

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

### **Decision notice**

**Date:** 21 Aril 2020

**Public Authority:** Criminal Cases Review Commission (CCRC)

**Address:** 5 St Philip's Place  
Birmingham  
B3 2PW

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

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1. The complainant has requested information relating to "criticised experts" or equivalent lists (parts 1 and 2 of the request) and particular guidance documents (parts 3-5 of the request). The CCRC provided information in response to parts 3-5 of the request but made some minimal redactions to third party personal data contained within its guidance under section 40(2) FOIA. It refused to disclose information in relation to parts 1 and 2 of the request under section 40(2) and 44 FOIA. The CCRC also said that some information requested at parts 1 and 2 of the request was reasonably accessible to the applicant and was therefore exempt under section 21 FOIA or in the alternative it would exceed the cost limit under section 12 FOIA for CCRC to provide this information.
2. The Commissioner's decision is that the CCRC has correctly applied section 40(2) to the redacted information. It correctly applied section 40(2) and 44 to the information withheld in full. The CCRC incorrectly applied section 21 FOIA and section 12 FOIA in the alternative to some of the requested information, however it was not obliged to provide this information under section 14(1) FOIA due to the grossly oppressive burden this would cause.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

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4. On 26 March 2019 the complainant made the following request for information under the FOIA for:

1. The CCRC's list of "criticised experts", which I believe was previously kept in the Case Guidance Note on Expert Evidence, but which may now be on the CCRC's SharePoint intranet.
  2. Any equivalent lists held by the CCRC regarding criticised law enforcement personnel or units, criticised lawyers (including solicitors and barristers, defence and prosecution) and criticised judges;
  3. The CCRC's internal guidance on obtaining material from the Forensic Archive (I understand that the CCRC previously had a Case Guidance Note on this, but again it may now be on the CCRC's SharePoint intranet.)
  4. The CCRC's internal guidance on informants/Covert Human Intelligence Sources/informant-related material (again, the CCRC seems to previously have had a Casework Guidance Note on informant-related material);
  5. The CCRC's internal guidance on intercepted communications (which, again, the CCRC seems to have at one point had a Casework Guidance Note on).
5. The CCRC responded on 18 April 2019 and refused to provide information in relation to parts 1 and 2 of the request under section 40(2) FOIA. It provided information in response to part 3-5 of the request with some minimal redactions under section 40(2) FOIA.
  6. The complainant requested an internal review on 18 April 2019. CCRC provided an internal review on 21 May 2019 in which it upheld its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 20 August 2019 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation the CCRC additionally applied section 12, 21 and section 44 FOIA.
9. The Commissioner has considered whether the CCRC correctly applied section 40(2) to the redacted information and whether it correctly applied section 40(2) and 44 to some of the information withheld in full. She has also considered whether the CCRC had correctly applied section

21 FOIA or section 12 FOIA in the alternative to some of the requested information.

## Reasons for decision

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### Information redacted from guidance under section 40(2)

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 ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
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

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

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. In this case information was redacted from guidance where CCRC applicants were referred to.
19. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to CCRC applicants. She is satisfied that this information both relates to and identifies the CCRC applicants concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
20. 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.

***Is the information criminal offence data?***

21. Information relating to criminal convictions and offences is given special status in the GDPR.
22. Article 10 of the GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:
  - (a) *The alleged commission of offences by the data subject; or*
  - (b) *Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.*
23. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include criminal offence data. She has reached this conclusion on the basis that it relates to criminal convictions.
24. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.

25. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under the FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
26. The Commissioner has seen no evidence or indication that the individuals 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.
27. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

**Information withheld in full under section 40(2)**

28. Please see paragraphs 9-12 explaining the scope of the exemption.

***Is the information personal data?***

29. Please see paragraphs 13-16 explaining how personal data is defined.
30. In this case CCRC has applied section 40(2) to information pertaining to the experts themselves. That is names, qualifications, experience and professional criticism. Also linked to this are the names and cases of CCRC applicants where similar issues have been raised, the same expert used or other useful cross-referencing information directly relevant to the CCRC's statutory function to investigate and administer justice.
31. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the 'criticised experts' or applicants. She is satisfied that this information both relates to and identifies the data subjects concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
32. As explained previously, 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.
33. The most relevant DP principle in relation to the criticised experts is principle (a).

**Would disclosure contravene principle (a)?**

34. 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".*

35. 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.

36. 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) of the GDPR**

37. 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.

