

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 April 2020

Public Authority: Information Commissioner's Office
Address: Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Decision (including any steps ordered)

1. The complainant has requested information relating to the data analysis reports produced for the Pay Consistency Panel (PCP) and the pay progression assessments that were revised. The ICO disclosed some information but refused to disclose the remainder, citing sections 22 and 40 of the FOIA.
2. During the Commissioner investigation, the ICO withdrew its application of section 22 and disclosed the withheld information to the complainant. It however still remained of the opinion that section 40 applied to a small amount of information.
3. The Commissioner's decision is that the ICO has appropriately withheld the remaining withheld information under section 40 of the FOIA. She does not therefore require any further action to be taken.

Request and response

4. On 5 August 2019, the complainant wrote to the ICO and requested information in the following terms:
 - 1) "Of the 94 pay progression assessments that were revised following the PCP, how many bandings were decreased and how many increased.
 - 2) For each of the decreased and increased cohort, a breakdown by **grade; department; length of service in grade.**

- 3) Each iteration of the data analysis report produced for the Pay Consistency Panel (I believe that there are 3 versions of this – the email below suggests that the intention is only to publish a revised version of the final one.)
 - 4) The report for the PCP produced by the independent equality advisor.
 - 5) All other information held relating to the PCP's consideration of equality issues, and action taken."
5. The ICO responded on 3 September 2019. It disclosed some information but refused to disclose the remainder citing sections 22 and 40 of the FOIA. In relation to question 3, it said that there were two iterations of the report produced by the panel, one prior to the first meeting and the next with updated information after the initial PCP meeting and review of assessments. It confirmed that the other version referred to was a version of the report sent before the second PCP meeting but additional information was added to it late in the process. As such it was not considered by the PCP as it was superseded by the final version of the report referenced in the request. The ICO therefore reached the view that it does not fall within the scope of the complainant's request.
 6. The complainant requested an internal review on 12 September 2019 in relation to question 3. He stated that he asked for each iteration of the report produced for the PCP, not each one presented to it. Therefore, all three iterations fall within the scope of his request. The complainant also disputed the application of the exemptions cited.
 7. The ICO carried out an internal review and notified the complainant of its findings on 20 September 2019. It upheld its initial handling of the request.

Scope of the case

8. The complainant contacted the Commissioner on 9 October 2019 to complain about the way his request for information had been handled. He confirmed that the ICO had now disclosed iterations 1 and 3 of the PCP data report but only internally to its staff and it had not disclosed iteration 2 at all. He advised that the ICO had still not published any information to the public at large. The complainant disputes the application of section 22 and 40 of the FOIA and is of the opinion that it deliberately misinterpreted his request initially in order to exclude the second version of the PCP data report.
9. During the Commissioner's investigation, iterations 1 and 3 were published on the ICO's website. With regards to iteration 2, the ICO accepted the Commissioner's view that this information falls within the

scope of the complainant's request and proceeded to disclose it to the complainant, with information redacted under section 40 of the FOIA. The ICO also withdrew its application of section 22 of the FOIA. It stated that whilst it had a settled intention to publish the reports, this was subject to the application of section 40. It acknowledged that whilst it had a broad view of what information needed to be redacted, at that stage it had not identified the specific information for redaction from the reports. It stated that in light of this it was now its understanding that as this is the case section 22 will not be applicable.

10. As the three iterations have been disclosed in redacted form and the ICO has withdrawn its application of section 22, the Commissioner will not make any formal decision on whether it applied or not at refusal (although paragraph 10 does provide some indication of what discussions took place between the ICO and the Commissioner on this subject and what the Commissioner's initial view was). To do so at this stage would be for purely academic reasons and this would not be an appropriate use of her resources.
11. The remainder of this notice will therefore address the ICO's application of section 40 of the FOIA to the redactions made to the three iterations of the PCP data report.

Reasons for decision

Section 40 personal information

12. 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.
13. In this case the relevant condition is contained in section 40(3A)(a)¹. 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').
14. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.

15. 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?

16. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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.
19. 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.
20. The ICO stated that the redacted information relates to comparatively small sample sizes or specific teams/departments which are made up of small numbers of individuals. It argued that disclosure would pose a real risk of identifying directly, or that in combination with other information (such as other information available in the report, or other information available to individuals, in particular ICO staff), would lead to individuals being identified.
21. The Commissioner has reviewed the withheld information and discussed the redactions and the potential for identification with the ICO in detail. She is satisfied that due to the low numbers involved and the small sample sizes it is possible for the data subjects concerned to be identified, if not from this information alone, this information and other information otherwise available, especially to particular ICO staff. The Commissioner is therefore satisfied that the withheld information falls within the definition of 'personal data' in section 3(2) of the DPA.
22. 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.

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

Would disclosure contravene principle (a)?

24. 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".

25. 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.

26. 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.

Lawful processing: Article 6(1)(f) of the GDPR

27. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.

28. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"².

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

29. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

30. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

31. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

32. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

33. The ICO considers there is a legitimate interest in the disclosure of information that the PCP considered when reviewing the implementation of the ICO's pay progression scheme and that informed their determinations in this regard. It also advised that there is a legitimate interest in the ICO being open, transparent and accountable regarding issues relating to staff pay and pay progression.

34. The Commissioner agrees there is a legitimate interest in the disclosure of the withheld information. There is a legitimate interest in having access to the necessary information to enable members of the public to understand more closely and scrutinise how the ICO awards pay and to ensure that it operates a fair progression system for all employees.

Is disclosure necessary?

35. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity

and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

36. The ICO informed the Commissioner that it does not consider disclosure of the withheld information is necessary in this case. It is of the view that the redacted information is minimal and the disclosure of the majority of the report fulfils the legitimate interest in disclosure.
37. The Commissioner to an extent agrees. The disclosed reports provide a valuable insight into the pay progression scheme at the ICO and how this has been implemented so far. However, she is of the view that the withheld information would provide a complete picture and enable members of the public to assess fully the scheme in place, how it operates and how it is applied across the ICO grades. The Commissioner does not consider this could be achieved by any other less intrusive means.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

38. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
39. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
40. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

41. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
42. The ICO stated that disclosure of the withheld information would reveal significant information about those individuals who are identified, including information about individual performance, their career banding and salary level. It argued that disclosure would not be within their reasonable expectations (particularly in relation to relatively junior staff), is overly intrusive and could have an unduly detrimental effect on those individuals. It referred to the following ICO guidance:

['Requests for personal data about public authority employees'](#)

Which advised that 'if salaries are individually negotiated or contain a significant element of performance related pay, disclosure may give significant information about that individual, and could have a detrimental effect on them'

43. The ICO commented further that it is not reasonably necessary for the purposes of transparency to know which individuals were assessed and which salary band the identified individuals fall into, which is the primary risk of disclosure of the withheld information. It considers that a disclosure of this nature would constitute a disproportionate and unwarranted level of interference into the data subjects' rights and freedoms and this is not overridden by the legitimate interest in disclosure in this case.
44. The Commissioner agrees in this case that the data subjects would have a reasonable expectation that the withheld information would remain private and confidential and would not be disclosed to the world at large. Some of the withheld information relates to more junior staff and these individuals would hold a greater expectation of privacy. For those more senior, the withheld information would reveal very specific information relating to their pay and performance at work and whilst they may expect more public scrutiny than junior staff generally, the disclosure of the withheld information would be a step too far. They are still entitled to privacy especially for the more personal aspects of their employment.
45. The Commissioner also agrees that disclosure would constitute an unwarranted intrusion into the more private aspects of the data subjects' employment and would result in some distress and upset. The Commissioner accepted that there is a legitimate interest in the disclosure of the withheld information. However, she does not consider the legitimate interest identified outweighs the rights and freedoms of the data subjects.

46. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
47. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

Right of appeal

48. 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

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

49. 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.
50. 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

Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF