

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 13 December 2011

**Public Authority:** Prisons and Probation Ombudsman for England and Wales

**Address:** Ashley House  
2 Monck Street  
London  
SW1P 2BQ

### Decision (including any steps ordered)

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1. The complainant requested the number of complaints filed against a particular prison officer within the three years preceding the request. The Prisons and Probation Ombudsman (PPO) refused to confirm or deny if it held this information and cited the exemption provided by section 40(5) of the FOIA.
2. The Commissioner's decision is that the PPO applied section 40(5) correctly and so it is not required to confirm or deny if it holds the requested information.

### Request and response

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3. On 4 February 2011, the complainant wrote to the PPO and requested information in the following terms:  
*"Can you please supply the number of complaints filed against [named prison officer] in the last 3 years".*
4. After a delay, the PPO responded on 27 May 2011. It stated that it was refusing to confirm or deny whether it held the requested information and cited the exemption provided by section 40(5) (personal information).

5. Following an internal review the PPO wrote to the complainant on 22 June 2011. It stated that the refusal of the request was upheld.

### **Scope of the case**

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6. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant emphasised that he had not requested the names of complainants or details of the nature of the complaints.

### **Reasons for decision**

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7. Section 40(5)(b)(i) provides that a public authority is not obliged to confirm or deny whether requested information is held if to do so would:
  - constitute a disclosure of personal data, and
  - this disclosure would breach any of the data protection principles or section 10 of the DPA. The first data protection principle, which requires that personal data be processed fairly and lawfully, is the relevant principle in this case.

The Commissioner's analysis of whether the above criteria would be fulfilled is as follows.

### **Would confirming or denying that the requested information is held constitute a disclosure of personal data?**

8. The complainant has requested information relating to complaints made about a specific named individual. The stance of the PPO is that confirming or denying whether information falling within the scope of the request is held would disclose whether complaints had been made about this individual. The public authority further argues that this would constitute a disclosure of personal data relating to this individual.
9. The Commissioner agrees that confirming or denying whether the requested information is held would constitute a disclosure of personal data. Confirming or denying would unavoidably disclose whether complaints had been made about the individual named in the request. As this information would clearly relate to an identifiable individual, the Commissioner accepts that this information would constitute personal data.

**Would disclosure of this personal data be unfair and in breach of the first data protection principle?**

10. The personal data that would potentially be disclosed here would relate to the named individual in a professional capacity. This is significant in that the Commissioner has made a clear distinction in previous decisions between requests for information relating solely to professional matters and information relating to an individual outside their professional capacity. The Commissioner's position has been that he considers it far less likely that disclosure of personal data relating to professional matters would be unfair than would disclosure of information relating to an individual in a non-professional capacity.
11. It is important to consider what expectation of disclosure the data subject would hold. The Commissioner would consider it reasonable that prison officers would have an expectation that information about complaints made against them individually (including whether or not any complaints have been made) would not be disclosed, even without any specific notification of this.
12. The PPO has published on its website statistical information about the complaints it has received. The Commissioner considers this significant as it demonstrates that the PPO has attempted to be open and accountable about its work, within the restriction of not wishing to disclose details relating to specific individuals. It can be argued, therefore, that a disclosure of the number of complaints made against individual prison officers would not be necessary in order to enhance the openness and accountability of the PPO, as this has already been demonstrated through the disclosure of statistical information about complaints.
13. The potential for detriment to the named individual through disclosure of information relating to complaints made against them is a significant issue here. The Commissioner's previous decision notice FS50086498 includes this argument about the issue of detriment:

*"To release the fact that a complaint has been made against an employee may lead to assumptions being made about that employee's competence. However, the complaint may be unsubstantiated or malicious, or certain employees may be involved more frequently with difficult decisions that are more likely to result in dissatisfaction. Therefore, releasing this information does not aid transparency or accountability but could be misleading and unfair to particular employees."*

14. This argument also applies in this case. A counterargument that an employee of a public body should have an expectation of accountability could be made, but the PPO has demonstrated its commitment to openness and accountability through disclosing statistical information about complaints. Any enhancement to the openness and accountability of the PPO or to the accountability of individual officers brought about by further disclosure of information concerning complaints made against individuals would be lessened by the previous disclosure of this statistical information.

## **Conclusion**

15. As mentioned previously, the Commissioner has taken a clear line that disclosure of personal information relating solely to an individual in a professional capacity would be less likely to be considered unfair than disclosing information about an individual's private life. It can also be argued that employees of public authorities should have an expectation that they will be accountable.
16. However, the Commissioner has also previously concluded that disclosure of information about complaints made against individual employees would be unfair, as the employees would have a reasonable expectation that such information would not be disclosed, and because of the potential detriment that could result from disclosure of information of this kind. It is also of significance that the PPO has demonstrated transparency through disclosure of statistical information about complaints.
17. The conclusion of the Commissioner is that the exemption from the duty to confirm or deny provided by section 40(5)(b)(i) is engaged. In making this decision the Commissioner has first concluded that confirming or denying that the requested information is held would constitute a disclosure of personal data. The Commissioner considers that it is clear that confirming or denying whether the requested information is held would disclose information that could be linked to an identifiable individual.
18. Secondly, the Commissioner concludes that disclosure of this personal data would be unfair and thus would be in breach of the first data protection principle. In making this decision, the Commissioner has taken into account the lack of expectation on the part of the individual named in the request that this information would be disclosed, the potential for detriment as a result of disclosure and that the public authority has disclosed statistical complaint information. The PPO is not,

therefore, required to confirm or deny if it holds the information requested by the complainant.

19. The Commissioner also finds, however, that the PPO did not comply with the FOIA in that it failed to respond within 20 working days of receipt of the request. The PPO should ensure that this delay is not replicated in future.

## Right of appeal

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20. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

21. 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.
22. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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