

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 June 2023

Public Authority: The British Library
Address: 96 Euston Road
London
NW1 2DB

Decision (including any steps ordered)

1. The complainant has requested the number of times books by specific authors were borrowed during specific years. The above public authority ("the public authority")'s final position was to rely on section 40(2) of FOIA to withhold the most recent year's data and to rely on section 12 of FOIA to refuse the remainder of the request.
2. The Commissioner's decision is that the public authority has not applied section 40(2) of FOIA correctly and is consequently not entitled to withhold that information. The public authority is entitled to rely on section 12 of FOIA to refuse the remainder of the request. Finally the public authority breached section 17 of FOIA as it failed to issue a correct refusal notice within 20 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the total library loans for both of the requested authors in 2022 as well as the top three most loaned titles for both individuals.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 10 January 2023, the complainant wrote to the public authority and requested the total number of loans of books written by either Dame Barbara Cartland or Dame Catherine Cookson in 1991, 2000, 2010 and 2022. He also asked for the top three titles by each author in each of those years and the number of loans for each of their top three books.
6. The public authority responded on 20 January 2023. It relied on section 14(2) of FOIA (repeated request) to refuse to provide the data for any year other than 2022. In respect of 2022, it withheld the requested information and relied on section 22 of FOIA (intended for publication) in order to do so – though it did provide figures for 2021.
7. Following an internal review the public authority wrote to the complainant on 8 March 2023. It upheld its previous provision – though it stated that, on reflection, it should not even have disclosed the 2021 figures.

Scope of the case

8. The complainant contacted the Commissioner on 21 April 2023 to complain about the way his request for information had been handled.
9. On 23 May 2023, the Commissioner wrote to the public authority to set out his provisional view of the complaint. He noted that the public authority's reliance on section 14(2) was predicated on the fact that it had successfully relied on section 12 to refuse a similar request (though covering more authors) and nothing had changed in the intervening period. The Commissioner noted that the public authority would not be entitled to rely on section 14(2) in such circumstances (it would have either had to have provided the information previously or stated that it wasn't held). However, based on the contents of the internal review it seemed likely that section 12 would apply to these elements of the request for the same reasons as it had applied previously.
10. In respect of section 22 of FOIA, the Commissioner noted that, on the basis of the public authority's arguments, the exemption was unlikely to apply. However, as the public authority had now published its list, there was no longer any reason to withhold the information – he therefore asked that the public authority simply disclose the information in order to resolve the complaint.
11. The public authority responded on 6 June 2023. It accepted that it could not rely on section 14(2) and instead relied on section 12 of FOIA to

refuse those elements of the request dealing with earlier years. In respect of the data for 2022, the public authority considered the section 22 issue moot as the list had been published (though it did not concede that it should not have relied on this exemption – only that its previous arguments had been “poorly formulated”). Instead it relied on section 40(2) of FOIA to withhold the requested information.

12. The Commissioner considers that the scope of his investigation is to determine whether section 40(2) applies to the 2022 data and whether the public authority was entitled to rely on section 12 to refuse the remainder of the request.

Reasons for decision

13. Section 12 of FOIA allows a public authority to refuse a request where the cost of compliance would exceed a particular cost limit. In the public authority’s case, that limit is £450 – the equivalent of 18 hours of staff time.
14. In decision notice IC-137335-R1X3, the Commissioner considered a very similar request for data, but relating to a larger number of authors. In that decision he explained why he was satisfied that, on the basis of the available evidence, the cost of complying with that request would exceed the cost limit.¹
15. The complainant has argued that the present request is a refined version of that earlier request in that he is seeking the data for fewer authors.
16. However, the public authority has explained in its refusal notice and internal review that, such is the way that the records concerned are held, any request of this kind can only be responded to by fully reconstructing the entire data file in order to run searches against it. Therefore, it mattered very little whether the request sought data on two authors, 22 authors or 202 authors – the work required would be largely the same.
17. Having considered the available evidence, the Commissioner is satisfied that the work involved in extracting the data for the years prior to 2013

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022101/ic-137335-r1x3.pdf>

would exceed the cost limit for the same reasons as set out in decision notice IC-137335-R1X3.

