

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 November 2021

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

Decision (including any steps ordered)

1. The complainant requested information relating to an investigation arising from criticisms made in the course of an Employment Tribunal.
2. The MoJ confirmed it held information within the scope of the request but refused to disclose it, citing sections 38 (health and safety), 40(2) (personal information), 41(1) (information provided in confidence) and 42 (legal professional privilege) of FOIA.
3. The Commissioner investigated the MoJ's application of section 40(2) to the withheld information.
4. The Commissioner's decision is that the information is exempt from disclosure on the basis of section 40(2) of FOIA.
5. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

6. Following earlier correspondence with the MoJ regarding an Employment Tribunal case, on 15 September 2020 the complainant wrote to the MoJ and requested information in the following terms:

"Penultimate sentence Paragraph 47 "Acting Director General for Prisons commissioned an investigation into those matters to be undertaken by a Senior Civil Servant (formerly an experienced Prison Governor), and inviting the claimant to participate in the investigation. The Terms of Reference are dated 20 March 2019."

1. *Please supply the findings of the above investigation referred to in Para. 47 if now completed.*
2. *Please advise if anybody involved was disciplined and or dismissed as a result of the findings in 1.*
3. *Were any HMPPS [HM Prison and Probation Service] staff (at any level) involved in the forgery of documents provided as evidence to the ET case, if so please advise if they were they disciplined/dismissed as a result.*
4. *Have any staff responsible for the forgery of documents, been referred to the Police/CPS [Crown Prosecution Service] for a consideration of a prosecution for the criminal offence of forgery?"*
7. The request was made using the 'whatdotheyknow' website.
8. The MoJ responded on 1 October 2020 citing reference FOI 200915040. It refused to provide the requested information, citing section 38(1)(a) (health and safety) of FOIA as its basis for doing so.
9. The complainant expressed dissatisfaction with that response on 1 October 2020, formally requesting an internal review on 18 October 2020.
10. On 25 October 2020, the complainant left an annotation on the 'whatdotheyknow' thread, acknowledging that it covered three separate requests. For clarity, she cited the reference numbers provided by the MoJ to each of those three requests.
11. Following an internal review the MoJ wrote to the complainant on 28 October 2020, citing reference FOIA IR 201001051. It maintained its original position.

Scope of the case

12. The complainant contacted the Commissioner on 30 October 2020 to complain about the way her request for information had been handled.
13. She told the Commissioner:

"The Public Body needs to supply further detail as to how it established the use of Section 38(1)(a) FOIA, their response to date lacks any detail. Full disclosure is required in the Public interest, to avoid any suspicion of "spin" or "cover up" by the MOJ Disclosure team".

14. Mindful that the '*whatdotheyknow*' thread included correspondence relating to multiple requests, when she wrote to the parties setting out the scope of her investigation the Commissioner specified that she was considering the case with the MoJ references 200915040 and FOIA IR 201001051.
15. Those reference number relate to the request for information dated 15 September 2020, refusal dated 1 October 2020, request for review dated 18 October 2020 and internal review dated 28 October 2020.
16. The complainant confirmed that she was content with that scope. Accordingly, the Commissioner progressed her investigation on that basis.
17. During the course of the Commissioner's investigation, the MoJ confirmed its application of section 38(1)(a) to the withheld information. It additionally confirmed that it considers that further exemptions apply, namely sections 40(2) (personal information), 41(1) (information provided in confidence) and 42 (legal professional privilege) of FOIA.
18. Having considered the additional exemptions applied by the MoJ, the complainant confirmed to the Commissioner that she wished to pursue her complaint.
19. During the course of her investigation, the MoJ provided the Commissioner with a copy of the withheld information, namely a report. It described the report as providing "*a detailed account*" of the matters it reported on.
20. Acknowledging that the report also includes annexes, the MoJ told the Commissioner:

"...however we believe them to be out of scope of the FOIA request as the questions raised by [the complainant] would be answered completely by publication of the main document".
21. The analysis below considers the MoJ's application of exemptions to the withheld report.

Reasons for decision

22. The MoJ considers that sections 38, 40(2), 41(1) and 42(1) apply to the requested information
23. The Commissioner has first considered its application of section 40(2). The MoJ confirmed that it considers the report is exempt in its entirety by virtue of section 40(2).

Section 40 personal information

24. Section 40(2) of 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.
25. 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').
26. 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 FOIA cannot apply.
27. 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?

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

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

29. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
30. 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.
31. 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.

