

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 19 November 2019

**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 former prisoners residing at a specified address.
2. The Ministry of Justice (MoJ) provided some information within the scope of the request but refused to provide the remainder, citing section 40(2) (personal information) of the FOIA.
3. The Commissioner's decision is that the MoJ was entitled to rely on section 40(2) of the FOIA to withhold the requested information within the scope of parts (1) and (2) of the request.
4. The Commissioner requires no steps to be taken as a result of this decision.

#### Request and response

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5. On 13 March 2019, the complainant wrote to the MoJ and requested information in the following terms:

*"I am writing to you regarding recidivism among offenders and the level of support that HM Prison and Probation Service [HMPPS] currently provide [to ex-offenders] ....*

*[Address redacted] is a house of multiple occupancy (HMO) which has a number of ex-offenders as residents.*

*....*

*I would ... specifically ask if HMPSS could provide details regarding the following areas which relate to former prisoners living at [address redacted]:*

*I. How many dealings it has had with residents registered at this address over the last two years.*

*II. How many residents have broken conditions and been returned to prison during the same time period.*

*III. If any further information on the behaviour of HMPPS clients at [address redacted] over the last two years could be provided."*

6. The MoJ sought clarification of the request on 2 April 2019:

*"Please can you specify, whether you want data relating to offenders who have served a prison sentence and have been released in the past two years or all NPS [National Probation Service] service users (including cases sentenced to community orders and suspended sentence orders who have resided in [address redacted] over the time period?*

- 1. Please specify what period you want the last two years to cover, e.g. calendar years (2016/17 and 2017/18), and do you mean the cases entering the address over this period?*
- 2. Do you mean those individuals who have breached licence conditions and subsequently been recalled to prison over the past two years?*
- 3. Please provide us with further clarity by what you mean by "information on the behaviour of HMPPS clients at [address redacted] over the last two years could be provided".*

7. The complainant responded saying:

*"Just wanted to confirm that on Q.1, we would be requesting information for the past two calendar years for cases entering the address. For Q.2, we would be asking for information on those who broke their conditions and have been recalled to prison and for Q.3, we would be grateful for some further information on the level of ongoing support and oversight that clients at [address redacted] have received."*

8. The MoJ provided its substantive response on 14 May 2019. It refused to provide the requested information within the scope of parts (1) and (2) of the request, citing section 40(2) (personal information) of the FOIA. It provided information in response to part (3) of the request.

9. The complainant requested an internal review on the MoJ's handling of parts (1) and (2) of the request on 15 May 2019.

10. Following an internal review the MoJ wrote to the complainant on 4 June 2019 maintaining its original position.

### **Scope of the case**

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11. The complainant provided the Commissioner with the relevant documentation on 10 July 2019 to complain about the way his request for information had been handled.
12. He disagreed that he had requested any identifiable or personal data. Accordingly, he disputed that section 40(2) of the FOIA applied in this case.
13. The analysis below considers the MoJ's application of section 40(2) of the FOIA to the information requested at parts (1) and (2) of the request.

### **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's guidance<sup>1</sup> states:

*"The DPA defines personal data as any information relating to an identified or identifiable living individual. If an individual cannot be directly identified from the information, it may still be possible to identify them".*

23. The Commissioner is satisfied that information about an individual's re-settlement and rehabilitation undoubtedly relates to them.
24. The second part of the test is whether an individual can be identified from the withheld information.
25. The complainant emphasised that he did not request any identifiable or personal data – only fully anonymised data on the number of individuals. Although not required to do so, he explained that the purpose of his request was one of:

*"... obtaining a clearer understanding of overall trends rather than obtaining information on individual residents".*

26. The MoJ told the complainant that, as the requested figures amounted to five people or fewer, it had considered whether disclosure of that information could lead to the identification of individuals. It told the complainant:

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-regulation-13.pdf>

*"We believe that the release of some of this information would risk identification of the individuals concerned".*

27. In its submission to the Commissioner, the MoJ told her:

*"Both data requested in part 1 and 2 of the request is personal data as it is requesting statistics, where the information recorded concerns people relating to service users managed or who have been managed by the National Probation Service. ... Disclosing such personal data could lead to the service users being identified as the number is so low ... and therefore breaches data protection legislation ..."*

28. Having viewed the withheld information, the Commissioner accepts that the numbers within the scope of the request are low.

29. The Commissioner is also mindful that the issue to be considered in a case such as this is whether disclosure to a *member of the public* would breach the data protection principles.

30. She accepts that different members of the public may have different degrees of access to the 'other information' needed for re-identification to take place.

31. 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 reidentification of an individual from information which, on the face of it, appears truly anonymised.

32. The ICO's Code of Practice on Anonymisation<sup>2</sup> 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".*

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>

33. In summary, the motivated intruder test is that if the risk of identification is reasonably likely, the information should be regarded as personal data.
34. The complainant disputed that he had requested personal data. Nevertheless, to ensure further anonymisation, he suggested that the requested information could be provided as:

*".. as an aggregate number for the last two calendar years without any year-by-year segregation"*.
35. The MoJ told the complainant that even if the figures were aggregated for the past two years the number of individuals would still amount to five people, or fewer. It also explained:

*"Due to the short time period the information is requested for, the fact it is a small community, and the low number of individuals supervised, it could mean revealing to other residents living in the block, that such individuals had allegedly committed a crime, and been returned to prison. That would be disclosure of personal data which would be unlawful"*.
36. In correspondence with the Commissioner, the MoJ described the property specified in the request as:

*"...a detached building providing a number of residential lettings to individuals..."*.
37. In the circumstances of this case, having considered the withheld information and the wording of the request, the Commissioner is satisfied that the information relates to HMPPS' dealings with residents registered at the specified address. She is satisfied that this information both relates to, and identifies, the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
38. She has reached that conclusion on the basis that the focus of the information is those individuals who meet the criteria specified in the request and that the information is clearly linked to those individuals because it is about them residing, or having resided, at the specified address and who are, or have been, managed by NPS.
39. In the circumstances of this case, the Commissioner is further satisfied that the individuals concerned would be reasonably likely to be identifiable from a combination of the requested information, the low number of individuals involved and other information which is likely to be in, or come into, the possession of others.

40. 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.

41. The most relevant DP principle in this case is principle (a).

*Would disclosure contravene principle (a)?*

42. 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".*

43. 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.

44. 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.

45. 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?*

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

47. 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.

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

49. She has reached this conclusion on the basis that the request was made in the context of recidivism among offenders and the level of support provided by HMPPS. She is further satisfied that part (2) of the request specifically refers to residents who have been returned to prison.

50. The Commissioner is satisfied that the individuals whose personal information falls within the scope of the request are subject to supervision by NPS. As supervision is a sentence imposed by the court, she is satisfied that it comprises criminal offence data.
51. 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.
52. 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).
53. 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.
54. 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.



## Right of appeal

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55. 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)

56. 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.
57. 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 .....**

**Carolyn Howes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**