38. The Commissioner considers that the lawful basis most applicable is basis 6(1)(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) 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 as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

39. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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.
40. 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*

41. 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.
42. 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.
43. The Commissioner does consider that there is a legitimate interest in information relating to the CCRC's criticised experts in relation to transparency and accountability in the course of justice.
44. In this case the Commissioner also considers that there is a particular legitimate interest for those that believe they have been wrongly convicted.

#### *Is disclosure necessary?*

45. '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.

46. The Commissioner considers that disclosure of the information requested is necessary to meet the legitimate interests identified above.

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

47. 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.
48. 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.
49. 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.
50. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
51. The withheld information includes names of experts under investigation or who may have been discredited and are subject to constant change. The data subjects would not expect the details and opinions contained in such lists to be disclosed into the public domain and any disclosure would cause damage and distress to the data subjects.
52. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.



53. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

***Is the information criminal offence data?***

54. In relation to the applicants, please see paragraphs 20-21 as to the definition of criminal offence data.
55. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the information withheld relates to criminal offence data of applicants. She has reached this conclusion on the basis that it relates to criminal convictions.
56. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.
57. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under the FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
58. The Commissioner has seen no evidence or indication that the individuals 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.
59. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

**The Commissioner's view**

60. The Commissioner has therefore decided that the CCRC was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

**Information withheld in full under section 44**

61. Section 44(1)(a) of the FOIA provides that information is exempt if its disclosure by the public authority holding it is prohibited by or under any enactment.

62. This exemption has been applied directly to the information in relation to the CCRC applicants also contained within the data base. This information has been obtained specifically and exclusively in the exercise of the CCRC's functions, and is exempt under section 23 of the Criminal Appeal Act 1995 (CAA), disclosure in contravention of this is a criminal offence.
63. Section 23 CAA states that:
- (1) A person who is or has been a member or employee of the Commission shall not disclose any information obtained by the Commission in the exercise of any of their functions unless the disclosure of the information is excepted from this section by section 24.*
- (2) A person who is or has been an investigating officer shall not disclose any information obtained by him in his inquiries unless the disclosure of the information is excepted from this section by section 24.*
- (3) A member of the Commission shall not authorise—*
- (a) the disclosure by an employee of the Commission of any information obtained by the Commission in the exercise of any of their functions, or*
- (b) the disclosure by an investigating officer of any information obtained by him in his inquiries,*
- unless the authorisation of the disclosure of the information is excepted from this section by section 24.*
- (4) A person who contravenes this section is guilty of an offence and liable on summary conviction to a fine of an amount not exceeding level 5 on the standard scale.*
64. Section 23 CAA established the CCRC and gave it its powers. It prohibits disclosure of material that the CCRC has obtained in the course of exercising its statutory function unless certain criteria are met under section 24 CAA.
65. Section 24 CAA provides the following exceptions to non-disclosure:
- (1) The disclosure of information, or the authorisation of the disclosure of information, is excepted from section 23 by this section if the information is disclosed, or is authorised to be disclosed—*
- (a) for the purposes of any criminal, disciplinary or civil proceedings,*

*(b) in order to assist in dealing with an application made to the Secretary of State [or the Department of Justice in Northern Ireland] for compensation for a miscarriage of justice,*

*(c) by a person who is a member or an employee of the Commission either to another person who is a member or an employee of the Commission or to an investigating officer,*

*(d) by an investigating officer to a member or an employee of the Commission,*

*(e) in any statement or report required by this Act,*

*(f) in or in connection with the exercise of any function under this Act, or*

*(g) in any circumstances in which the disclosure of information is permitted by an order made by the Secretary of State.*

*(2) The disclosure of information is also excepted from section 23 by this section if the information is disclosed by an employee of the Commission, or an investigating officer, who is authorised to disclose the information by a member of the Commission.*

*(3) The disclosure of information, or the authorisation of the disclosure of information, is also excepted from section 23 by this section if the information is disclosed, or is authorised to be disclosed, for the purposes of—*

*(a) the investigation of an offence, or*

*(b) deciding whether to prosecute a person for an offence,*

*unless the disclosure is or would be prevented by an obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by or by virtue of an enactment) arising otherwise than under that section.*

*(4) Where the disclosure of information is excepted from section 23 by subsection (1) or (2), the disclosure of the information is not prevented by any obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by or by virtue of an enactment) arising otherwise than under that section.*

*(5) The power to make an order under subsection (1)(g) is exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.*

66. CCRC confirmed that none of the exemptions to allow disclosure under section 24 applied. CCRC confirmed to the Appellant in its letter of 21 May 2019:

"...the information requested is not in relation to any specific investigation or proceedings, nor is it necessary for providing legal advice to any existing client."

