

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 July 2023

Public Authority: Office of Communications (Ofcom)
Address: Riverside House
2a Southwark Bridge Road
London
SE1 9HA

Decision (including any steps ordered)

1. The complainant has requested information from Ofcom in relation to salary ranges within its constituent groups.
2. The Commissioner's decision is that Ofcom has correctly applied section 40(2) of FOIA – personal information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 10 February 2023, the complainant wrote to Ofcom and requested information in the following terms:

"After reading Ofcom's senior salary disclosure information, I would like to know the salary ranges by grade in each of Ofcom's constituent groups.

Please provide the minimum and maximum salaries for associates, senior associates, principals and directors in each of Ofcom's constituent groups namely: economics and analytics; broadcasting and online content; legal and enforcement; networks and communications; technology; corporate; strategy and research; and spectrum.

Note I am not interested in any personal data that would be subject to exemption under the Freedom of Information Act, only in the salary ranges by grade. I look forward to your response.”

5. Ofcom responded on 9 March 2023. It stated that it was unable to provide the requested information as it is personal data and it was relying on section 40(2) of FOIA to withhold the information. However, Ofcom did provide a link to the published salary bands but also advised that it was in the process of reviewing and updating salary ranges, which would be published by the end of 2023.
6. Following an internal review Ofcom wrote to the complainant on 11 April 2023. It stated that it upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 21 May 2023 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of the complaint is to determine if Ofcom was correct to withhold the requested information under section 40(2) of FOIA.

Reasons for decision

Section 40 personal information

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)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 UK General Data Protection Regulation ('UK GDPR').
11. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection

¹ 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.

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:

"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. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects. The salary of the data subjects quite obviously is information that both relates to and provides personal information about those concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
18. Ofcom has explained that it recognises and acknowledges that there is a legitimate public interest in understanding how it deploys its resources.
19. Ofcom notes that the requested information itself does not directly identify individuals, and that there are a larger number of individuals within certain roles. However, information on the grade of employees is available in various ways. Therefore individuals may be identified indirectly or by piecing together other sources of information.
20. Ofcom has explained that its employees engage with the public and stakeholders in a variety of ways and other details, such as job title or grade may be disclosed as part of these interactions, which could lead to the identification of these individuals. This would also be in addition to information on individuals job titles and grade being generally known internally. Ofcom has advised that it is concerned that this information

could be combined with information relating to salary to provide the salary range for that individual.

21. The Commissioner agrees that Ofcom's employees have a reasonable expectation that their actual salaries will be kept private, with the exception of those whose salary information is included as part of Ofcom's Senior Salary disclosure.
22. Ofcom has also advised that it is not general practice to include actual salaries in job adverts and no actual salaries are published internally which further gives employees an expectation of privacy around their actual salary.
23. 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.
24. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

25. Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

26. 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.
27. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

28. 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.

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".

29. In considering the application of Article 6(1)(f) of the UK 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.
30. 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

31. 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.
32. 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.
33. The Commissioner acknowledges that there is a wider legitimate interest in the release of the requested information

Is disclosure necessary?

34. '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

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 UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".

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

35. In this case, the Commissioner is satisfied that the information already disclosed (the salary bandings available online) meets the legitimate interests of the complainant. The information available online provides the salary ranges available and therefore provides information which answers the complainant's request. If Ofcom were to release further information, it could lead to individuals being identified and personal information being disclosed.
36. The Commissioner is therefore satisfied that Ofcom was entitled to rely on section 40(2) when refusing to provide this information.

Right of appeal

37. 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 <mailto:GRC@hmcts.gsi.gov.uk>

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

38. 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.
39. 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

Michael Lea
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF