

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 July 2017

Public Authority: Crown Prosecution Service
Address: Rose Court
2 Southwark Bridge
London
SE1 9HS

Decision (including any steps ordered)

1. The complainant has requested information about any reviews and assessments carried out by the Crown Prosecution Service (CPS) in relation to its handling of cases involving a man who killed someone while suffering a psychotic episode. The CPS refused the request, citing the non-disclosure exemptions at sections 30 (Investigations and proceedings), 36 (Prejudice to the conduct of public affairs), 40 (Personal information) and 42 (Legal professional privilege) of the FOIA.
2. The Commissioner's decision is that the CPS was entitled to apply section 40(2) of the FOIA to refuse the request.
3. The Commissioner requires no steps to be taken.

Background

4. In May 2015, Femi Nandap was arrested on suspicion of possession of a knife and assaulting a police officer ("the May 2015 incident"). While on bail for that incident, he left the UK (apparently in contravention of his bail conditions) and travelled to Nigeria, where he received treatment for severe mental health conditions. He returned to the UK, whereupon, in October 2015, he was arrested for failing to comply with his bail conditions. He was granted bail a further time in respect of that charge.
5. In December 2015 the CPS decided to not proceed with charges in respect of the May 2015 incident, on the grounds of insufficient evidence. Six days later, on 29 December 2015, Mr Nandap stabbed

Jeroen Ensink to death in an unprovoked attack, while in a psychotic state. Mr Nandap later pled guilty to manslaughter due to diminished responsibility and received an indefinite hospital order.

6. Some parties to the matter expressed the view that if the charges relating to the May 2015 incident had not been dropped by the CPS, Nandap would not have been free to kill Mr Ensink. The judge at his trial expressed the hope "*...that those in a position to do so will investigate all the aspects of this case and the appropriate lessons will be learned.*"

Request and response

7. On 13 October 2016, the complainant wrote to the CPS and requested information in the following terms:

"Please provide copies of all reviews/assessments carried out by the CPS relating in any way to the handling of cases involving Femi Nandap."

8. The CPS responded on 8 November 2016 and refused to provide the requested information citing the following exemptions of the FOIA:

Section 30(1)(c) - Investigations and proceedings conducted by public authorities

Section 40(2) – personal information

9. Following an internal review the CPS wrote to the complainant on 11 November 2016 and maintained its position.

Scope of the case

10. The complainant contacted the Commissioner on 25 January 2017 to complain about the way his request for information had been handled. He wished to challenge the application of the exemptions to refuse the request, and felt that there was a strong public interest in disclosure. The complainant also pointed to the Data Protection (Processing of Sensitive Personal Data) Order 2000 as a source of authority for disclosure of sensitive personal information in this case.
11. During the course of the Commissioner's investigation, the CPS located additional information which it had not previously taken into account when considering the complainant's request.
12. It explained to the Commissioner that it considered most of that information to be exempt under section 40(2) (Personal information),

section 42 (Legal professional privilege) and section 36 (Prejudice to the effective conduct of public affairs). However, it said that a letter setting out its assessment of the decisions made in respect of the May 2015 incident could be disclosed, albeit with minor redactions for section 40(2). It duly disclosed this letter to the complainant, albeit with several minor redactions for section 40(2).

13. Following the combined cases of the Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new grounds for refusing a request, either before the Commissioner or the First-tier Tribunal, and both must consider any such new claims.

Reasons for decision

14. The withheld information comprises several CPS forms setting out the charges, the charging decision, and case action in respect of the May 2015 incident together with witness statements, evidence and correspondence setting out the decision not to continue proceedings. With regard to the CPS's subsequent review of this decision, there are five briefing notes examining it. There are also several minor redactions of personal data from the disclosed letter, of information which identifies other individuals and of health information about Mr Nandap.

Section 40 – personal data

15. 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 Data Protection Act 1998 (DPA).

Is the information personal data?

16. Personal data is defined in section 1 of the DPA as:

" ...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."

17. 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.

18. In this case, the CPS has stated that all of the withheld information constitutes the sensitive personal data of Mr Nandap and that it would be unfair to him to disclose it. The Commissioner notes that it also contains the names of, and information about and given by, witnesses and police officers.
19. The Commissioner has considered the withheld information. She is satisfied that it 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 Mr Nandap and other identifiable individuals.

Is the information sensitive personal data?

20. 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:

"(e) his physical or mental health or condition,"

and

"(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."

21. The Commissioner is satisfied that the withheld information here, in its entirety, is sensitive personal data. This is because it relates to Mr Nandap, who committed a criminal offence which led to his conviction. The withheld information examines the circumstances of the offence itself, a previous alleged offence (including the evidence against Mr Nandap in that case) and his mental health.
22. In light of this finding the Commissioner has considered whether disclosure of Mr Nandap's sensitive personal data would breach one of the data protection principles.
23. She has also considered whether disclosure of the personal data of the other individuals identified in the withheld information would breach the data protection principles.