Section 40(2) – personal data

18. Section 40(2) of FOIA allows a public authority to withhold information that is the personal data of someone other than the requester if there would be no basis under data protection law for publishing that information.
19. Personal data must relate to a living individual who is identifiable, either directly from the information or from combining the information with other available data.
20. The public authority explained to the Commissioner that:

“Each year the Public Lending Right [PLR] is paid by the government to registered authors (and other content creators) to compensate them for the loan of their published works in the public library system. This payment is administered by the British Library, and is calculated on the basis of sample set of loan data gathered from a rotating selection of public libraries, and then grossed up to represent the volume of public library loans at a national level. Payments are then allocated on a per loan basis calculated as a proportion of the available payment pool, and this payment per loan figure is published on annual basis. The maximum payment per author is capped in order to prevent the most popular authors from diluting the payment per loan figure to the point where the payment to less popular authors becomes negligible. This cap figure is also published on an annual basis.

“For the most popular authors (for example, JK Rowling, or other authors with more than 100,000 loans per annum) it is obvious that they will a) receive the maximum capped payment, and that b) this payment will likely represent only a trivial proportion of their net income in a given year. In this instance the exact number of library loans per annum is not directly connected to their income, and disclosure of the statistic is unlikely to be unfair. The British Library therefore routinely discloses annual number of loans where this figure is over 100,000.

“However, for less popular authors, where their annual number of loans is under 99,999, the author will receive a payment calculated on a basis of the payment per loan figure multiplied by the total number of loans. Because the payment per loan figure is published, disclosure of the specific number of loans would allow the author’s income under the scheme to be calculated.

"We know from our regular research with authors and copyright societies that the Public Lending Right payment represents a substantial proportion of the household income for many of these less popular authors, many of whom are retired. The disclosure of their income under the scheme would represent a disclosure of their private financial affairs, and by extension, a disclosure of their personal data, and an unwarranted intrusion into their private life. As such, the Library asserts that such disclosure would be unfair, and a breach of the Data Protection Principles set out in the UK GDPR. The publication of these loan statistics, and by extension their income under the scheme, would represent an unwarranted infringement of the privacy of these private citizens; it would be analogous to disclosing the sum paid to a specific individual in relation to their receipt of any other payment made by the state to a private individual on the basis of a right provided by legislation – for example Universal Credit or Child Benefit – a disclosure which we understand would never be required under the Freedom of Information Act."

21. The Commissioner pointed out to the public authority that both Dame Barbara and Dame Catherine had been dead for over 20 years and so any income stream would not be their personal data (personal data must relate to a living individual). The public authority responded to say that:

"PLR is also an intellectual property right that may be given away, sold, or bequeathed. As such, the recipient of PLR payments may not be the author themselves, although for convenience the Library often refers to recipients as 'the author' in our communications.

In particular, the PLR right continues for up to 70 years after the original registered owner's death, and is part of their property that is transferred to a new owner as part of the administration of their estate...

"As such, even though the authors in question have no personal data (being deceased), their nominated assignees who receive the payments for their work are living individuals. These individuals are data subjects under the Data Protection Act 2018 and GDPR, and the payments that they receive each year are part of their private financial affairs, and by extension, their personal data. These data subjects are identifiable by the British Library in its capacity of the data controller of the personal data in question, and could likely be identified by a third party via access to public probate records or similar."

22. The Commissioner accepts that, in principle, where an author has bequeathed the intellectual property rights to their books to a particular

individual (or specified how proceeds are to be divided between specific individuals), the loans made (and thus the income received) would probably be the personal data of the person in question. Wills are considered to be public documents and there would be nothing to prevent a person from accessing copies of the relevant wills to determine how the intellectual property rights had been bequeathed.

23. However, whilst that works in principle, no evidence has been provided to demonstrate that such an arrangement is in place here – and there is evidence to demonstrate that different arrangements may be in place.
24. Dame Catherine established a charitable trust, during her lifetime, to support worthy causes – particularly those involving young people in the North East of England. The Trust's website states that it:

“The aim of The Catherine Cookson Charitable Trust is to apply the income and capital to such charities or other charitable causes, cognisant of any wishes expressed by the settlor during her lifetime. The trust receives royalties relating to the work of Dame Catherine Cookson and offers financial support to suitable organisations.”
25. Contemporary media reports indicate that royalties from Dame Barbara's books were originally received by Cartland Productions Ltd.² That company is no longer registered. Although some of its directors are still listed as directors of similarly-named companies, the Commissioner has been unable to establish definitively, via Companies House records, where PLR or other royalty payments are currently made.
26. The public authority has not disclosed to the Commissioner which individuals it considers receive the PLR payments – or why it is satisfied that those individuals (if indeed the payments are made to individuals) are acting on their own behalf and not on behalf of a company or charitable trust.
27. On the evidence available, it would appear that both individuals bequeathed some or all of their royalties to either a company or a charitable trust. On that basis, the Commissioner is not persuaded that this particular information is personal data and, if the public authority has evidence to suggest otherwise, it has not produced it.
28. Finally, the Commissioner notes that, even if he were to accept that the individuals were identifiable, simply disclosing the top three titles from each author and the loans for each title reveals very little about the

² <https://www.dailymail.co.uk/news/article-14765/Barbara-Cartland-leaves-will.html>

individual. Dame Barbara wrote 723 titles during her lifetime, Dame Catherine, over 103 (either in her own name or a pen name). There will be considerable variation between the most and least popular titles, therefore revealing only the top three titles would be of little use to anyone trying to calculate the PLR payments made to the beneficiaries. The data thus does not "relate to" the data subjects (even if they were identifiable) in any meaningful way.

29. The Commissioner therefore does not consider that section 40(2) of FOIA applies.

Procedural matters

30. The public authority breached section 17 of FOIA in dealing with this request as it failed to provide a refusal notice, citing the correct exemptions on which it ultimately came to rely, within 20 working days.

Other matters

31. Because the top 40 list of authors had been published by the time this complaint was investigated, the public authority recognised that it no longer needed to rely on section 22 of FOIA to withhold information. However, given the content of its responses to date on this particular exemption, the Commissioner considers it necessary to place the following matters on the record.
32. In order to rely on section 22, the public authority must have had, at the time of the request, a settled intention to publish the information that has been requested. It is not sufficient for the public authority to have had a intention to publish something vaguely similar to what was requested. It must be the information itself (or something substantially similar - such as the publication of the final version of an earlier draft).
33. The Commissioner is not satisfied that, at the time it dealt with the request, the public authority had a settled intention to publish the requested information, for three reasons.
34. Firstly, the complainant requested actual loan figures, not the position each author was ranked on the list. The list that the public authority published does not show the actual number of loans at all. Therefore the

Commissioner does not consider the public authority ever had a settled intention to publish such information.³

35. Secondly, the Commissioner notes that neither Dame Barbara, nor Dame Catherine, nor any of their titles, appear on any of the lists – and the public authority must have been well aware of that fact at the point at which it responded. The information the public authority has provided about its annual list demonstrates that it is determined by loans made in a 12 month period from July 2021 to June 2022. Therefore when the public authority dealt with the request, the names on the list would have already been fixed and it would have known that neither author would be on it.
36. Thirdly, there is a very obvious logical contradiction in stating that certain information was both previously intended for publication (because section 22 was applied) and yet also could not be published for data protection reasons. The public authority stated in its internal review that it had a policy of not publishing loan figures below 100,000 (and would have known whether the totals involved were higher or lower than that figure) – therefore it cannot simultaneously claim that it had both a settled intention to publish the information and a policy prohibiting its publication.
37. Whilst the public authority clearly had an intention to publish a list of the top 40 authors by loans, that was not the information that was requested. There is no evidence of an intention to publish the specific evidence the complainant requested – and a considerable amount of evidence to demonstrate that the public authority had a deliberate intention not to publish the information: now or ever.
38. The public authority appears to have fallen into error here because it spent too much time focusing on what it believed to be the motivation for, or purpose of, the request – instead of focusing on the actual wording of the request and the information it was seeking.

³ <https://www.bl.uk/plr/britishlibrary/~media/c9a90df030ec4984b6194f594b021e61.ashx>

Right of appeal

39. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

40. 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.
41. 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

Roger Cawthorne
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