

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 October 2020

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information relating to the Ministry of Justice's (MoJ) Disclosure Team. The MoJ refused to provide the requested information citing section 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that the MoJ applied section 40(2) appropriately to the requested information.
3. The Commissioner requires no steps to be taken as a result of this decision.

Background

4. By way of background to the request in this case, the MoJ told the Commissioner:

"The Disclosure Team provides advice on disclosure issues to the department (MoJ) in respect of the Freedom of Information Act (FOIA), Environmental Information Regulations (EIR), and the General Data Protection Regulation (GDPR) and Data Protection Act (DPA) 2018. We operate an anonymised public facing functional mailbox, whereby requesters can submit their enquiries. The Team logs, tracks and records FOI requests and subject access requests (SARs), so that these requests are responded to within statutory timeframes. The Team also checks compliance with legislation, quality and accuracy of responses, and deals with many queries from within the department about handling of individual cases,

those of a more general nature, and queries about use and interpretation of the appropriate legislation”.

Request and response

5. On 14 March 2020, the complainant wrote to the MoJ and requested information in the following terms:

“Please provide a copy of the organigram of your Disclosure Team and the names and contact details of its managers”.

6. The request was made via the ‘*whatdotheyknow*’ website.
7. The MoJ responded on 9 April 2020. It confirmed it held the requested information but refused to provide it, citing section 40(2) (personal information) of the FOIA.
8. Requesting a review of its handling of his request for information, the complainant clarified the nature of his request:

“First, I do not require the names of the individuals that occupy the respective positions. Please provide the organigram showing only the structure of the Data Access team. No “personal data” needs to be disclosed.

Second, the managers of a Ministry of Justice department, who are public officials, cannot, by any means, hold “a clear and strong expectation” that their names and contact details are withheld from the public. This is an utterly ridiculous proposition.

Please provide a copy of the organigram of your Disclosure Team and the names and contact details of its managers”.

9. Following an internal review the MoJ wrote to the complainant on 6 May 2020, maintaining its original position.

Scope of the case

10. Following earlier correspondence, on 20 July 2020 the complainant provided the Commissioner with the necessary documentation to support his complaint about the way his request for information had been handled.
11. He confirmed the nature of his complaint, telling the Commissioner:

"The nature of my complaint is that the Ministry of Justice refused to provide a copy of the organigram of its Disclosure Team and the names and contact details of its managers based on misplaced "personal data" concerns".

12. He also confirmed that he did not require the names of the individuals that occupy the respective positions, except for those of the managers.

13. During the course of the Commissioner's investigation, the MoJ confirmed that it considered the request was for:

"... a copy of the organogram which shows names, job titles and contact details of managers within the team, ... , plus a team structure".

14. It also told her:

"We have also interpreted the request to now ask for all contact details of managers, regardless of whether those contact details are shown on the chart".

15. The analysis below considers the MoJ's application of section 40(2) of the FOIA to the requested information.

16. During the course of her investigation, the MoJ provided the Commissioner with a copy of the organisational chart for the Disclosure Team.

17. In light of the above, the Commissioner considers that the disputed information within the diagram comprises the job titles of the roles within the team and the names and contact details of those individuals with a 'manager' role.

18. She considers that it also comprises the structure of the team, depicted by the lines showing the relationship between the various roles within the team. For the purposes of this decision notice, the Commissioner will refer to that structure as 'the blank organigram'.

19. In his correspondence, the terms 'Disclosure Team' and 'Data Access Team' are variously used by the complainant. For the purpose of this decision notice, the Commissioner accepts that both terms refer to the same team.

Reasons for decision

Section 40 personal information

20. 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.
21. 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').
22. 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.
23. 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?

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

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

25. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
26. 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.
27. 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.
28. In its submission, the MoJ told the Commissioner:

"We believe that names, job titles and contact details are the personal data of each person within the team".

29. Explaining that the job titles within the structure chart were specific to the Disclosure Team, the MoJ told the Commissioner:

"The job titles contained within the organogram are specific to the Team and the work undertaken, and are not a generic title whereby there are multiple individuals in that role around the department, for example "caseworker".

30. It considered that there was *"a real and significant risk of identification of individuals from such specific job titles"*.

31. With respect to the requested contact details, the MoJ considered that disclosure *"would inevitably result in identification"*. It explained that individual email accounts contain the member of staff's name, and that work telephone numbers can easily be used to identify individuals:

"... as one is likely to answer a 'phone call by stating one's name".

32. The Commissioner considers that the names of the individuals under consideration in this case, namely those of managers, clearly constitute their personal data.

33. The Commissioner also accepts that the requested contact details of the managers constitutes their personal data.

34. The Commissioner has next considered the remaining information within the scope of the request. She considers that to be the job titles and the blank organigram.

35. The Commissioner is mindful that the issue to be considered is whether disclosure to a member of the public would breach the data protection principles, because an individual is capable of being identified from apparently anonymised information.

36. She accepts that different members of the public may have different degrees of access to the 'other information' needed for re-identification to take place.

37. A test used by both the Commissioner and the First-tier Tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.

38. In the circumstances of this case, the Commissioner accepts that the job titles of the Disclosure Team, if disclosed, would identify the holders of

those roles, and that accordingly that information also constitutes their personal data. She is also satisfied that the blank organigram, if disclosed, would identify the individuals within the team structure, and that accordingly that information constitutes their personal data.

39. She has reached that conclusion on the basis that the focus of the information is the Disclosure Team. The Commissioner is satisfied that the wording of the clarified request, which specifically names the Disclosure Team, makes it clear that the information requested could only relate to the members of that team. In the circumstances of this case, she is satisfied that the information about its structure and job titles is clearly linked to the individuals within that team.
40. The Commissioner is further satisfied that the individuals concerned would be reasonably likely to be identifiable from a combination of the requested information and other information, which is likely to be in, or come into, the possession of others, such as those with knowledge of the team.
41. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information both relates to, and identifies, members of the Disclosure Team. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
42. 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.
43. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

44. 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".

45. In the case of a FOI 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.
46. 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

47. 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.

48. 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.

49. 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

50. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises

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".

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.

51. The MoJ told the complainant:

"Legitimate public interest: - you have not established what wider public interest there might be in releasing managers' names and job titles; and we do not believe there is any public interest that would outweigh the data protection rights of those concerned".

52. Similarly, the MoJ told the Commissioner:

"... the requester has not established any wider public interest for disclosure of managers' personal details".

53. The Commissioner acknowledges that the complainant did not put forward any arguments in support of a wider public interest in disclosure of the requested organigram with respect to the structure, including job titles, of the team. Nor has the Commissioner seen any evidence of a wider public interest in its disclosure.

54. With regard to the disclosure of the managers' names and contact details, the Commissioner recognises that the complainant explained that he considers that information relating to managers of a Ministry of Justice department should be disclosed.

55. The Commissioner has taken into account the role of the Disclosure Team within the MoJ, including with regard to providing advice on disclosure issues and about the use and interpretation of the appropriate information legislation.

56. She considers that there is a generic legitimate interest in disclosure of the job titles within the team, together with the managers' names and contact details, namely transparency.

Is disclosure necessary?

57. '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.

58. In its submission, the MoJ told the Commissioner that the organigram is for internal business use only "*and was always intended as only an internal MoJ document*".
59. The Commissioner is mindful that disclosure under the FOIA is a disclosure to the world at large. Therefore, the effect of complying with this request would be that the team roles and managers' personal details were effectively being publicly disclosed and would be accessible to anyone, for any purpose.
60. She also recognises that the MoJ's website explains how to contact the Disclosure Team to make a FOI request and, in doing so, provides contact details for postal and email correspondence.
61. With respect to the requested information, the Commissioner does not find disclosure of the job titles of non management roles necessary to meet the legitimate interests specified.
62. However, the Commissioner has taken into account that the complainant considers that managers of a Ministry of Justice department cannot expect their names and contact details to be withheld.
63. In the circumstances of this case, the Commissioner considers there to be a case for arguing that disclosure of the information relating to managers is necessary in order to meet the legitimate interests identified.

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

64. 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.
65. 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.
66. 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.
67. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
68. While acknowledging that the information relates to the managers in their public role, the MoJ argued that disclosure of the requested information:
- "...may result in members of the team being unnecessarily approached and perhaps targeted, leading directly to harm and distress. i.e. adverse consequences".*
69. It argued that, taking account of their grade, such possible adverse consequences towards non-forward facing members of staff would outweigh any wider legitimate public interest.
70. However, as the MoJ did not provide any evidence in support of this view, the Commissioner gives no weight to this argument.
71. With regard to the requested contact details already being in the public domain, in its submission to the Commissioner the MoJ confirmed that work telephones are issued to Disclosure Team staff for internal MoJ communications only and that work telephone numbers are not published outside the department.
72. The Commissioner accepts that that is consistent with the information that does, or rather does not, appear on the MoJ's correspondence published on '*whatdotheyknow*'.
73. With regard to the incidence of managers on the organigram, the Commissioner recognises that the MoJ told her:
- "There are various "manager" grades shown in the organogram, meaning those who directly manager others".*
74. The MoJ acknowledged the complainant's view that all managers should be known to the public. However, with respect to what is meant by a 'manager', it told the Commissioner:

"... in the Civil Service as a whole this could range from a Band D/Executive Officer to the highest ranking of Civil Servants".

75. With regard to the managers' expectations, the MoJ told the complainant that the managers in the Disclosure Team are not forward- or public-facing civil servants. It argued, therefore, that there is a reasonable expectation on behalf of Disclosure Team managers *"for their personal information not to be disclosed to the wider world"*.

76. Similarly, in its submission to the Commissioner, it confirmed:

"... that wider disclosure is contrary to the reasonable expectations of all those named".

77. Acknowledging the Commissioner's view in her guidance² *'Requests for personal data about public authority employees'* that senior employees should expect their posts to carry a greater level of accountability, the MoJ also told the complainant:

"Seniority: - all managers within the Disclosure Team are below that of Senior Civil Servant or Deputy Director. Whilst seniority (or lack thereof) cannot be the only criteria used to decide whether to disclose or not, it is a contributing factor we have considered. In this instance, I do not believe that the managers are of a seniority, or fulfil a public-facing role that would justify disclosure".

78. While accepting that the withheld information related to their public role, the MoJ explained to the Commissioner:

"All those named understood the purpose of the chart was solely to show the structure and personnel to colleagues within in the MoJ. Therefore, I contend strongly that wider disclosure is contrary to the reasonable expectations of all those named".

79. It also confirmed that:

"Managers within the Disclosure Team do not make public statements, make decisions of a level that make them of wider

² https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

interest to the public, or publish official material in their own name".

80. Based on the above factors, and mindful of the role of the Disclosure Team, 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.
81. 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.
82. The Commissioner has therefore decided that the MoJ was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

83. 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

84. 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.

85. 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

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