Would disclosure breach one of the data protection principles?

24. The CPS 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?

25. 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".

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, 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?

27. 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.
28. Under the first principle, the disclosure of the 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.

29. 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?

30. The Commissioner is not aware of anything to suggest that consent has been given for disclosure of the requested information by any party concerned.

Has the data subject actively put some or all of the requested information into the public domain?

31. 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 to them.

32. In this case the Commissioner has not seen any evidence that Mr Nandap has actively put some or all of the requested information into the public domain. She notes that his identity will be in the public domain by virtue of media coverage of his trial, but does not consider that this constitutes action taken by him to place information about himself in the public domain. Similarly, the identities of the other data subjects (witnesses, police officers) are not likely to have been placed in the public domain (if indeed they are in the public domain) by their own doing.

Nature of the information

33. The requested information, if disclosed, would reveal information about the May 2015 incident, the charging decisions in respect of that incident, the incident in December 2015, in which Mr Nandap killed Mr Ensink and the CPS's assessment of its charging decisions in respect of Mr Nandap, in light of that. Taking all this into account, the Commissioner considers that all the data subjects would have a reasonable expectation that this information would not be disclosed for purposes not directly to do with addressing the concerns examined in the briefing notes.

Consequences of disclosure

34. The requested information, if disclosed, would reveal information about Mr Nandap, police officers and witnesses to the incidents in which he was involved. Taking account of the description of it set out in paragraph 33, above, 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.

35. In particular, the consequences for Mr Nandap would be to re-open a matter which occurred while he was severely mentally ill and which he has accepted responsibility for, pled guilty to and has been sentenced for.

Balancing rights and freedoms with legitimate interests

36. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for their own sake, along with specific interests.
37. The Commissioner notes the complainant's comments that the nature of the concerns considered in the withheld information merit public scrutiny.
38. In view of the nature of the concerns set out in paragraph 6, above, the Commissioner accepts that there is a legitimate public interest in understanding the CPS's decision with regard to the May 2015 incident.
39. However, the Commissioner considers that this interest is satisfied by the disclosure of the CPS's letter to the Central Criminal Court. It sets out the CPS's assessment that the charging decision in respect of the May 2015 incident was incorrect because there existed sufficient evidence for the charges to be pursued. It is therefore possible to gain an understanding of why the initial charging decision was made, and why it was subsequently deemed to be incorrect, without sight of the withheld information. Furthermore, the letter also notes that the decision to grant bail in relation to the May 2015 incident, and then again in October 2015, was still considered by the CPS to be a reasonable one, on the facts of the case at those times. Therefore, even if the CPS had not dropped the charges against Mr Nandap, he would still have been on bail and his adherence to the bail conditions in place would not have prevented him carrying out the killing.

Conclusion

40. The Commissioner considers that there is a legitimate public interest in understanding the CPS's charging decisions, especially as the suggestion from some parties involved in the trial was that the murder could have been prevented had the charges in respect of the May 2015 incident not been dropped by the CPS. However, having reviewed the matter the CPS has publicly stated that this would not have been the case, and it has disclosed its reasons for arriving at this conclusion. The Commissioner therefore considers the public interest in understanding the consequences of the CPS's decision, has, to a large degree, been satisfied by this disclosure.
41. The Commissioner notes that the requested information is considered to be 'sensitive' personal data relation to Mr Nandap. Disclosure of

sensitive personal data must have justification, whatever the circumstances of the individual. It is certainly possible for a 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 the data subject to disclose the information requested and this would therefore breach the first data protection principle. She is satisfied that disclosure would not be within his reasonable expectations; that it would be likely to have detrimental consequences for him; and that there are no wider legitimate interests to be served by disclosure which would be capable of outweighing his expectation of, and right to, privacy.

42. The Commissioner also finds that disclosure would be unfair to the other individuals identified in the withheld information and that to do so would contravene the first principle.
43. Since the Commissioner has determined that disclosure would be unfair, it is not necessary to go on to consider whether any of the schedule 2 conditions would permit disclosure.
44. The Commissioner further notes that the complainant has pointed to the Data Protection (Processing of Sensitive Personal Data) Order 2000 (the "Order") as an authority for the disclosure of sensitive personal data. This Order provides that in some circumstances, sensitive personal data may be disclosed. The complainant argued that, because he was a journalist, the sensitive personal data in this case should be disclosed to him. The Commissioner has not considered this condition as she has already found that the disclosure would be unfair and that it would breach the first principle. This is in contrast to the judgment of the First-tier Tribunal in the case of Wall, cited by the complainant, where the Tribunal found that disclosure would be fair and then went on to consider the Order. The Commissioner reserves her position as to whether the Order is relevant to any disclosure under FOIA.
45. The Commissioner considers that the exemption at section 40(2) of the FOIA is engaged in respect of all of the withheld information and she has therefore not gone on to consider the other exemptions cited by the CPS.

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

Samantha Bracegirdle
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