

Freedom of Information Act 2000 (the FOIA)

Decision notice

Date: 13 January 2020

Public Authority: The Department for Work and Pensions

Address: Caxton House
Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested the qualifications and professional development record of a named Department for Work and Pensions (DWP) employee.
2. The Commissioner's decision is that DWP is entitled to rely on section 40(2) of the FOIA to refuse to provide the requested information.
3. The Commissioner does not require DWP to take any steps in relation to this complaint.

Request and response

4. On 26 October 2018, the complainant wrote to DWP and requested information in the following terms:

"Can you please supply me with the qualifications and dates of ongoing professional development [sic] of FIU¹ investigator [named individual]"
5. On 29 October 2018, DWP responded and refused to provide the requested information. It confirmed that it was relying on section 40(2) of the FOIA to withhold this information as it was third party personal data.

¹ Fraud Investigation Unit

6. On 30 October 2018, the complainant requested an internal review and explained that he believed the public interest lay in disclosure of the requested information.
7. DWP provided the outcome of its internal review on 3 December 2018. It upheld its decision to withhold the information under section 40(2) and provided a brief explanation of the necessity test.

Scope of the case

8. The complainant contacted the Commissioner on 6 May 2019 to complain about the way his request for information had been handled. Specifically, he disputed DWP's reliance on section 40(2) to withhold the requested information.
9. The Commissioner considers that the scope of this investigation is to determine whether DWP is entitled to rely on section 40(2) to withhold the requested information.

Reasons for decision

Section 40 personal information

10. Section 40(2)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)³. 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.

² <http://www.legislation.gov.uk/ukpga/2000/36/section/40>

³ 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. The Commissioner notes that the request names a specific individual and requests information about them. She considers that it is clear that the information relates to the named individual and 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. 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”⁴.

25. 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.

26. 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

⁴ 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 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.
28. 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.
29. DWP explained that the complainant had not explained why he requires the named individual's qualification and training details and it therefore was unable to identify a legitimate interest in disclosure of the requested information.
30. The complainant confirmed to the Commissioner that he had requested the qualification and training details of the named individual as he considered that they had acted inappropriately in their role as a DWP employee. The complainant confirmed that he was in the process of legal action against DWP regarding this matter. He also considers that it is in the public interest to know the qualification of FIU investigators.

Is disclosure necessary?

31. '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.
32. DWP considers that disclosure of the requested information is not necessary as it would not provide any further insight on how the named individual carries out their role.
33. The Commissioner has considered whether disclosure of the requested information is necessary to meet the requester's legitimate interests and the wider legitimate interest in openness and transparency.
34. It is important to state at this point that disclosure under the FOIA is disclosure into the public domain. The Commissioner has therefore considered whether disclosure to the world at large is necessary to meet the legitimate interests above.
35. The Commissioner acknowledges that the complainant is dissatisfied with the conduct of the named individual, however, she also notes that

the named individual is a representative of DWP and it is ultimately DWP who are responsible for the conduct of their employees.

36. The Commissioner considers that the appropriate approach when dissatisfied with a DWP employee's conduct is to follow DWP's complaint procedure or complain to the relevant regulatory body or ombudsmen. It is not apparent how public knowledge of an individual's qualifications would aid in rectifying the complainant's dissatisfaction.
37. The Commissioner also notes that the complainant has stated that he is undertaking legal proceedings. If this information is required for this legal action, there are more appropriate routes to obtain information via the court available to litigants to obtain any required information.
38. 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 is unlawful. It therefore does not meet the requirements of principle (a).

Right of appeal

39. 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

40. 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.
41. 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

**Victoria Parkinson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF**