

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 June 2019

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

Decision (including any steps ordered)

1. The complainant requested information about costs incurred by the Crown Prosecution Service ("CPS") in relation to specified judicial review proceedings. The CPS would neither confirm nor deny ("NCND") whether it held the requested information, citing the exemption at section 40(5) (personal information) of the FOIA.
2. The Commissioner's decision is that the CPS was entitled to neither confirm nor deny holding information within the scope of the request by virtue of section 40(5)(a) of the FOIA.

Background

3. The complainant's request quotes an extract from a First-tier Tribunal decision on a substantially similar request for information he had previously submitted to the CPS. The particular wording of that request identified the complainant and two defendants as parties, both to criminal proceedings and to a judicial review of the CPS's handling of those proceedings.
4. The Commissioner's decision in that case was that the request was for the complainant's own personal data, and that, as such, the CPS was entitled to rely on section 40(5)(a) of the FOIA to issue a NCND response to the request. The Tribunal subsequently dismissed the complainant's appeal against that decision notice.
5. The Commissioner is unable to cite the decision notice or Tribunal reference numbers here, as for reasons given below, they are capable of

identifying the complainant; the complainant is, of course, familiar with them.

Request and response

6. On 13 December 2018, the complainant wrote again to the CPS and requested information in the following terms:

"In Appeal Reference: [appeal reference number and link to First-tier Tribunal decision redacted] the following is stated at paragraph 1:

"On a date which it is not necessary to specify, criminal proceedings were brought by OP, the Appellant, against two individuals, QR and ST. Those proceedings were taken over by the Crown Prosecution Service ('CPS') and discontinued. That action was challenged by the Appellant through the medium of judicial review, which was successful. The prosecution was then resumed but subsequently, for a second time, taken over by the CPS and discontinued."

I hereby request the following information under the Freedom of Information Act:

A breakdown of the costs to the CPS of dealing with the judicial review mentioned above. Please include the notional cost of staff time spent on dealing with the case, and the cost of any external counsel."

7. The CPS responded on 9 January 2019. It issued a NCND response, citing the exemption at section 40(5) of the FOIA.
8. The complainant requested an internal review on 9 January 2019, disputing that compliance with the request would involve the disclosure of personal data. The CPS wrote to the complainant on 23 January 2019. It upheld its application of section 40(5) to issue a NCND response.

Scope of the case

9. The complainant contacted the Commissioner on 31 January 2019 to complain about the way his request for information had been handled. He argued that the names of those involved in the proceedings to which the judicial review related had been anonymised ("*OP, the Appellant, against two individuals, QR and ST*"). He said that the requested information did not, therefore, relate to any identifiable person and could be disclosed without breaching anyone's privacy rights.
10. The analysis below considers the CPS's application of section 40(5)(a) to issue a NCND response to the request.

Reasons for decision

Section 40 - personal information

11. Section 1(1) of the FOIA provides two distinct but related rights of access to information, that impose corresponding duties on public authorities:
 - a) the duty to inform the applicant whether or not the information they have requested is held; and, if so
 - b) the duty to communicate the information to the applicant.
12. Section 1(1)(a) is commonly known as “the duty to confirm or deny”. However, the duty does not always apply and a public authority may refuse to confirm or deny whether it holds information through reliance on certain exemptions under the FOIA. It follows that where section 1(1)(a) is disapplied, there is no duty on a public authority to go on to comply with section 1(1)(b).
13. Section 40(5)(a) of the FOIA excludes a public authority from complying with the duty to confirm or deny in relation to information which, if held, would be exempt information by virtue of section 40(1) of the FOIA.
14. Section 40(1) of FOIA states that:

“Any information to which a request relates is exempt information if it constitutes personal data of which the applicant is the data subject”.
15. Therefore, where the information requested is the requester’s own personal data within the meaning of section 40(1) of the FOIA, the effect of section 40(5)(a) is that a public authority is not required to confirm or deny whether it holds the information.
16. ‘Personal data’ is defined in sections 3(2) and (3) of the Data Protection Act 2018 and means any information relating to an identified or identifiable living individual. 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. The complainant maintains that no individual is capable of being identified from his request. While the Commissioner accepts that, unlike his previous request, nobody is explicitly named in the request, she has nevertheless considered whether anyone might be identified via other information related to the request.

18. 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 re-identification of an individual from information which, on the face of it, appears truly anonymised.
19. The ICO's Code of Practice on Anonymisation¹ 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".
20. In summary, the motivated intruder test is that if the risk of identification is reasonably likely, the information should be regarded as personal data.
21. When the Commissioner conducted a cursory internet search using only the Tribunal appeal reference number quoted in the request, the search immediately returned a link to that appeal, the reference number of the decision notice which was the subject of the appeal and the complainant's full name. Therefore, the Commissioner must conclude that the complainant remains readily identifiable from the information cited in the request.
22. Having considered the wording of the request in this case, the Commissioner is satisfied that the complainant is, or would be, the subject of the requested information and that it is therefore his personal data. This is because the information he has requested, by its own definition, relates to the complainant himself and he is identifiable.
23. It follows that the Commissioner considers that the complainant is the data subject within the meaning of the exemption at section 40(1) of the FOIA.
24. In relation to such information, the provisions of section 40(5)(a) of the FOIA mean that the CPS is not required to comply with the duty to confirm or deny whether the information is held, as the duty to confirm or deny does not arise in relation to information which is (or, if it were

¹ <https://ico.org.uk/media/1061/anonymisation-code.pdf>

held by the CPS, would be) exempt information by virtue of subsection (1).

25. The Commissioner is satisfied that complying with section 1(1)(a) in this case would effectively confirm or deny whether the requested information is held in connection with the complainant as he is identifiable from the request. It would not be possible to confirm or deny the details of any costs incurred by the CPS without revealing whether or not the data subject had any involvement in a judicial review of the handling of criminal proceedings.
26. The Commissioner therefore considers that the CPS was entitled to rely on section 40(5)(a) of the FOIA to issue a NCND response in this case.

Right of appeal

27. 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

28. 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.

29. 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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