

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 November 2020

Public Authority: The Department for Work and Pensions

Address: Caxton House
Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested information regarding whether disciplinary action was taken against a specified employee.
2. The Commissioner's decision is that the Department for Work and Pensions (DWP) is entitled to rely on section 40(2) to withhold this information.
3. The Commissioner does not require DWP to take any steps regarding this request.

Request and response

4. On 24 January 2020, the complainant wrote to DWP and requested information in the following terms:

"A claimant was referred to as a "lying bitch" in papers provided to a Tribunal over a disputed decision on the claimant's entitlement to Personal Independence Payment ((PIP)

The DWP recently made an out of court settlement and paid the claimant £5000 plus her legal costs according to an article in The Guardian newspaper (12 December 2019)

I am not wishing to know the identity of the person why defamed the claimant but I am asking to be provided with precise details of what action was taken against that individual (i.e. was that person dismissed?)

If the person was not dismissed what, other action was taken (e.g. a final written warning?)”

5. On 19 February 2020, DWP wrote to the complainant and provided its response. DWP confirmed that it held the requested information and that disciplinary action had been taken against the individual concerned. DWP explained that it could not provide the details of this disciplinary action as it constituted personal data and disclosure would breach principle a of the General Data Protection Regulation (GDPR). DWP confirmed that the information was therefore exempt under section 40(2).
6. The complainant requested an internal review on 24 February 2020. He disputed that DWP was entitled to rely on section 40(2) to withhold the requested information. He explained that he disagreed that disclosure would prejudice anyone as he had not requested any identifying information.
7. The complainant explained that the behaviour of the member of staff could be considered evidence of a culture of contempt at DWP and it is in the public interest to disclose whether this member of staff continues to work for DWP and what disciplinary action DWP considers appropriate for such actions.
8. On 6 April 2020, DWP provided the outcome of its internal review. DWP upheld its original response. DWP acknowledged the public interest in ensuring the public's confidence in its standards and ethics. DWP explained that all staff are subject to the Civil Service Code and where breaches of this code are proven, appropriate disciplinary action will be imposed.
9. DWP acknowledged the need for transparency of how it responds to such breaches but maintained that it needs to balance this against its obligation to protect personal data.
10. DWP explained that whilst it had not been asked to name the individual, their identity may be known to other people.

Scope of the case

11. The complainant contacted the Commissioner on 23 April 2020 to complain about the handling of his request for information.
12. The Commissioner considers that the scope of this case is to determine whether DWP is entitled to rely on section 40(2) to withhold the requested information.

13. As the regulator of both the FOIA and data protection legislation, the Commissioner must balance the right of the public to access official information with the right to privacy of those whose personal data is held by public authorities.

Reasons for decision

14. 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.
15. In this case, the relevant condition is contained in section 40(3A)(a). This applies where disclosure of the information to any member of the public would contravene any of the principles relating to the processing of the personal data (the data protection principles), as set out in Article 5 of the GDPR.
16. 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.
17. 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 data protection principles.

Is the information personal data?

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

“any information relating to an identified or identifiable living individual”

19. The two main elements of personal data are that the information must relate to a living person and that person must be identifiable.
20. 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.
21. 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.

22. The Commissioner acknowledges the complainant's assertion that disclosure would not involve personal data as the individual is not identified. However, the request and the response are inextricably linked and as DWP is able to identify the individual by the description in the request, it follows that others may be able to do so. If the individual was not identifiable from the request, DWP would not be able to confirm whether it holds information within the scope of the request.
23. DWP confirmed to the Commissioner that the Tribunal papers referred to in the request contained the identity of the employee who made the comment. From the article referred to by the complainant in his request, it appears that the complainant has access to the Tribunal papers and that he posted an anonymised version of them on a welfare rights forum.
24. The information therefore clearly relates to an individual whose identity is known, albeit to a limited number of people.
25. In the circumstances of this case, the Commissioner is satisfied that the withheld information relates to an identifiable individual. The requested information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
26. 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 data protection principles.
27. The most relevant data protection 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 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.
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.

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

31. 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.

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

“processing is necessary for the purpose 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”.

33. 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 disclosure;

iii. **Balancing test**

Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

34. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii).

Legitimate interests

35. In considering any legitimate interest(s) in the disclosure of the requested information under the 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 sates, 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.

36. In this case the complainant has argued that there is a legitimate interest in informing the public as to whether this member of staff continues to work for DWP and what disciplinary action DWP considers

appropriate for such actions. The Commissioner accepts that this is a legitimate interest, although she considers that it carries limited weight since it relates to one individual in one particular case.

37. In addition, the Commissioner considers that there are wider legitimate interests in the disclosure of the withheld information. Understanding how DWP handles instances of such misconduct may allow the public to have confidence in, or raise concerns about, the standards DWP expects of its employees. This is particularly important where employees have responsibility for making or influencing decisions regarding entitlement to benefits because of the potential impact on those affected.

Is disclosure necessary?

38. 'Necessary' means more than desirable but less than indispensable or absolute 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 cognisant that disclosure under the FOIA is disclosure to the world at large. It is the equivalent of DWP publishing the information on its website. When considering the necessity test, she is not therefore considering whether providing the information *to the requester* is necessary to achieve the legitimate interest, but whether it is necessary to *publish* the information.
40. As set out above, the Commissioner recognises the legitimate interest in the public being assured that civil servants are held to the highest standards of behaviour. The Commissioner notes, however, that DWP has confirmed that disciplinary action was taken against the individual. The question is therefore whether it is necessary for DWP to disclose the nature of the disciplinary action taken in order to meet the legitimate interest.
41. The Commissioner considers that determining whether or not disclosure of the withheld information is necessary is a finely balanced one. Whilst DWP has taken the decision to disclose that disciplinary action was taken, given the wide range of outcomes that this includes, the Commissioner is not persuaded that this completely fulfils the legitimate interests identified above. The only way for the public to be fully informed as to how DWP treated the incident would be for DWP to disclose details of the disciplinary action taken.
42. The Commissioner is not aware of any other means by which the requester could reasonably obtain the requested information, nor is she aware of any other circumstances where DWP would make it available.

The Commissioner is therefore satisfied that disclosure is necessary to meet the legitimate interests identified in relation to the DWP's actions in this matter and, in doing so, to further the public's understanding of how DWP handles cases of employee misconduct against claimants.

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

43. 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 are likely to override the legitimate interests in disclosure.
44. In the Commissioner's view, a key issue is whether the individual or 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. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
45. The Commissioner considers that people generally have an expectation that a public authority, in its role as a responsible data controller, will not disclose certain information, such as personnel matters, and that it will respect their confidentiality.
46. In particular, the Commissioner considers that an employee would have a very firm expectation that disciplinary matters would remain private between themselves and their employer. They would have no expectation that such information would be shared with their peers or disclosed to the wider public. This approach was supported by the Tribunal in the case of *Rob Waugh v Information Commissioner and Doncaster College (EA/2008/0038, 29 December 2008)* in which it found that:

"... there is a recognised expectation that the internal disciplinary matters of an individual will be private".
47. Given the nature of the information and the level of damage and/or distress that disclosure may cause to the data subject, the Commissioner is not persuaded that the legitimate interests in disclosure override the data subject's fundamental right to privacy. In considering this, the Commissioner does not underestimate the damage and distress

caused to the affected claimant. Although the data subject is a junior official, they had responsibility for making decisions regarding benefit claims. There is a stronger public interest in disclosing information relating to an individual's professional role than their private life.

48. However, as set out above, disclosure under the FOIA is essentially disclosure into the public domain and whilst this may be necessary to fulfil the legitimate interests, the Commissioner considers that the legitimate interests do not override the data subject's right to privacy. The Commissioner is mindful that DWP has gone some way towards meeting the legitimate interest by confirming that disciplinary action was in fact taken. The Commissioner is of the opinion that disclosing more detailed information would tip the balance of transparency and accountability, and would have an unjustified detrimental impact on the privacy rights of the data subject.
49. Based on the above factors, the Commissioner has determined that the legitimate interest in disclosure is not sufficient to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so disclosure of the withheld information would not be lawful.
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.
51. The Commissioner's decision is that DWP is entitled to withhold the information on the basis of section 40(2), by way of section 40(3A)(a).

Right of appeal

52. 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

53. 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.
54. 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

Victoria Parkinson
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