

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 3 October 2017

**Public Authority:** Ministry of Justice  
**Address:** 102 Petty France  
London  
SW1H 9AJ

#### Decision (including any steps ordered)

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1. The complainant requested information relating to complaints made against a division of the Probation Service, including complaints made against a named individual.
2. The Ministry of Justice (MoJ) confirmed that it held some of the requested information but that it could not be provided without exceeding the costs limit under section 12 of the FOIA (cost of compliance exceeds appropriate limit). It also neither confirmed nor denied holding information relating to the individual named in the request, citing section 40(5) of the FOIA (personal data).
3. The Commissioner's decision is that the MoJ correctly applied section 12(1) to the information withheld by virtue of that exemption. The Commissioner's decision is that the MoJ correctly applied section 40(5) to the remaining requested information.
4. She does not require any steps to be taken.

#### Request and response

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5. On 31 January 2017, the complainant wrote to the MoJ and requested information in the following terms:

*"Please supply me with a list of all the complaints made against the Sussex Probation Service (formally Surrey and Sussex Probation Trust) in the past ten years.*

*Please also supply me with a list of all the complaints made against [name redacted], Probation Officer/Offender Manager, while he has been working for the Probation Service. This should include not just Sussex Probation Service but any other district of the Probation Service which forms part of the British Isles”.*

6. The MoJ responded on 21 February 2017. It refused to provide the requested information about complaints made against the Sussex Probation Service. It cited section 12(1) of the FOIA (cost of compliance) as its basis for doing so.
7. With respect to the second part of the request, the MoJ refused to confirm or deny whether it held the requested information about the named individual, citing section 40(5) (personal information) of the FOIA.
8. Following an internal review the MoJ wrote to the complainant on 13 April 2017 maintaining its original position.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 20 April 2017 to complain about the way his request for information had been handled. Specifically he complained that he had not been provided with any of the requested information.
10. During the course of the Commissioner’s investigation, the MoJ told the Commissioner that there is no organisation with the precise name ‘Sussex Probation Service’. Accordingly, it explained how it had interpreted the request:

*“It was clear to the business unit from the context of [the complainant]’s request, however, that, for the initial part of the ten-year period he specified, he was seeking information in relation to the Sussex Probation Board (SPB) (a predecessor body to the Surrey and Sussex Probation Trust); and for the period from 1 June 2014 onwards, information in relation to the Sussex Local Delivery Unit (LDU), which forms part of the South East & Eastern Division of the National Probation Service (NPS). The NPS was formed on 1 June 2014. It assumed some of the functions of the former probation trusts, including the management of all offenders assessed as posing a high risk of harm to the public”.*

11. The Commissioner acknowledges that the MoJ referred to ‘*the former Surrey & Sussex Probation Trust*’ and the need to examine archived material ‘*for the period prior to June 2014*’ in its correspondence with the complainant.

12. In the absence of any comment from the complainant about the MoJ's interpretation of the request, the Commissioner undertook her investigation on the basis that the MoJ took the background and context of the request into account in interpreting the request and interpreted it objectively.
13. The MoJ confirmed that it considered that section 12(1) of the FOIA applied to part (1) of the request. It acknowledged that, as part (2) of the request related to the same or similar information - complaints made to the Probation Service - it could have aggregated both parts of the request and applied section 12 to all the requested information.
14. The Commissioner's guidance on requests where the cost of compliance exceeds the appropriate limit acknowledges that public authorities can aggregate two or more separate requests. It also recognises that multiple requests within a single item of correspondence are separate requests for the purpose of section 12.
15. However, the Commissioner accepts that in this case the MoJ chose not to aggregate the requests.
16. Accordingly, the analysis below considers the MoJ's application of section 12(1) of the FOIA to the information requested at part (1) of the request and section 40(5) of the FOIA to the information requested at part (2) of the request.

## **Reasons for decision**

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### *Section 12 cost of compliance*

17. Section 12(1) of the FOIA states that:

*"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit".*

18. This limit is set in the fees regulations at £600 for central government departments and £450 for all other public authorities. The fees regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 24 hours in this case.

### *Would complying with the request exceed the appropriate limit?*

19. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:

- determining whether it holds the information;
  - locating the information, or a document containing it;
  - retrieving the information, or a document containing it; and
  - extracting the information from a document containing it.
20. The four activities are sequential, covering the retrieval process of the information from the public authority's information store.
21. In support of its application of section 12, the MoJ told the complainant that to identify any information relating to the former Surrey and Sussex Probation Trust for the period prior to June 2014 would be labour-intensive. It told him that the process would require a manual search "*of a large volume of archived material*".
22. Although explaining in general terms why it considered that complying with the request would exceed the cost limit, the MoJ did not provide an estimate of the actual work involved in complying with the request.
23. In the absence of an estimate, the Commissioner considers it understandable that the complainant found it unsatisfactory to be told that it was not a simple task for the MoJ to supply the requested information.
24. During the course of the Commissioner's investigation, the MoJ was asked to provide more detail in respect of its application of section 12, including a description of the work that would need to be undertaken in order to provide the requested information.
25. In its substantive submission, the MoJ told the Commissioner that it was not possible to quantify the total number of files that would need to be obtained and examined in this case. It explained:
- "... it was clear from knowing the current caseload for Sussex LDU that it would take a disproportionate amount of time to comply with the request and would therefore exceed the cost limit"*.
26. It further explained:
- "Complaints could be sent by offenders or by members of the public and the relevant paperwork was stored in manual files... There are no readily available figures for the historical caseloads of these probation services, but the recent figures for the number of cases managed by Sussex and Surrey LDU's gave an indication to the number of cases that would need to be looked at"*.
27. The MoJ told the Commissioner that in December 2016 - the month preceding the request - Sussex and Surrey had a caseload of 2963

offenders between them. It argued that the total number of offender files covering the ten-year period specified in the request would be many times greater.

28. With regard to an estimate of the time/cost taken to provide the information falling within the scope of this request, the MoJ provided the Commissioner with the following estimate:

*"2963 case files x 5 minutes = 14815 minutes or 247 hours".*

29. While using a figure of five minutes in the above estimate, the MoJ told the Commissioner:

*"A conservative estimate of the time taken to review each file to see whether a complaint had been made would be between five and ten minutes".*

30. Even if the MoJ's estimate of five minutes per file was excessive, from the evidence she has seen during the course of her investigation, the Commissioner is satisfied that the MoJ has demonstrated that it would exceed the appropriate limit to locate, retrieve and extract the requested information. Section 12(1) does therefore apply and the MoJ is not required to comply with the request.

#### *Section 16 advice and guidance*

31. Section 16(1) of the FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request. In general where section 12(1) is cited, in order to comply with this duty a public authority should advise the requester as to how their request could be refined to bring it within the cost limit.

32. The MoJ told the Commissioner during the course of her investigation:

*"Files prior to June 2014 have been archived and it would therefore be more time consuming to extract the information requested".*

33. The Commissioner acknowledges that the MoJ told the complainant that although it could not comply with the request, it may be able to answer a refined request within the cost limit. She accepts that it explained that he may wish to revise the scope of his request, for example by narrowing the scope of his request to a more limited period of time.

34. However she considers that the MoJ could have been clearer in explaining that he may wish to consider limiting any further requests to the time period after June 2014.

*Section 40 personal information*

35. The Commissioner has next considered the MoJ's application of section 40(5) to the information requested at part (2) of the request.
36. Generally, the provisions of section 40(1) to (4) exempt 'personal data' from disclosure under the FOIA if to do so would breach the data protection principles of the Data Protection Act 1998 (DPA).
37. Section 40(5) further excludes a public authority from complying with the duty imposed by section 1(1)(a) (that is, to either confirm or deny holding the information), if complying with that duty would:
  - constitute a disclosure of personal data, and
  - this disclosure would breach any of the data protection principles or section 10 of the DPA.
38. This exemption is absolute and therefore requires no consideration of the public interest.
39. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of personal data, and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.