67. The request was not made in light of any potential legal proceedings. Section 24 CAA aside; it is the view of the CCRC that in the absence of any identifiable client it is difficult to argue the existence of any prospective proceedings that would tip the balance in favour of disclosure to the 'world at large' of such sensitive data.

68. Based upon the CCRC's submissions, the Commissioner is satisfied that section 23 CAA provides a statutory bar to disclosure of the withheld information which has been obtained specifically and exclusively in the exercise of the CCRC's functions. None of the section 24 exceptions to non-disclosure would apply. CCRC therefore correctly applied section 44 FOIA in relation to this information.

## **Section 21**

69. Section 21 states that:

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

70. The CCRC has explained that all of the remaining information in relation to the criticised experts has been gathered, over time, from various public sources. It is a living database that has been added to in a 'as and when' fashion from multiple sources such as those mentioned by the complainant. CCRC confirmed submissions were made by the complainant in relation to disclosing some of the requested information based on the fact that it is available in the public domain:

*'Any such information may currently only be imperfectly gleaned by searching media reports, published court judgments and the limited information released by police forces and agencies such as the Judicial Conduct Investigations Office, the Independent Office for Police Conduct and the Solicitors Regulation Authority.'*

71. CCRC confirmed that this is, indeed, exactly how it has compiled some of its information over time. Given the complainant's acknowledgment above, CCRC considers the complainant has adequate resources, knowledge and access to carry out the required searches for any relevant information they require available in the public domain. Meaning it is all reasonably accessible to them in the same way as it was/is to the CCRC.
72. CCRC explained that it would be impossible to point the requester to any specific source /sources, as that's not how the information has been compiled or recorded; the information is not held in this way.
73. As the Commissioner understands it, whilst the requested information is held, the database does not distinguish information obtained from publicly available sources and information obtained from non-publicly available sources. The CCRC cannot therefore distinguish this information from its database.
74. CCRC went on that any attempt to narrow down a 'catalogue' of sources, would substantially take the CCRC over the costs threshold as prescribed in section 12. It would essentially require a complete breakdown of the recorded information and the search criteria being carried out from scratch to identify possible sources. It said that this is an exercise that can legitimately be carried out by the requester themselves should they so wish.
75. For section 21 to apply to the remaining withheld information, the CCRC must be satisfied that:
- a. The public authority knows that the complainant has already found the information; or

- b. is able to provide the complainant with precise directions to the information so that it can be found without difficulty. When applying section 21 in this context, the key point is that the authority must be able to provide directions to the information.
76. In this case, the complainant has confirmed that some of the requested information can be obtained from media reports, published court judgments and the limited information released by police forces and agencies such as the Judicial Conduct Investigations Office, the Independent Office for Police Conduct and the Solicitors Regulation Authority.
77. It cannot however be said that the complainant has already found the information or that the CCRC can give precise directions to the information.
78. The Commissioner does not therefore consider that section 21 FOIA has been correctly applied to the remaining withheld information in this case.

### **Section 12/14 FOIA**

79. As the CCRC has mentioned section 12 FOIA (cost limit) the Commissioner would take this opportunity to confirm that when calculating the cost of complying with a request under section 12 FOIA, a public authority cannot include time taken reviewing information for the purpose of applying exemptions. The CCRC would therefore be unable to apply section 12 FOIA under the circumstances it has described.
80. However for requests which would impose a grossly oppressive burden but are not covered by the section 12 cost limit, public authorities may apply section 14(1) where it can make a case that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the organisation.
81. The Commissioner's guidance<sup>3</sup> confirms that an authority is most likely to have a viable case where:
- The requester has asked for a substantial volume of information AND
  - The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the ICO AND

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<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

- Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.
82. In this case it is clear to the Commissioner that the CCRC's database contains by its nature a substantial volume of information. It is also clear that the CCRC has real concerns regarding disclosure of much of the information not available in the public domain. Indeed the Commissioner has upheld the application of section 40(2) and 44 FOIA to the withheld information not obtained from sources within the public domain. Finally the Commissioner is satisfied that the remaining withheld information cannot be easily isolated as the database does not record the source of the intelligence, so it would not be obvious what information was obtained from the public domain without the CCRC conducting research/searches to determine this.
83. The Commissioner is therefore satisfied that to review and prepare the information for disclosure would impose a grossly oppressive burden on the CCRC and it was not therefore obliged to do so under section 14(1) FOIA.

## Right of appeal

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84. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

85. 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.
86. 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.....**

**Gemma Garvey**

**Senior Case Officer**

**Information Commissioner's Office**

**Wycliffe House**

**Water Lane**

**Wilmslow**

**Cheshire**

**SK9 5AF**