

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 March 2019

Public Authority: Department for Work and Pensions (DWP)
Address: 4th Floor
Caxton House
Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested information in a correspondence exchange between DWP and a Trade Union. The DWP relied on sections 40(2) (third party personal data) and 41 (information provided in confidence) to withhold some of the requested information.
2. The Commissioner's decision is that the DWP correctly relied on sections 40 (2) and 41 to withhold requested information.
3. The Commissioner requires the public authority to take no steps to ensure compliance with the legislation.

Request and response

4. On 4 March 2017, the complainant ,via the WhatDoTheyKnow (WDTK)) website wrote to DWP and requested information in the following terms:

ER ref: 478-13e

Reference 131014 Conditionality Week.

1st November 2013

The reference is from a letter sent by (...a trade union official...) which talks about conditionality, sanctions and rewards for staff and states:

"I do agree, as mentioned in my previous reply, that the offer of financial rewards linked to this area was ill advised..."

Please provide a copy of the letter that this letter is replying to, (... the trade union official...) previous reply as mentioned above, and any other letters that could be considered as forming part of this letter chain on this subject".

5. On 28 April 2017, DWP wrote to the complainant and confirmed that it held the requested information but was withholding it under, amongst others, section 41 of the Act. On 1 May 2017, the complainant requested an internal review and explained that he considered the public interest favoured disclosure. On 25 May 2017, DWP provided the complainant with the outcome of its internal review. DWP upheld its original response.
6. The complainant first contacted the Commissioner 10 March 2018 to complain about the DWP response to his request for information.
7. After consultation with the ICO the DWP informed the complainant (on 18 September 2018) of a revised response to his request for information. It now looked at the request in its two separate parts:
 - i) A request for the information contained in the correspondence sent to the DWP from the Trade Union, and
 - ii) A request for the information contained in the DWP responses to the Trade Union's correspondence.
8. The DWP response confirmed that the information contained in the correspondence sent it from the Trade Union was still exempt from release under section 41, but that there was not a valid exemption to withhold the DWP correspondence in response to the Trade Union.
9. The complainant requires the information contained in DWP correspondence to be provided to him via the WhatDoTheyKnow website. The record relating to the request had been suspended on the grounds of the passing of time since the original request was made. However the record was latterly reactivated and on 31 January 2019 DWP provided the requested information contained in the DWP responses to the Trade Union's correspondence¹.

Scope of the case

¹ https://www.whatdotheyknow.com/request/reference_131014_conditionality#incoming-1302975

10. The complainant contacted the Commissioner 10 March 2018 to complain about the way his request for information had been handled.
11. The Commissioner is to determine whether the DWP correctly relied on section 41 to withhold the correspondence sent to the DWP from the Trade Union.
12. The Commissioner is also to determine whether the DWP correctly relied on section 40(2) to withhold third party personal data in the correspondence sent to the Trade Union from the DWP.

Reasons for decision

Section 41

13. The Commissioner next considers the DWP reliance on section 41(1) to withhold the information contained in the correspondence sent to the DWP from the Trade Union,

Section 41(1) states:

Information is exempt information if–

- (a) it was obtained by the public authority from any other person (including another public authority), and
 - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
14. Therefore for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party and the disclosure of that information has to constitute an actionable breach of confidence.
 15. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:
 - Whether the information had the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and

- Whether an unauthorised use of the information would result in a detriment to the confider.

16. The DWP has submitted to the Commissioner as follows:

The third party that provided this information (the letters) was the PCS Trade Union on behalf of concerns their members had raised in a specific region of the country.

This information does have the necessary quality of confidence and was not otherwise accessible as there is a relationship between DWP Operations and Trade Unions that provides Trade Unions with a direct path to discuss concerns that they or their members have. This relationship is necessarily one that requires confidentiality and trust between all parties involved to allow for an open forum to deal with issues. The PCS Trade Union have their own website where they provide updates to their members where, if they wanted to share this information more widely, they could publish their letters to the DWP. The Trade Union have not done this and instead chose to post summaries of their activities on their website.

The Trade Union has requested that their information (the letters) not be shared and that an exemption be applied to protect the necessarily confidential channel of communication they have with DWP Operations.

17. Having read evidence from the union (that it considered the withheld information to be confidential), viewed the withheld information itself, and considered the DWP submissions, the Commissioner accepts that the withheld information would have been communicated in confidence to the DWP by the PCS Trade Union. The Commissioner is also satisfied that there would have been no reasonable expectation on behalf of the confiders at the time, that this may be put into the public domain in the future. Accordingly, she accepts that there is both an implied and explicit obligation of confidence on the DWP that it will not share the information with the public.
18. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a defence to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the DWP could successfully rely on such a public interest defence to an action for breach of confidence in this case.
19. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure

of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider.

20. As the decisions taken by courts have shown, very significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality. On viewing the withheld information, there is no suggestion in this case that the information concerns such matters.
21. Having considered all the circumstances of this case, and the withheld information, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.

Section 40(2)

22. Though the DWP placed most of the requested information (correspondence sent to the Trade Union from the DWP on WDTK) a small portion of that information was third party personal information and was redacted. The DWP relies on section 40(2) to redact that information.
23. The section 40(2) exemption provides that any third party personal data is exempt from disclosure, if that disclosure would contravene any of the principles set out in Schedule 1 of the DPA 1998. Although the DPA 1998 has been superseded by the General Data Protection Regulation and Data Protection Act 2018, the request was made on 4 March 2017. It is therefore the Commissioner's view that the DPA 1998 was the appropriate legislation to take into account, when considering whether the DWP was entitled to rely on section 40(2) of the FOIA to withhold the personal data.
24. In order to help determine whether the DWP's reliance on section 40(2) was correct the Commissioner asked the DWP a series of relevant questions. The questions and the DWP replies are given below:

Please explain whose personal data the DWP considers the requested information to be.

- The DWP considers the personal data belongs to the individual responding to the correspondence received by the trade union.

Is the DWP position that all of this withheld information is personal data?

- Yes. The information that has been redacted and withheld is the same on all of correspondence provided. This is the individual's phone number and email address as well as their signature.

Has the DWP considered whether any of the withheld information also constitutes sensitive personal data?

- As part of our assessment of fairness on releasing the information the DWP did consider whether any of the information redacted also constitutes sensitive personal data. However, we determined that the information did not fall in to this category and instead relied on the other principles of fairness. These being:
 - the possible consequences of disclosure on the individual;
 - the reasonable expectations of the individual, taking into account: their expectations both at the time the information was collected and at the time of the request; the nature of the information itself; the circumstances in which the information was obtained; whether the information has been or remains in the public domain; and the FOIA principles of transparency and accountability; and
 - whether there is any legitimate interest in the public or the requester having access to the information and the balance between this and the rights and freedoms of the individuals who are the data subjects.

Please confirm which of the data protection principles you believe would be breached if the withheld information was disclosed.

- The DWP believes that the first data protection principle would be breached. The approach taken by the DWP to assessing whether the first principle is satisfied is as set out in the ICO's guidance available here: <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

In assessing whether disclosure would be unfair and thus constitute a breach of the first data protection principle the ICO takes into account a number of factors such as:

Does the information relate to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life)?

- The information relates to the individual's public life as a DWP official. The individual is of Senior Civil Service (SCS) grade but as they are SCS pay band 1 their details are not shown on the DWP

transparency data available at data.gov.uk and as such their contact details are not easily accessible within the public domain.

What reasonable expectations does the individual have about what will happen to their personal data?

- The expectations of the individual were that they were responding to the Trade Union through a confidential process which allows the Trade Union to raise the issues of their members with DWP officials, and also that if it was known that this information was to go into the public domain it would have been in a different format ie. not including the redacted information. The redacted information was provided to allow the Trade Union to contact the DWP official directly, whereas there are well established processes in place for citizens to contact DWP to ensure the correct orientation of their query.
- The requester also already had the redacted information, as they had (or had seen) the confidential correspondence from the individual to the Trade Union. Another determination of DWP not to disclose the information is that this would not just be going to the individual, and would be going on to the What Do They Know website. Misuse of the individual's contact details would result in disruption of service for DWP as well as a monetary cost if we were required to change the individual's email address or telephone number. Furthermore the requester had not directly asked for the contact details of the individual, instead asking for a copy of the letter and letter chain in response to the correspondence they had provided.

Has the individual named been asked whether they are willing to consent to the disclosure of their personal data?

- Whilst the case has been discussed with the individual they have not been explicitly asked for their consent to disclose their personal data.

Have the DWP considered whether any of the conditions in schedule 2 would allow the information to be disclosed, for example the sixth condition?

- The sixth condition of Schedule 2 of the Data Protection Act, as set out in the ICO guidance (available here: <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>) says:
- DWP does not believe that there is a legitimate interest to disclose the redacted information. To make incorrect contact details

available in the public domain would mean that customers could use these to try contacting DWP via incorrect routes, potentially holding up there [sic] enquiry by not using the well-established channels of communication that have been set up to ensure that customers are routed (either by phone or written communication) to the area of DWP that can best help them.

- If the individual was inundated with telephone calls and emails this could cause disruption to the individual by requiring them to deal with emails/phone calls that are not within their area of work, and for which they are not in a position to respond, but could also cause the individual distress, depending on the content of the contact, and also put added pressure on them to handle additional work – not allowing them to concentrate on the areas of work for which they are accountable.
 - The DWP has already shown transparency by disclosing the correspondence from DWP to Trade Unions that formed the letter chain the requester had asked for. There was also no direct request for the contact details of the individual. It is for these reasons, and those that have already been described in answering the previous questions, that the DWP considers that these conditions would not allow for the information to be disclosed.
25. After considering the nature of the withheld information (the individual's phone number and email address as well as their signature), and the reasonable expectation of the data subject, the Commissioner considers that disclosure under FOIA would be unfair and in breach of the first principle of the DPA and that any legitimate public interest would not outweigh the rights of the data subject in this case Therefore the Commissioner considers that section 40(2) FOIA is engaged, and entitled the DWP to withhold the third party data in question.

Right of appeal

26. 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

Reference: FS50712366



Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

27. 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.
28. 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

**Gerrard Tracey
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Information Commissioner's Office
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