*Is the information personal data?*

40. On the issue of whether confirmation or denial in response to the complainant's request would involve the disclosure of personal data, the definition of personal data is given in section 1(1) of the DPA:

*"personal data' means data which relate to a living individual who can be identified:*

*(a) from those data, or*

*(b) from those data and any other information which is in the possession of, or is likely to come into the possession of, the data controller".*

41. The MoJ told the complainant it was satisfied that he had requested personal data relating to a third party. In correspondence with the Commissioner, the MoJ confirmed that its view that the requested information, if held, would constitute the personal information of the individual named in the request. It explained that to confirm or deny whether the requested information is held would result in disclosure of personal data in that it would disclose whether or not any complaints had been made about the named individual.

42. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
43. In the Commissioner's view, whether or not a complaint has been made against a named individual is information which constitutes the personal data of that individual.
44. Furthermore, the Commissioner considers that even confirming or denying whether information is held would reveal whether or not a complaint had been made about that individual.
45. Accordingly, the Commissioner considers that if the MoJ confirmed or denied holding the requested information it would represent the disclosure of the personal data of the individual specified in the request. This is because, in the circumstances of this case, the very act of stating that the requested information is or is not held would disclose to the requester whether or not that individual has been complained about.

*Would confirmation or denial breach one of the data protection principles?*

46. The next step is to address whether disclosure of the personal data – in this case the confirmation or denial that information is held - would be in breach of any of the data protection principles.
47. The data protection principles are set out in Schedule 1 of the DPA. The first principle, and the most relevant in this case, states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focussed on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of disclosure against the legitimate public interest in disclosing information.

*Reasonable expectations*

48. In the Commissioner's view, when considering whether a disclosure of personal information is fair it is important to take account of whether the disclosure would be within the reasonable expectations of the data subject.
49. In this case, the Commissioner is satisfied that the data subject would have the reasonable expectation that their personal data, if held, would not be disclosed.



*Consequences of disclosure*

50. Given the nature of the request and the sensitivity of the subject matter, the Commissioner considers that confirming or denying in this case could lead to an intrusion into the professional and private life of the individual concerned and the consequences of any disclosure could cause him damage and distress.

*Balancing the rights and freedoms of the data subject with legitimate interests*

51. Notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by 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.
52. The Commissioner acknowledges that there is always some legitimate public interest in the disclosure of any information held by public authorities. This is because disclosure of information helps to promote transparency and accountability amongst public authorities.
53. On the other hand the Commissioner recognises that this legitimate interest must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of any individual who would be affected by confirming or denying that the requested information is held.
54. With respect to the legitimate interest in disclosure, the interest must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.
55. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest in confirming or denying whether or not information is held must outweigh the public interest in protecting the rights and freedoms of the data subject if providing confirmation or denial is to be considered fair.

*Conclusion*

56. The request in this case relates to complaints that may or may not have been made about the individual identified in the request.
57. In making a decision in this case, the Commissioner is satisfied that confirming or denying that the requested information is held would constitute a disclosure of personal data as it is clear that it would disclose information which is linked to an identifiable individual. The Commissioner concludes that the disclosure of this personal data would



be unfair, and would therefore be in breach of the first data protection principle, as it would reveal information relating to an individual's personal and private circumstances about which they would have an expectation of non-disclosure.

58. As disclosure of information under the FOIA is considered disclosure to the public at large and not to the individual applicant, in the case of personal data there is no assumption of disclosure and the Commissioner must balance the legitimate public interest in disclosure against the interests of the individual(s) whose data it is.
59. Having considered the circumstances of this case, the Commissioner's view is that the data subject's right to privacy outweighs the legitimate public interest in confirming or denying whether the requested information was held.
60. Accordingly, she considers that the exemption provided by section 40(5)(b)(i) is engaged and that the MoJ was therefore not obliged to confirm or deny whether it held the information requested by the complainant.

## Right of appeal

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61. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

62. 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.

63. 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 .....**

**Jon Manners  
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