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

32. By way of background to the request in this case, the MoJ explained that the request was made in the context of an Employment Tribunal. It is acknowledged that the Tribunal was critical of HMPPS.
33. Describing the information that is the subject matter of this decision notice, the MoJ told the Commissioner that the report:

"... contains information relating to a number of identified or identifiable living individuals..."
34. The MoJ also argued that that any information on whether staff have been disciplined or dismissed is their personal data.
35. The Commissioner acknowledges that the report is about matters that were the subject of an Employment Tribunal and that individuals are named throughout the report.
36. The names of the data subjects quite obviously is information that identifies those concerned. There is also further information in the report that, if disclosed, could enable individuals to be identified either directly or in combination with other available data.
37. The report clearly relates to those individuals: given the purpose and context of the report, it is about them.
38. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that this information falls within the definition of 'personal data' in section 3(2) of the DPA.
39. 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.
40. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

41. 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".

42. 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.
43. 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

44. 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.

45. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under 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.

46. 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

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

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".

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.

48. The complainant considered there was a legitimate interest in transparency in the issue that the information in question relates to, notably the outcome of an investigation into allegations, made in the course of an Employment Tribunal, of unacceptable conduct.

49. The MoJ told the Commissioner:

"... we accept the legitimate interests of [the complainant] in wishing to discover and understand the findings [of the report]".

50. The Commissioner accepts that there is a legitimate interest in disclosure and has therefore gone on to consider whether this is necessary in order to meet the legitimate interest.

Is disclosure necessary?

51. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

52. The Commissioner is prepared to accept that disclosure of the withheld information is necessary to meet the interests identified above.

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

53. 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 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.

54. 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.
55. 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.
56. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
57. With reference to the context of the request in this case, the MoJ acknowledged that the Employment Tribunal judgment had been issued at the time of the request. It recognised that the judgment is in the public domain, alongside other documentation resulting from the Tribunal case. It also highlighted that there had been media interest in the matter.
58. During the course of the Commissioner's investigation, the MoJ told her that disclosure of the requested information is likely to cause distress to individuals who are identified, explaining:
- "... the Tribunal proceedings have already attracted press coverage and it is likely that publication of the report would be widely reported and discussed in the media".*
59. In that respect, the MoJ also noted:
- "Publication of the Report is likely to result in fresh press attention at a time when ... [the individuals concerned] might reasonably have expected the matter to be closed".*
60. With reference to the scope of the request, in its submission to the Commissioner the MoJ argued that the data subjects would not expect information relating to disciplinary matters to be disclosed. It advised that a general principle of MoJ policy is that disciplinary matters must be treated in strictest confidence.
61. The MoJ also confirmed that the data subjects have not consented to disclosure of their personal data.
62. Acknowledging the legitimate interest in disclosure, the MoJ confirmed that it had considered whether the report can be redacted in a way which could protect individuals' identities, while allowing for information

to be disclosed. However, it had concluded that simply redacting individual names would not adequately protect their identities.

63. It explained that, in reaching that position, it had had regard to the ability of interested parties to use personal knowledge to identify an individual from the requested information. It argued that the report would be rendered meaningless following the large redaction exercise required to enable disclosure.
64. Nevertheless, in its submission, the MoJ went on to consider the value in disclosing the heavily redacted report. It argued that a substantial amount of the remaining text is already in the public domain as a result of the Employment Tribunal and concluded that publication of a heavily redacted version of the report would not reveal its findings and therefore was unlikely to meet any significant public interest.
65. The Commissioner is mindful of the context of the request, and that the report was commissioned to investigate allegations relating to the conduct of staff in public office. While she acknowledges that information about the Tribunal case is publicly available, she is not aware that the information requested by the complainant is in the public domain.
66. The Commissioner appreciates that the individuals involved would have no expectation that their personal data would be disclosed under FOIA, particularly given that the request specifically seeks information relating to disciplinary matters and referral to the Police/CPS.
67. In reaching a decision, the Commissioner is mindful that disclosure under FOIA is disclosure to the world at large. She has also taken into account the background to the report, the reason why it was commissioned and the nature of the information within the scope of the request.
68. The Commissioner considers that disclosure of the report under FOIA would be likely to result in unwarranted damage or distress to the individuals concerned. Furthermore, she accepts that disclosure of the withheld information risks invading the privacy of those individuals.
69. She has also taken into account the arguments put forward by the MoJ regarding the passage of time and the impact of further disclosure on the individuals concerned.
70. Based on all 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.

71. 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

72. 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).

Other exemptions

73. As the Commissioner has found that the MoJ was entitled to withhold the requested information by virtue of section 40(2), she has not considered the other exemptions the MoJ applied to the same information.

Right of appeal

74. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

75. 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.
76. 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

Laura Tomkinson
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF