

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 June 2020

Public Authority: Department of Finance (NI)

**Address: Clare House
303 Airport Road
Belfast
BT3 9ED**

Decision (including any steps ordered)

1. The complainant has requested information from the Department regarding a recruitment process. The Department disclosed some information to him, however it refused to disclose the remainder, citing section 40(2) of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the Department has correctly applied section 40(2) of the FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. The complainant made a request for information on 10 October 2019, which was made in the following terms:-
 - "1. The interviews for this competition took place in January 2019 but I note that an appeal was received in May 2019. Is there a limit to the time period within which an appeal can be submitted?"

2. Can you provide any further details on the appeal that was submitted on 03 May 2019 and 'upheld'? For example what was the context of the appeal and how was the finding arrived at? Again, I do not require any personal details to be released, just the facts upon which the appeal turned (if necessary, please consider this under the provisions of FOI).
3. In reference to the appeal received on 03 May 2019 and 'upheld' can I ask the date on which the decision was made? As you will be aware, any request for a review by the Courts will need to be submitted within 3 months and I would be grateful for a prompt response on this particular matter."
5. The Department responded on 1 November 2019 and provided the complainant with information in response to parts 1 and 3 of his request. It refused to disclose information in response to part 2 of the request, citing section 40(2) of the FOIA (personal data of third parties) as a basis for non-disclosure.
6. On the same date, the complainant sought an internal review of the Department's decision not to disclose the information in part 2 of his request, and the reviewer upheld the original decision, which was communicated to the complainant in the Department's letter of 22 November 2019.

Scope of the case

7. The complainant contacted the Commissioner on 28 November 2019 to complain about the way in which the Department had handled his request for information.
8. The Commissioner has considered the Department's handling of the complainant's request and in particular its application of section 40 of the FOIA to the withheld information.

Reasons for decision

Section 40(2) – third party personal data

9. 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.

10. The Commissioner has ascertained from the Department that the information requested in part 2 of the complainant's request related specifically to the grievance of a third party individual based on personal circumstances.
11. 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').
12. 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.
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. The Commissioner, having ascertained that the information is as described in paragraph 10 above, is satisfied that this information is the personal data of individuals. The Department states that the individual is likely to be able to be identified from the requested information together with other information which the complainant would have in his possession. The Commissioner is also therefore satisfied that it is not possible to anonymise the information in order to prevent the relevant individuals being identified.
19. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that all of the withheld information relates to certain living individuals. She is satisfied that this information both relates to and identifies them. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
20. The fact that information constitutes the personal data of identifiable living individuals 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.
21. The most relevant DP principle in this case is principle (a).

Is the information special category data?

22. Information relating to special category data is given special status in the GDPR.
23. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
24. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the withheld information does include special category data. She has reached this conclusion on the basis that the withheld information contains data about the health of specific individuals.
25. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.

26. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
27. The Department has informed the Commissioner that the individuals concerned have not specifically consented to this data being disclosed to the world in response to the FOIA request – the Department has not asked them for their consent on the basis that this is likely to cause distress- or that they have deliberately made this data public.
28. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

Would disclosure of the remaining personal data contravene principle (a)?

29. 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".

30. In the case of a 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.
31. 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

32. 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.

33. 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"¹.

34. 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.

35. 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

¹ 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".

36. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
37. In this case, the complainant was seeking information which related to a specific recruitment process within the Northern Ireland Civil Service. The Department did not consider that there was a legitimate interest in the complainant or the public being provided with the withheld information. The Commissioner, however, disagrees, and considers that there is a legitimate interest to the complainant and also to the public, in seeing how the Northern Ireland Civil Service's recruitment and decision-making processes operate in a specific instance such as the one in question.

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. In this case, the Commissioner is satisfied that the withheld information would not be available to the public other than through a freedom of information request.
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. The Department states that, based on its own Privacy Notice, the individuals concerned would have had a reasonable expectation that their personal information would not be disclosed into the public domain. It also states that, since all individuals concerned, including the complainant, work within the Northern Ireland Civil Service, disclosure of the withheld information would be likely to cause unjustified distress to the individuals who are the subject of the withheld information.
45. 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.
46. 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.

The Commissioner's view

47. The Commissioner has therefore decided that the Department was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

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: 0116 249 4253

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

Deirdre Collins
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