

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 April 2020

Public Authority: Agriculture and Horticulture
Development Board

Address: Stoneleigh Park
Warwickshire CV8 2TL

Decision (including any steps ordered)

1. The applicant has requested contact details of organisations that have paid a levy to the Agriculture and Horticulture Development Board (AHDB).
2. The Commissioner's decision is that AHDB has correctly cited section 40(2) in response to the request.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 20 August 2019, the applicant wrote to the public authority and requested information in the following terms:

"Please disclose the business name and contact details for every organisation that made a AHDB horticulture (previously HDC) levy payment to you in the financial year 2018/19, as recorded by you.

Please provide the information electronically in Microsoft Excel or CSV format. Please ensure that the disclosure contains all of the contact information recorded by you; I would expect as a minimum this to be: Name of business, address of business, contact telephone number, contact email address."
5. AHDB responded on 3 September 2019 and refused to provide the requested information. It cited sections 40 and 41 of the FOIA as its basis for doing so.

6. Following an internal review the AHDB wrote to the applicant on 23 September 2019. It revised its position, withdrawing reliance on section 41. It maintained that section 40(2) applied to some of the withheld information and additionally cited that it was considering section 12 of the FOIA.

Scope of the case

7. The applicant contacted the Commissioner on 18 October 2019 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation AHDB disclosed the majority of the requested information. However, it still maintained that section 40(2) applied to the remaining withheld information.
9. The applicant confirmed on 12 March 2020 that he wished to proceed with his complaint, therefore the Commissioner considers the scope of her investigation to be to establish whether the public authority is entitled to withhold the requested information under section 40(2) of the FOIA.

Reasons for decision

Section 40 personal information

10. 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.
11. 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').
12. 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.

13. 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?

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

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. 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.
18. AHDB explained that the requested information consists of:- individuals, sole traders, collectives (a number of individuals), partnerships, small and medium businesses, limited companies – usually larger companies.
19. It considered that most of these, except the limited companies, will be personal data. The limited companies will be registered at Company House, they will have a corporate identity and as such, they are not an individual for the purpose of the Data Protection legislation.
20. Any 'business' without a corporate identity, i.e., not a limited company, will be likely to be an individual because they usually operate under their own name, as opposed to a registered company name.
21. AHDB stated it may have some Levy Payers who are registered in a name other than their individual name, ie, a 'business name' which, whilst not registered at Company House as a limited company, may nonetheless, be a name other than that of an individual, and as such, that would not be personal information for the purposes of the Data Protection legislation.
22. AHDB was unable to identify what percentage of the names held in its Levy Payer system are names other than those of an individual without

a significant amount of time being spent to investigate and interrogate the records.

23. It had focused its internal review on the fact that the information requested, being names and addresses of Levy Payers, is personal data as it considered most of the Levy Payers will be individuals.
24. Given that the Commissioner is unable to specifically verify that all the remaining withheld information is personal data, and being the regulator of the Data Protection Act 2019 (DPA), she has erred on the side of caution. Therefore, in the circumstances of this case, the Commissioner will accept that the information relates to individuals and therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
25. In his submission to the Commissioner the applicant referred to a previous decision notice she had issued². However it should be noted that the introduction of the GDPR has superseded the DPA 1998 and this has had an impact on the way the Commissioner considers such cases under the FOIA.
26. Nevertheless, 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.
27. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

28. 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".

29. 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.
30. 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.

² https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1043304/fs_50553684.pdf

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

31. 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"³.

32. 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:-

i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

33. 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

34. 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.

³ 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".

35. 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.
36. The applicant has not indicated any specific legitimate interests in support of disclosure of the withheld information. However, in his correspondence with AHDB he stated:

"this is such an important point relating to the transparency of how a public authority is funded"

37. The Commissioner must therefore assume that this is the applicant's interests.

Is disclosure necessary?

38. '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.
39. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

40. 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.
41. 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.
42. 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.
 43. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
 44. AHDB confirmed that the Levy Payers have not provided their consent for the disclosure of their personal information, and neither had they been asked to do so. Furthermore AHDB had not advised the Levy Payers that their personal information will be disclosed to the general public in this manner and so there is no provision governing disclosure in the AHDB Privacy Statement on the Levy Collection Form.
 45. It went on to explain it had considered whether it would be lawful and fair to disclose the information, any possible consequences of disclosure on the individuals concerned, the reasonable expectations of the individuals, taking into account their expectations both at the time the information was collected and at the time of the request, the nature of the information itself, whether the information has been or will be likely to be in the public domain and also, the FOIA principles of transparency and accountability.
 46. AHDB also considered whether there is any legitimate interest in the public or the applicant having access to the information and the balance between this and the rights and freedoms of the individuals who are the data subjects.
 47. AHDB believe that this could constitute a disproportionate and unwarranted level of interference with the individual Levy Payers' rights and freedoms. In addition it could not identify any legitimate interest in the disclosure which would warrant such an interference. The law provides that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate.
 48. 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.

49. There is no suspicion of any wrong doing in relation to the way the Levy payments are dealt with, which would potentially create a pressing need or legitimate interest in the disclosure of the requested information.
50. 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

51. 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

52. 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.
53. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF