

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 November 2021

Public Authority: The Information Commissioner's Office (ICO)

Address: Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Decision (including any steps ordered)

1. The complainant has requested information relating to Executive Team expenses claims. The ICO has confirmed that some of the requested information is exempt under section 21 FOIA as it is already reasonably accessible and some information is exempt from disclosure under section 40(2) FOIA.
2. The Commissioner's decision is that section 21 and 40(2) FOIA were applied correctly to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 5 October 2020 the complainant requested information of the following description (the same request had previously been made on 20 July 2020):

"Accordingly, we would be grateful if you could now provide us with the Expenses Claim Forms and/or the Account Statements for the Executive Team expenses claims made since October 2019, and that you could do so within a reasonable timeframe."

5. The ICO responded on 20 October 2020 confirming that, "The expenses are published in line with the attached and available on the website."
6. On 27 October 2020 the complainant disputed that the requested information was available on the ICO website and again reiterated the request for:
 - The Expenses Claim Forms and/or the Account Statements for the Executive Team expenses claims made since October 2019.
 - If ET expenses claims are now being presented for authorisation in the new opaque mode, we also now request the supporting documentation as well (eg receipts).
7. On 23 November 2020 the ICO responded and again confirmed that, "The expenses information and corporate charge card information are all available and up to date on the ICO website."
8. On 1 December 2020 the complainant explained that Corporate Charge Cards information stops in October 2019 and is not therefore available on the website. His position was that all of the information he had requested was not available on the ICO's website and again reiterated the required information:
 - *The Expenses Claim Forms and/or the Account Statements for the Executive Team expenses claims made since October 2019.*
 - *If ET expenses claims are now being presented for authorisation in the new opaque mode, we also now request the supporting documentation as well (eg receipts).*
9. The ICO formerly responded under FOIA on 19 February 2021. It confirmed that the information falling within part 1 of the request was available on the ICO website and so was exempt from disclosure under section 21 FOIA. It provided the complainant with a link to the relevant information. It refused to disclose the other information held falling within the scope of the request such as receipts under section 40(2) FOIA.
10. On 22 February 2021 the complainant requested an internal review. On 29 March 2021 the ICO provided the result of the internal review. It upheld its response of 19 February 2021.

Scope of the case

11. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
12. During the course of the Commissioner's investigation the ICO provided the complainant with the number of instances of expenses falling within the timeframe of the request and confirmed for how many claims receipts were held and for how many no formal receipt was held. The complainant confirmed that his request included receipts as well as any other supporting information provided with a claim for expenses. The Commissioner has therefore considered the application of the exemptions to all information held by the ICO, whether formal receipts or other supporting information provided with expenses claims.
13. The Commissioner has considered whether the ICO was correct to withhold the requested information under section 21 and 40(2) FOIA.

Reasons for decision

Section 1

14. Under section 1 FOIA, (1) Any person making a request for information to a public authority is entitled – (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him.
15. The Information Commissioner's guidance on 'The Right to Recorded Information and Requests for Documents'¹ makes it clear that these rights only apply to information held by a public authority and there is no explicit right to copies of original documents.
16. The guidance explains that this is because section 1 was designed to provide a wide-ranging right to information. It ensures that information

¹ [The right to recorded information and requests for documents | ICO](#)

is covered wherever and however it is recorded. It also means that public authorities have to consider the release of information within a document, rather than taking a document by document approach or withholding whole documents when only some of the information is exempt.

17. However the guidance recognises that requesters often ask for copies of documents, or refer to documents by name to describe the information they want. In this case the requester has asked for expenses claim forms and supporting documents such as receipts.
18. In this case the ICO has not disclosed redacted copies of the actual expenses forms or redacted copies of receipts or other supporting evidence submitted with claims. This is because the information proactively published is now taken from the individual expenses claim forms and receipts and collated on a spreadsheet which is reasonably accessible and so this information has been withheld under section 21 FOIA. Information contained within the claim forms and supporting evidence which is not proactively published has been withheld under section 40(2) FOIA as the ICO consider it to be the Executive Team member's personal data.
19. The guidance referred to above also acknowledges that most documents usually contain recorded information over and above the actual wording, such as the design, layout and style of writing. This means that, in most cases, the only practicable way to accurately communicate all the information to the requester is to provide a copy of the original document.
20. In this case the ICO has acknowledged that potentially a blank expenses claim form (with all personal data and information already accessible relating to the claim removed) could fall within the scope of the request. If a blank expenses claim form was deemed to fall within scope, it considers that this would also be reasonable accessible to the applicant under section 21 FOIA. The Commissioner has addressed this under 'Section 21' below.
21. Finally, during the investigation the ICO also found some further expenses information (outside of the expenses claim forms and supporting evidence) falling within the scope of the request in a system called SDOL, which is used to log corporate charge card expenditure. The ICO again considers that so far as the information contained in this system is published, it is exempt under section 21 FOIA and so far as the information is not published it is exempt under section 40(2) FOIA.

22. The Commissioner has considered the application of section 21 FOIA to the information held but already proactively published and section 40(2) to the information held which is not proactively published whether contained within expenses claim forms, supporting evidence e.g. receipts or in the SDOL system.

Section 21

23. Section 21 of the FOIA states that:

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

24. The Commissioner considers that the purpose of the section 21 exemption is to protect the scarce resources of public authorities by shielding them from replying to requests for information which the requestor could have found elsewhere. It also acts as an incentive for public authorities to be proactive in publishing information as part of their publication schemes.

25. In this case the ICO provided the complainant with a link to the following webpage on which it publishes Executive Team expenses information:

<https://ico.org.uk/about-the-ico/our-information/income-and-expenditure>

26. Up to October 2019 the ICO published a copy of the expenses claim forms submitted. From October 2019 this information is published in the form of an excel spreadsheet providing the name of the executive team member, the date of expenditure, the type of expenditure and

the amount claimed. The ICO's position is that this information is reasonably accessible to the complainant.

27. From October 2019 the expenses information is taken from the expenses claim forms and supporting evidence e.g. receipts then collated and published on an excel spreadsheet. The Commissioner considers that to the extent information is taken from the expenses claims and supporting evidence e.g. receipts and published on the ICO website, this is reasonably accessible to the applicant and therefore section 21 FOIA was correctly applied to this information.
28. The published information is not a redacted disclosure of the actual expenses claim forms, however based upon the ICO's submissions, she is satisfied that a blank expenses claim form is also reasonably accessible to the complainant in this case.

Section 40(2)

29. The ICO's position is that any information contained with the expenses claim forms (which is not published as set out above) and the evidence provided in support of expenses claims such (as receipts or other supporting evidence where a receipt could not be provided) is the personal data of the Executive Team member concerned and withheld under section 40(2) FOIA.
30. 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.
31. In this case the relevant condition is contained in section 40(3A)(a)². 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').
32. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection

² 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.

33. 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?

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

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

35. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
36. 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.
37. 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.
38. The information withheld under section 40(2) FOIA is actual receipts in support of expenses claims or other supporting evidence where a receipt was not provided by an Executive Team member or any other further detail supplied on the expenses claim form or in the SDOL system which is not published as set out under section 21.
39. The ICO has explained that in some instances the Executive Team member's name is written on the receipts; where they are not, comparison between the receipt and the proactively published expenses information would allow the staff member to be identified. The receipts contain information about how and where ICO staff have carried out their public duties; the data has 'biographical significance' because it describes their whereabouts at particular times and is used to make decisions as to whether they will be reimbursed. Similar to information contained with the expenses claim forms, some of the information on the receipts has already been withheld as it is already publicly available – most obviously the amount of the purchase.
40. In the circumstances of this case, having considered the information withheld under this exemption, the Commissioner is satisfied that this

information both relates to and identifies the Executive Team members concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

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

Would disclosure contravene principle (a)?

42. 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".

43. 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.
44. 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

45. 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.
46. 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.

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".

47. 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.
48. 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

49. 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.
50. The ICO considers that there is a general public interest in transparency around expenses for an organisation like the ICO.

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".

51. The Commissioner agrees that there is a legitimate interest in transparency regarding information relating to expenses claimed by Executive Team members.

Is disclosure necessary?

52. '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.
53. The ICO has argued that the disclosure of the further information over and above that proactively published would add negligible value to the information contained within the publicly available records. It considers that the information published already allows the public to interrogate expenses claims and to see, to an appropriate level of detail, what types of expenses are claimed. The ICO considers that the publication of further detail, comprising the personal data of the members of staff making the expenses claims, does not meet the test of necessity.
54. In this case, whilst the Commissioner accepts that the information already published goes a long way to meet the legitimate interests in this case, to provide a full picture of the expenses claimed along with supporting evidence such as receipts further disclosure would be necessary.

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

55. 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.
56. 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.
57. 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.
58. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
59. In this case the ICO has argued that although expense claims were made as part of the performance of a senior role at a public organisation, the level of detail requested would mean that disclosure intrudes into the private life of the staff members. The level of detail contained in the receipts would provide biographical information (the specific type of sandwich they have eaten, the type of small items they required in order to be able to homework effectively during the pandemic, or the specific times and destinations of their taxi journeys) about which the staff would have a reasonable expectation of privacy.
60. The ICO considers that disclosure of this information would release into the public domain biographical information about identifiable staff members to a level which is intrusive even when weighed against their reasonable expectations as senior staff that a certain appropriate level of information about them and their activities on behalf of the ICO will be public knowledge. Those reasonable expectations cannot be seen to extend to the disclosure of specific information about their location at specific times, outside the context of formal engagements at which they may appear as representatives of the ICO and exceeding the type of information that might be disclosed regarding a request for detailed of diarised meetings, which might be considered appropriate for disclosure. Receipts of the type requested here also detail specific food and drinks consumed, which the ICO considers is clearly unnecessarily intrusive.
61. In carrying out the balancing exercise the ICO also relied upon a previous Decision Notice dated 25 March 2019 which involved the expenses of the Surveillance Camera Commissioner made to the Home

Office under the reference FS50807443⁴. The Commissioner's decision was that the Home Office was entitled to rely on section 40(2) of the FOIA to withhold the receipts. In that case the Commissioner decided disclosure of the requested receipts was not necessary to meet the legitimate interests identified.

62. In this case, where the withheld information provides very little further detail to meet the legitimate interests in this case, such as a travel receipt showing the particular mode of transport or a particular supermarket visited, whilst necessary to present a full picture of the expenses claimed, there cannot be sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms in this case.
63. Where a receipt does provide greater detail such as particular dietary preferences or geographical locations the rights and freedoms of the data subjects based upon their reasonable expectations must outweigh the legitimate interest in disclosure of this further detail.
64. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the withheld information would not be lawful.
65. 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

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

⁴ [FOIA decision notice template \(ico.org.uk\)](https://ico.org.uk/for-the-public/foia/foia-decision-notice-template/)

Right of appeal

67. 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

68. 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.
69. 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.....

Gemma Garvey
Senior Case Officer

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF