

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 8 March 2022

**Public Authority:** Independent Parliamentary Standards Authority  
**Address:** 2nd Floor, 85 Strand  
London  
WC2R 0DW

#### **Decision (including any steps ordered)**

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1. The complainant has requested information in relation to published expenses claims by Khalid Mahmood MP. IPSA confirmed that some information was not held, it provided some information but refused to disclose the remaining information under 40(2) FOIA.
2. The Commissioner's decision is that section 40(2) FOIA was applied correctly to the withheld information.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

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4. On 3 June 2021 the complainant made the following request for information under the FOIA for:

"I am submitting an FOI request in the public interest. Further to my communication with [named individual] asking for information in respect of clarity in respect of published expenses claims by Khalid Mahmood MP.

Mr Mahmood has been asked directly and refused the request,.

The information I require is as follows :

April 2020 : consultancy services : £1,500.00 . To whom or to which organisation was this fee paid and what skill was required.?

May 2020: consultancy services: £2.500.00 . To whom or to which organisation was this fee paid and what skill was required.?

June 2020: consultancy services: £2.500.00 . To whom or to which organisation was this fee paid and what skill was required.?

July 2020: consultancy services : £2.500.00. To whom or to which organisation was this fee paid and what skill was required.?

August 2020: consultancy services: £2.500.00 To whom or to which organisation was this fee paid and what skill was required ?

September 2020: consultancy services: £2.500.00. To whom or to which organisation was this fee paid and what skill was required?

October 2020: consultancy services. £2.500.00. To whom or to which organisation was this fee paid and what skill was required ?

November 2020: consultancy services £2.500.00. To whom or to which organisation was this fee paid and what skill was required.?"

5. On 28 June 2021 IPSA responded. It provided some basic information from the documents which show the types of services provided. It confirmed it did not hold any information about "level of skill required." It applied section 40(2) FOIA because it considers the remaining requested information (the identity of whom the consultancy service fee was paid to) is personal data of a third party and exempt from disclosure.
6. The complainant requested an internal review on 9 July 2021 in relation to IPSA's application of section 40(2) FOIA to the withheld information. IPSA sent the outcome of its internal review on 10 August 2021. It upheld its original position.

## Scope of the case

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7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.

8. The Commissioner has considered whether IPSA was correct to withhold the requested information under section 40(2) FOIA.

## **Reasons for decision**

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### **Section 40(2)**

9. 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.
10. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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').
11. 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.
12. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

### ***Is the information personal data?***

13. Section 3(2) of the DPA defines personal data as:
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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

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

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. 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.
16. 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.
17. IPSA confirmed that the information withheld under section 40(2) FOIA is the name of an identifiable, living individual operating as a sole trader.
18. IPSA referenced the previous decision notices FS50628943 Cornwall Council (28 February 2017) and FS50450700 High Peak Borough Council (19 February 2013) and in both cases information relating to sole traders was considered as meeting the definition of personal data.
19. Whilst the above Decision Notices pre-date the Data Protection Act 2018, the Commissioner’s “Guide to the General Data Protection Regulation” notes that: However, information about individuals acting as sole traders, employees, partners and company directors where they are individually identifiable and the information relates to them as an individual may constitute personal data.
20. 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 individual acting as a sole trader which is the information withheld in response to this request. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
21. 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)?**

22. 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".*

23. 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.

24. 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**

25. 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.

26. 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"<sup>2</sup>.*

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<sup>2</sup> 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".*

27. 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.
28. 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*

29. 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.
30. IPSA explained that there is a legitimate interest in transparency and accountability of the use of public funds by MPs.
31. The complainant considers that "...the recipient of substantial payments given to persons ( unknown) on a regular basis outside his generous tax payer funded staffing allowance is in the public interest and should be fully disclosed by IPSA on the public register of expenses".
32. The Commissioner accepts that there is a legitimate interest in transparency and accountability of the use of public funds by MPs.

#### *Is disclosure necessary?*

33. '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.
34. IPSA considers that disclosure would provide an additional level of assurance to the public concerning the use of public funds. However it did explain that a significant amount of information has already been published concerning these claims and additional details were provided about the nature of the work undertaken, the period of engagement and the cost of these services. Information on MPs' business costs is published every two months, and there is an annual publication of MPs' total spend on staffing and business costs.
35. Furthermore, in addition, IPSA has rules concerning the employment or engagement of 'connected parties', which includes family members, close associates, a body corporate, firm or a trust with which the MP is connected as defined in section 252 of the Companies Act 2006. Paragraph 3.21 of "The Scheme of MPs' Staffing and Business Costs 2021-22" states that: IPSA will not pay any claims relating to the purchase of goods or services, where the MP or a connected party is the provider of the goods or services in question.
36. The Commissioner considers that disclosure of the identity of the sole trader is necessary to provide an additional level of assurance to the public concerning the use of public funds.

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

37. 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.
38. 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.
39. 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.
40. IPSA has explained that the data subject has no choice about the disclosure of data to IPSA. In order for costs to be reimbursed, MPs must submit full supporting evidence.
41. IPSA accepts therefore that there would be an expectation that information would be shared with IPSA for payment to be made. It acknowledged that individuals and organisations which contract with public authorities would expect those arrangements to (potentially) be subject to a greater degree of public scrutiny than where they contract with privately owned organisations. Where a public authority is purchasing goods or services, there is a public interest in ensuring that it gets value for money. Although MPs are not public authorities, and not themselves, therefore, directly subject to the FOIA, there would still be a reasonable expectation that services carried out for MPs would be subject to a high level of scrutiny and public interest. It reiterated that IPSA already publishes more information about sole traders than might be disclosed by other public authorities, for example the nature of, and amount paid for services provided. However, as names and contact details for individuals employed as staff members by MPs are not disclosed, and the data subject in this case was providing similar research and administrative services on a short term basis, it would be reasonable for a sole trader who does not advertise their work for an MP not to expect their personal data to be shared more widely.
42. In this case whilst the data subject has not been approached to seek consent to disclosure, the MP has refused to disclose the data subject's name. No internet or social media site has been traced by IPSA which advertises the data subject's services, nor have any searches identified any published links between the data subject and any MP.



43. Finally IPSA argued that over the last few years there has been a sharp increase in the level and intensity of abuse and threats against MPs, their staff, families and associates. It provided the Commissioner with some examples in the media. It therefore considers that disclosure could cause damage and distress to the data subject in this case.
44. Based upon IPSA's submissions in this case, the Commissioner considers that the rights and freedoms of the data subject must outweigh the legitimate interest in disclosure in this case. This is because of the data subject's reasonable expectations as to what information would be made publicly available, in this case the amounts but not the identity of the sole trader in a similar way the identities of staff members of MPs are not disclosed. The Commissioner has also taken into account the potential damage and distress disclosure could cause by connecting the data subject to the MP, the fact that IPSA already publishes the amounts paid to sole traders which goes a long way to meeting the legitimate interests in this case and IPSA already has mechanisms in place to prevent payments to individuals connected to an MP.
45. 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.
46. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

### **The Commissioner's view**

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

## Right of appeal

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48. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

49. 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.
50. 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**