

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 January 2021

Public Authority: Financial Ombudsman Service
Address: Exchange Tower
London
E14 9SR

Decision (including any steps ordered)

1. The complainant requested information about the background and length of employment of a member of staff. The Financial Ombudsman Service ("the FOS") withheld the information under the exemption provided for personal data by section 40(2) of the FOIA.
2. The Commissioner's decision is that the FOS correctly applied section 40(2).
3. The Commissioner does not require the FOS to take any steps.

Request and response

4. On 29 June 2020, the complainant wrote to the FOS and requested information in the following terms:

"First of all, I asked you how long you have been employed by the FSA and your background and you haven't answered them, therefore I am now making an official request, please consider this email as a request under the freedom of information act."
5. The FOS responded on 24 July 2020. It stated that it was withholding the information under section 40(2) of the FOIA (personal data).

6. Following an internal review the FOS wrote to the complainant on 4 September 2020. It stated that it maintained the application of section 40(2).

Scope of the case

7. The complainant contacted the Commissioner on 14 September 2020 to complain about the way his request for information had been handled, and specifically that the Council was incorrect to apply section 40(2).
8. The scope of this notice is to determine whether the FOS has correctly applied section 40(2).
9. For clarity, upon receiving the FOS' initial response to his request, the complainant submitted a further, similar information request regarding staff qualifications. However, in bringing this to the ICO, the complainant has only raised concerns about the FOS' handling of the above request so this notice only concerns the above request.

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 Act 2018 ("DPA"). If it is not personal data then section 40 of the FOIA cannot apply.

¹ As amended by Schedule 19 Paragraph 58(3) DPA

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. In the circumstances of this case, having considered the type of information requested, the Commissioner is satisfied that the information relates to an individual. She is satisfied that this information would both relate to and identify the employee concerned. This information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
19. 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.
20. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

21. 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".

22. 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.

23. 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

24. 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.

25. 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"*².

26. 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.
27. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

² 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".

Legitimate interests

28. 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.
29. 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.
30. In bringing this to the ICO, the complainant argued that disclosure of the information would not allow the individual to be identified. He argued that qualifications and training are relevant and necessary in order for the employee to successfully fulfil the role and put trust in the FOS. He stated that the employee in question is fulfilling a public duty and it is important that they possess the necessary skills and training. He also stated that he considers that a minimum of qualification and training should be required for the employees to be able to apply to the position, ultimately stating his view that, *"I believe that for the organization's role, in this case, qualification and training should be disclosed otherwise I can be asked to accept a decision if I am not confident on the skills of the investigator?"*.
31. In the circumstances of this case, the Commissioner recognises that there is a legitimate interest in ensuring that FOS officers are appropriately qualified and trained in order to undertake their roles.

Is disclosure necessary?

32. "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.
33. In this case, the Commissioner understands that the FOS do not look for or require specific qualifications when it recruits its investigators. The FOS has stated that the role of its investigators is to provide an informed opinion on complaints and settle disputes, however the decisions they make are not legally binding. It stated that when it recruits investigators, it looks for the skills that would enable them to do this. These skills include the ability to stand back and listen to all sides of the

story and to weigh up the arguments and arrive at decisions fairly and impartially. It stated that in its response to the request, it provided information about the role of an investigator generally and the training they undergo for the role.

34. The FOS also explained that the investigators are junior members of staff and therefore publishing a brief background of their experience on its website would not be necessary or lawful in the same way that it is for its statutory appointed ombudsmen. The FOS argued that the investigator would not expect their employer to disclose this information and it has a duty to keep the personal data of employees confidential.
35. In responding to the request, the FOS explained that *"the qualifications and experience of the investigator [...] may be found in their CV, which is likely to be held in their HR files on our system. However as we don't ask for specific qualifications, because it isn't a requirement of the role, we would only hold that information if the individual had provided it to us"*.
36. In its internal review response to the complainant, the FOS stated, *"we have a duty to keep the personal data of our employees confidential. We don't have the consent of our investigator to make a public disclosure of the information you've asked for and we don't consider that they would reasonably expect their data to be made public."*
37. The FOS also stated its view that this request arose because the complainant was unhappy with the outcome the investigator has reached in his complaint. It stated that it did not consider this is how the FOIA was intended to be used.
38. In the circumstances of this case, the Commissioner accepts the FOS' arguments that it has a robust recruitment process, conducts quality checks on the work of its investigators and provides comprehensive training on core skills to investigators to help them give fair and reasonable answers to consumers. She also notes that if a consumer or financial business has a concern that they can escalate the complaint to an ombudsman to review and ask for a service complaint. In light of all of these measures, the Commissioner accepts the FOS' position that disclosure of this employee's background and length of employment is not necessary and does not meet the requirements of principle (a).
39. It is pertinent to note that the Commissioner has undertaken a range of decisions in respect of requests for the qualifications of public authority employees, and has consistently found that the disclosure of such

information would breach data protection law. Examples of such decisions in respect of local government employees can be found in decision notices FS50668506³, FS50566676⁴, and FS50394978⁵.

40. In addition to this, the FOS noted that the ICO has upheld its position in respect of staff member qualification in the decisions FS50674756⁶ and FS50853126⁷.
41. The Commissioner is satisfied in this case that there are less intrusive means of achieving the legitimate aims identified.
42. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it therefore does not meet the requirements of principle (a).

The Commissioner's view

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

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014311/fs50668506.pdf>

⁴ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432187/fs_50566676.pdf

⁵ https://ico.org.uk/media/action-weve-taken/decision-notices/2011/681396/fs_50394978.pdf

⁶ <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014416/fs50674756.pdf>

⁷ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617323/fs50853126.pdf>

Right of appeal

44. 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

45. 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.
46. 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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