

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 July 2020

**Public Authority:** Attorney General's Office  
**Address:** 102 Petty France  
London  
SW1H 9EA

#### Decision (including any steps ordered)

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1. The complainant requested a briefing document which had been referred to in correspondence. The Attorney General's Office (AGO) refused to provide the requested information citing sections 40 (personal information), 31(1)(b) and (c) (law enforcement) and 41 (information provided in confidence) of the FOIA.
2. The Commissioner's decision is that the AGO was entitled to rely on section 40(2) to withhold the requested information.
3. The Commissioner requires no steps to be taken as a result of this decision.

#### Request and response

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4. On 27 November 2019, the complainant wrote to the AGO and requested information in the following terms:  
  
*"Further to a letter sent from Michael Ellis QC MP dated 04th November 2019, to my constituency MP Rory Stewart, in which Mr Ellis refers to a briefing document provided to him by the CPS [Crown Prosecution Service] outlining facts and a chronology of correspondence to date, I am submitting an FOI request. My FOI request is to obtain a copy of the briefing Mr Ellis refers to in his letter".*
5. The AGO responded on 19 December 2019. It confirmed it held information that fell within the scope of the request but refused to

provide it, citing section 40 (personal information) of the FOIA as its basis for doing so.

6. Following an internal review the AGO wrote to the complainant on 25 February 2020. It revised its position, confirming its application of section 40(2) and additionally citing sections 31(1)(b) and (c) (law enforcement) and 41 (information provided in confidence) of the FOIA.

### **Scope of the case**

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7. Following earlier correspondence, the complainant provided the Commissioner with the relevant documentation on 9 June 2020 to support his complaint about the way his request for information had been handled.
8. The complainant explained that he was aware that the CPS had briefed the AGO in relation to a particular matter. Although not required to do, he explained the background to his request for information. He also suggested a way in which he considered the matter could be resolved informally.
9. The Commissioner acknowledges that the requested information relates to sensitive issues.
10. Where possible the Commissioner prefers complaints to be resolved informally. She therefore advised the AGO of the complainant's suggested approach.
11. In the absence of an informal resolution acceptable to both parties, the Commissioner progressed her investigation.
12. A request for information made under the FOIA regime cannot be limited to disclosure to one individual, but has to be considered in the context of disclosure to the world at large. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of the FOIA.
13. The analysis below considers the AGO's application of section 40(2) to the requested briefing.

## Reasons for decision

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### *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. The Commissioner is restricted in what she is able to say due to the nature of the withheld information. However, having considered the withheld information, she is satisfied that this information both relates

to and identifies the data subject concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

23. She has reached this conclusion on the basis that the briefing has a specific individual as its main focus and that the requested information is clearly linked to that individual.
24. 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.
25. The most relevant DP principle in this case is principle (a).

*Would disclosure contravene principle (a)?*

26. 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".*

27. 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.
28. 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.
29. In addition, if the requested data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the GDPR.

*Is the information criminal offence data?*

30. Information relating to criminal convictions and offences is given special status in the GDPR.
31. 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.

32. The Commissioner acknowledges that, in its correspondence with the complainant, the AGO told him:

*"The material that you have requested amounts to criminal offence data, as it concerns the alleged commission of offences".*

33. The Commissioner recognises that the AGO also told the complainant, albeit with respect to a different exemption, namely section 31 of the FOIA:

*"Prosecutors must be free to provide detailed analyses of sensitive issues when making charging decisions".*

34. In that respect, the Commissioner is mindful of the reference to the CPS, the body responsible for prosecuting criminal cases, in the request for information.

35. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include criminal offence data.

36. 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.

37. 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).

38. In its submission, the AGO told the Commissioner:

*"... we can confirm that the data subject has not given consent to the processing (para.29 of Sch.1) nor has the personal data been manifestly made public by the data subject ...".*

39. Similarly, the Commissioner has seen no evidence or indication that the individual concerned has 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.

40. 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.

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

*Other exemptions*

42. As the Commissioner has found that the section 40 exemption applies to the withheld information in its entirety, she has not considered the AGO's application of sections 31 and 41 to the same information.

## Right of appeal

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43. 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)

44. 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.
45. 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 .....**

**Laura Tomkinson  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**