacted], who was recently convicted of sex offences."*
4. DBS responded on 17 March 2015. It refused to confirm or deny whether it held the information requested and cited the exemption provided by section 40(5) (personal information) of the FOIA.
5. The complainant responded on the same date and requested an internal review. DBS responded with the outcome of the internal review on 7 April 2015 and upheld the refusal to confirm or deny under section 40(5).

## Scope of the case

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6. The complainant contacted the Commissioner on 10 April 2015 to complain about the refusal of his information request. The complainant argued at this stage that DBS had failed to take into account the specific circumstances relating to the requested information and that the seriousness of the case referred to in his request meant transparency was required.
7. The complainant was subsequently contacted by the ICO and his attention drawn to the likelihood that the Commissioner would conclude that section 40(5) did apply. The complainant responded to this and confirmed that he wished to continue with this case and gave further reasoning as to why he believed that the requested information should be disclosed. The analysis below covers section 40(5) and addresses the arguments made by the complainant.

## Reasons for decision

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### Section 40

8. DBS has cited section 40(5) of the FOIA. This section provides an exemption from the section 1(1)(a) duty to confirm or deny whether requested information is held where to do so would involve the disclosure of personal data and that disclosure would be in breach of any of the data protection principles. Consideration of this exemption involves two stages; first confirmation or denial as to whether the requested information is held must involve the disclosure of personal data. Secondly, that disclosure must be in breach of at least one of the data protection principles.
9. Covering first whether confirmation or denial would involve the disclosure of personal data, the definition of personal data is given in section 1(1) of the Data Protection Act 1998 (DPA):

*"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".*

10. The view of the Commissioner is that it is clear that confirmation or denial of whether information falling within the scope of the complainant's request was held would involve the disclosure of personal data. Such a confirmation or denial would also provide the same in relation to whether or not the individual named in the request had been the subject of "*prohibition orders/barrings*". That information would relate to that individual and he is identified in the wording of the request. Confirmation or denial would, therefore, disclose personal data.
11. The next step is to consider whether that disclosure of personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on the first data protection principle, which states that personal data shall be processed fairly and lawfully.
12. Section 2 of the DPA sets out what categories of personal data are classed as *sensitive* for the purposes of that Act. These include personal data as to the commission or alleged commission by the data subject of an offence. The personal data in question here is, therefore, sensitive.
13. A particular requirement in relation to processing sensitive personal data (which includes its disclosure) is that at least one of the conditions in Schedule 3 of the DPA is met. Generally when considering this exemption the Commissioner will focus primarily on the general fairness requirement. In this case the complainant made representations as to how a DPA Schedule 3 condition could be satisfied and so those representations are also addressed in this analysis, as well as another argument advanced by the complainant.
14. The complainant's argument on fairness was effectively that the seriousness of the crimes committed by the individual named in his request meant that individual could hold no reasonable expectation of privacy and so it would not be unfair to that individual for his personal data to be disclosed. Notwithstanding whether the Commissioner agrees with that reasoning, he does not agree that conviction of a crime of any level of seriousness would necessarily mean that an individual could no longer hold a reasonable expectation of privacy. He does, however, accept that the seriousness of the crimes committed and to which any information that was held would relate is a relevant factor when considering whether disclosure would be fair.
15. Even if the Commissioner found that disclosure would be generally fair, this would not impact on the outcome of the complaint if he found that no Schedule 3 condition could be satisfied. In order to address the main focus of the complainant's arguments, he has proceeded on the basis that he accepts that there is some possibility that in this case disclosure could reasonably be considered to be fair, and he has gone on to consider the applicability of the Schedule 3 DPA conditions.

16. The Commissioner's general view is that the two conditions in Schedule 3 that might apply in relation to disclosures made under the FOIA are the first condition, which is that the data subject has consented to disclosure, and the fifth condition, which is that the data subject has already deliberately made the personal data public.
17. The Commissioner is aware of no evidence that the first or fifth condition is met and the complainant did not advance any argument about those conditions. Instead, the complainant argued that the third condition in Schedule 3 would be satisfied. This condition concerns processing necessary for the vital interests of the data subject or another person and consent can either not be given by the data subject, the data controller could not be reasonably expected to seek consent, or consent has been unreasonably withheld. The argument of the complainant was that this processing of personal data was necessary to protect the vital interests of the victims of the subject of the request and the wider public. In summary the complainant argued that disclosure of the confirmation or denial was necessary to show whether appropriate steps had been taken to protect children from the named individual.
18. The Commissioner's view, however, is that confirmation or denial as to whether the requested information is held is too far removed from the protection of children at risk from that individual for this condition to be satisfied. The 'vital interests' wording in this condition sets a high bar; one that is not met here given that no argument has been advanced as to how the confirmation or denial would further protect those at risk. As a result, even if it is accepted that it is possible for this condition to be satisfied in the context of an FOIA request, the Commissioner does not believe that it is satisfied in this case.
19. The complainant advanced a further argument that related to the Data Protection (Processing of Sensitive Personal Data) Order 2000 and the processing of personal data for the 'special purposes' set out in section 3 of the DPA. One of these is the purposes of journalism. The view of the Commissioner, however, is that the processing of personal data in question here would be for the purpose of complying with section 1(1)(a) of the FOIA, rather than for journalism. It is not the case that journalists have additional privileges under the FOIA to any other requester.
20. In conclusion, the Commissioner does not accept the complainant's assertion that the third condition in DPA Schedule 3 is satisfied. He maintains that none of the Schedule 3 conditions apply in relation to this request. Neither does the Commissioner accept the complainant's argument concerning the DPA section 3 special purposes. Therefore, confirmation or denial as to whether this sensitive personal data is held would be in breach of the first data protection principle. The finding of

the Commissioner is that the exemption provided by section 40(5) is engaged and DBS was not obliged to confirm or deny whether it held the information requested by the complainant.

## **Other matters**

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21. Whilst the Commissioner has found above that section 40(5) did apply, he notes that the refusal notice and internal review response showed some misunderstanding about how this exemption from the duty to confirm or deny is engaged. The reasoning given in the internal review response was that section 40(5) was engaged "*by virtue of the exemption engaged under section 40(2)*".
22. The DBS should be aware that section 40(5) does not automatically apply in any case where section 40(2) does. Instead the test is as described above; the confirmation or denial itself must involve a disclosure of personal data that would be in breach of any of the data protection principles.

## Right of appeal

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23. 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: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

24. 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.
25. 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 .....**

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
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**Water Lane**  
**Wilmslow**  
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