

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 1 February 2010

**Public Authority:** Department for Environment, Food and Rural Affairs  
**Address:** Nobel House  
17 Smith Square  
SW1P 3JR

### Summary

---

The complainant requested the names and corresponding box markings for each grade 6 (G6) lawyer, within a legal team at DEFRA, in the 2009 moderation. The public authority provided the complainant with a numerical breakdown of the distribution of the box markings; however it withheld the names and their corresponding box marking by virtue of the exemption contained at section 40(2) - third party information. The Commissioner finds that DEFRA correctly applied the exemption and requires no further action to be taken.

### Background

---

The box markings referred to in this Decision Notice are the scores awarded to each staff member as a result of their annual performance appraisal. The marks range from box 1 to box 5, with 1 being the highest rating and 5 being the lowest. The complainant in this case has requested the names and corresponding box marking for each staff member at grade 6 in the legal team.

### The Commissioner's Role

---

1. 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 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## The Request

---

2. On 5 July 2009 the complainant submitted a request to DEFRA, the request was as follows:

*".....please let me know the box markings given to each G6 in the Legal Career Home in the 2009 moderation."*

3. DEFRA provided a response to the complainant in an email dated 20 July 2009. The public authority refused to disclose the information requested on the basis of the exemption contained in section 40(2) of the Freedom of Information Act 2000.
4. The complainant requested an internal review of the public authority's decision on 22 July 2009, in which he clarified that he was seeking the following information:

*"I am seeking the names and corresponding box numbers of every G6 in LG (Legal Career Home)"*

5. On 12 August 2009 the public authority wrote to the complainant with the result of the internal review it had carried out. DEFRA provided the complainant with details of the distribution of each box marking in a numerical format, listing the total number of G6 Legal team employees in each box, but upheld their decision to refuse disclosure of the names and their corresponding box marking by virtue of the exemption contained in section 40(2).

## The Investigation

---

### Scope of the case

6. On 20 August 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

- The application of section 40(2)

7. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

### Chronology

8. Having reviewed the nature of the request and the correspondence supplied by the complainant, the Commissioner decided that it was not necessary to contact DEFRA for further information or arguments in support of its decision to withhold the requested information.

## Analysis

---

9. The full text of the relevant provisions of the Act referred to in this section is contained within the legal annex.
10. In considering whether the exemption is valid, the Commissioner has taken into account that the Act is designed to be applicant blind and that disclosure should be considered in its widest sense, which is to the public at large. In doing this the Commissioner has not taken into account the circumstances of the complainant. If information were to be disclosed it would, in principle, be available to any member of the public.

### Exemption: Section 40(2)

11. Section 40(2) provides an exemption for information which is the personal data of a third party. Section 40(2) is contingent on two conditions and the public authority has stated that it is withholding the recorded information under section 40(2) by virtue of section 40(3)(a)(i) - that release of the information would breach the Data Protection Act 1998. This condition requires firstly for the information to be personal data under the DPA and secondly that the disclosure of it would contravene a data protection principle.

Is the information 'personal data'?

12. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal data as:

*'...data which relate to a living individual who can be identified*

*a. from those data, or*

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

*and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'*

13. The Commissioner has considered the information that was requested and is satisfied that the information relates to an identifiable living individual. The Commissioner accepts that information about an individual's performance is the individual's personal data as defined by the DPA.

Does the disclosure of the information contravene any data protection principles?

14. Having concluded that the information falls within the definition of 'personal data', the Commissioner must then consider whether disclosure of the information

- breaches any of the eight data protection principles as set out in schedule 1 of the DPA.
15. In this case the public authority has stated that it is the first data protection principle that it believes would be contravened by releasing the withheld information.
  16. The first data protection principle requires that the processing of personal data should be fair and lawful and that at least one of the conditions in Schedule 2 of the DPA must be met. The term 'processing' has a wide definition and includes disclosure of the information under the Act to a third party.
  17. In considering whether disclosure of this information would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:
    - The individual's reasonable expectation of what would happen to their personal data and whether disclosure would be incompatible with the purposes for which it was obtained;
    - Whether disclosure would cause any unnecessary or unjustified damage or distress to the individual and whether the individual has refused to consent to disclosure.
  18. The public authority stated that the information was obtained for the purposes of DEFRA business to enable it to carry out its functions. Disclosure of the withheld information would be unfair, would cause unwarranted harm and undermine confidence and trust in the public authority's ability to process personal data. It informed the Commissioner that it believed the release of the withheld information would be unfair to the data subject. DEFRA stated that it did not have consent for disclosure nor did it intend to seek it as to seek consent from all staff would be disproportionate and that it did not think that the data subject would have had a reasonable expectation of the withheld information being released in this case. Instead, there was an expectation of confidentiality and privacy. The Commissioner, having considered the withheld information, is convinced that the reasonable expectations are a persuasive factor in indicating that the release of this information would be unfair.
  19. The Commissioner considers that employees, regardless of their seniority, would expect that information about their performance at work is confidential and not passed on to third parties without the explicit consent of the employee in question.
  20. The Commissioner has also considered in detail the submissions of the public authority and in particular whether it felt that the release of the information would cause unnecessary or unjustified damage to the individual involved. Having considered the information the Commissioner is satisfied that the release of employee box markings could potentially cause unnecessary and unjustified damage in this case as the release of such information has the potential to damage their reputations/career prospects etc.

21. In finally considering the legitimate interests of the public, the Commissioner notes that there is an inherent public interest in the accountability and transparency about the way in which public sector performance management is conducted. However, in this case the public authority has released information to the complainant about the distribution of the box markings in a numerical format showing the number of people in each department, the number in each box marking (from 1-5) along with the percentage per box marking. The information provided is substantial enough to show the distribution of the box markings across the whole of DEFRA.
22. In considering how the factors balance, the Commissioner has come to the conclusion that the disclosure of named employee box markings would be unfair to the data subjects. The central reason for this conclusion is that the legitimate expectations of the individuals concerned are that the information would not be provided and the overriding of these expectations cannot be justified in this case. As the release of the information would be unfair, the first data protection principle would be contravened and the information therefore engages the section 40(2) exemption.
23. As the Commissioner has found that disclosure would be unfair and therefore in breach of the first data protection principle there is no need to consider whether the release would also be unlawful, or if the processing of the personal data would meet one of the conditions of Schedule 2 of the DPA.
24. The Commissioner therefore upholds the public authority's application of section 40(2) by virtue of section 40(3)(a)(i).

## The Decision

---

25. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## Steps Required

---

26. The Commissioner requires no steps to be taken.

## Right of Appeal

---

27. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

First Tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 1<sup>st</sup> day of February 2010**

**Signed .....**

**David Smith  
Deputy Commissioner and Director of Data Protection**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Section 40

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).

(5) The duty to confirm or deny—

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the [1998 c. 29.] Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject’s right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the [1998 c. 29.] Data Protection Act 1998 shall be disregarded.

(7) In this section—

- “the data protection principles” means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
- “data subject” has the same meaning as in section 1(1) of that Act;
- “personal data” has the same meaning as in section 1(1) of that Act.

## **Data Protection Act 1998**

### **Section 1 - Basic interpretative provisions**

(1) In this Act, unless the context otherwise requires—

- “data” means information which—
  - (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
  - (b) is recorded with the intention that it should be processed by means of such equipment,
  - (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
  - (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;
- “data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;
- “data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;
- “data subject” means an individual who is the subject of personal data;
- “personal data” means data which relate to a living individual who can be identified—
  - (a) from those data, or
  - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;
- “processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—
  - (a) organisation, adaptation or alteration of the information or data,



- (b) retrieval, consultation or use of the information or data,
  - (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
  - (d) alignment, combination, blocking, erasure or destruction of the information or data;
- “relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.
- (2) In this Act, unless the context otherwise requires—
- (a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and
  - (b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.
- (3) In determining for the purposes of this Act whether any information is recorded with the intention—
- (a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or
  - (b) that it should form part of a relevant filing system,
- it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.
- (4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.