

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

### **Decision notice**

**Date:** 9 May 2019

**Public Authority:** Department of Justice  
**Address:** Information Services Division  
Block 4  
Knockview Buildings  
Ballymiscaw  
Stormont  
Belfast BT4 3SL

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

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1. The complainant has requested specific staff related information from the Northern Ireland Prison Service ("NIPS") which is part of the Department of Justice (Northern Ireland) ("DoJ"). DoJ explained that it was excepted from its duty to confirm or deny whether it held this information and cited section 40(5) as its basis for doing so – unlawful/unfair processing of personal data. It upheld this position at internal review. During the course of the Commissioner's investigation, DoJ explained that Human Resources information was now held by the Department of Finance following a reorganisation of how certain Civil Service information is held in Northern Ireland.
2. The Commissioner's decision is that DoJ is the relevant public authority in this case but that it is entitled to rely on section 40(5)(B) as its basis for refusing to confirm or deny whether it holds the requested information.
3. No steps are required.

### **Request and response**

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4. On 19 June 2018, the complainant requested information of the following description:

"Any email or other written correspondence in regard to the confirmation from [named official] to [named official] from [named HM Prison], on [temporary promotion to cover a vacancy at a named

location]. The dates of the confirmed temporary promotion is [date range] with a pay increase to £41.651. Please confirm also that [named official] from the Pay Section was copied in on the email/correspondence."

5. He received an acknowledgement on the same day which said: "Redactions will be made to the papers in line with Sections 38 and 40 of the Freedom of Information Act 2000, in order to protect the identities of third parties." This appears to confirm that exempt information is held.
6. However, on 10 July 2018, DoJ responded slightly differently. It refused to confirm or deny that it held the requested information and it cited the FOIA exemption at section 40 as its basis for doing so.
7. The complainant requested an internal review on 11 July 2018. He said that this response contradicted correspondence DoJ had sent on 19 June 2018 where it had appeared to confirm holding this information but had argued that it could be redacted. He asked DoJ to make those redactions but send the information that was not redacted to him.
8. DoJ sent him the outcome of its internal review on 6 August 2018. It upheld its position set out in its letter of 10 July 2018 of refusing to confirm or deny whether it held this information on the basis of section 40 of the FOIA.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 14 August 2018 to complain about the way his request for information had been handled.
10. The Commissioner has considered firstly whether DoJ is the appropriate public authority in respect of this request and, if so, whether it can rely on section 40(5) as its basis for refusing to confirm or deny whether it holds the requested information.

## **Reasons for decision**

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### **Background**

11. The Human Resources ("HR") function of the Civil Service in Northern Ireland was transferred to the Department of Finance ("DoF") on 3 April 2017. Paragraph 2.4 of the Recruitment to NICS Annual Report 2016 states this.

<https://irecruit-ext.hrconnect.nigov.net/resources/documents/r/e/c/recruitment-to-the-nics-annual-report-2016.pdf>

12. However, DoJ explained to the Commissioner that for security reasons, this did not apply immediately to Northern Ireland Prison Service HR information. That information was transferred on 25 October 2018 (after the complainant had submitted his complaint to the Commissioner).

**Was information of this type held by DoJ at the time of the request?**

13. Section 3(2) of the FOIA states that –

“For the purposes of this Act, information is held by a public authority if—

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority.”

14. The delayed transfer described above created a conundrum in this case. Although HR information had been transferred to DoF in April 2017, information of the type described in the request was still physically located at DoJ.
15. The Commissioner sought to establish if, at the time of the request, HR information of the type described in the request was held for the purposes of the Act by DoF and not by DoJ, even if it was still physically located at the DoJ. She sent DoJ a copy of her published guidance to assist it in answering her queries on this point.<sup>1</sup>
16. The Commissioner recognises that DoJ sought to answer the Commissioner’s enquiries promptly. However, these responses were inconclusive and, at times, contradictory. The main thrust of its argument (and it used General Data Protection Regulation EU2016/679 (“GDPR”) terminology to answer the Commissioner’s enquiries) was that although it physically held information of this type for security reasons, it was a data processor of HR information and not a data controller. Essentially, data processors do not make decisions about the purposes for which personal data is processed even if they physically hold it. The

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1148/information\\_held\\_by\\_a\\_public\\_authority\\_for\\_purposes\\_of\\_foia.pdf](https://ico.org.uk/media/for-organisations/documents/1148/information_held_by_a_public_authority_for_purposes_of_foia.pdf)

Commissioner has published guidance on this topic including a checklist to identify whether an organisation is a data processor, a data controller or a joint data controller.<sup>2</sup>

17. However, it then explained that it responded to the complainant's request for information in accordance with its own obligations under FOIA. This appears to contradict its assertion set out above.
18. The Commissioner would observe that where a public authority does not hold the information for the purposes of the FOIA ("Public Authority A") but it knows that another public authority does ("Public Authority B"), its obligation to the requester under section 16 of the FOIA is to explain this to the requester and to direct the requester to Public Authority B or even transfer the request to Public Authority B themselves. The practical consequence may be that Public Authority A processes the request on behalf of Public Authority B but it is not, itself, liable for responding to the request under FOIA.
19. Reading through the correspondence that DoJ had with the complainant about their request (and taking into account its somewhat contradictory responses to the Commissioner's enquiries), the Commissioner is satisfied that, at least at the time of the request, DoJ held information of the type described in the request for the purposes of the FOIA. In reaching this view, the Commissioner has taken into account the type of information described in the request and the level of decision making that took place at DoJ about how to respond for requests for information of this type. The Commissioner is satisfied that it consulted DoF on this request but that the final decision was taken by DoJ at a relatively senior level at internal review.
20. Having concluded that DoJ held information of this type at the time of the request, the Commissioner went on to consider whether it was correct when it cited section 40(5) as its basis for refusing to confirm or deny whether it actually held the requested information.

### **Section 40(5B) – refusal to confirm or deny whether information is held**

21. Section 1 of FOIA places a two-part obligation on public authorities. Firstly, they must confirm or deny whether requested information is held. Secondly, they must provide that information, if held. Both parts of subject to exemptions. In this case, DoJ has argued that it is excepted

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<sup>2</sup> <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/key-definitions/controllers-and-processors/>

from its obligation to provide confirmation or denial by virtue of section 40(5B).

22. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the GDPR to provide that confirmation or denial.
23. Therefore, for DoJ to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
  - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
  - Providing this confirmation or denial would contravene one of the data protection principles.

**Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?**

24. Section 3(2) of the Data Protection Act 2018 ("DPA2018") defines personal data as:-

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

25. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
26. 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.
27. In this case, the requested information is clearly about named individuals, who are employees of the DoJ in different capacities related to the Northern Ireland Prison Service. The Commissioner recognises that identifying details have been heavily redacted from this decision notice but she has reproduced the full wording when corresponding with the complainant and the public authority.
28. The requested information is about individuals' employment and, in one case, describes what is understood to an individual's employment location, their grade and their salary.
29. The Commissioner is therefore satisfied that confirming or denying the information is held would disclose personal data about several third parties. Through confirmation or denial, information about individuals' employment would be made public. In short, the public would know

whether these individuals worked in specific locations and, if they did, what their role was. In one case, should confirmation be given about one individual, the public would also learn what their employment grade was and how much they were paid.

**Would the provision of this confirmation or denial contravene one of the data protection principles?**

30. As noted above, the Commissioner is satisfied that providing either confirmation or denial as to whether the requested information is held would, of itself, disclose personal data about living, identifiable individuals. It would tell the public whether they worked at a particular location and, if they did, it would, in one case, give public information about their grade and salary. It is not automatically a breach of data protection principles to provide such confirmation and denial and, as a consequence, disclose information about an individual, particularly if it relates to someone in a public role whose salary is paid from the public purse.

31. 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".*

32. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. As explained above, providing confirmation or denial in this case would involve the disclosure of personal data by making public whether or not a living individual works at a particular location. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

33. 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**

34. 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.

35. 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>3</sup>.*

36. 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.
37. 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*

38. In considering any legitimate interest(s) in the disclosure in this case 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.

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<sup>3</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".*



39. 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.
40. The complainant has indicated a specific personal interest in staff responsibilities in the prison service in Northern Ireland. Although he has not explained this interest any further, the Commissioner can see a clear and legitimate interest and wider societal benefit in greater transparency about staffing that is paid for from the public purse. She notes, for example, that NIPS produces an annual report and accounts to serve a legitimate interest in transparency about how it spends public money.<sup>4</sup>
41. DoJ also acknowledged that there was a legitimate interest in this information.

*Is disclosure necessary?*

42. '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.
43. The Commissioner acknowledges that the provision of confirmation or denial (and thus disclosing personal data) would serve this legitimate interest but does not agree that it is reasonably necessary in this case. She agrees that disclosure in this manner would be particularly intrusive and wholly outside the reasonable expectations of the individuals concerned.
44. The DoJ explained that "All NIPS staff have been advised by NIPS security branch that they are under a 'severe' threat from dissident paramilitary organisations". The Commissioner has no reason to query this assertion.
45. As explained above, the provision of confirmation or denial in this case would disclose whether living identifiable individuals work for NIPS. The Commissioner accepts that this puts the individuals at personal risk and

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<sup>4</sup> <https://www.justice-ni.gov.uk/publications/northern-ireland-prison-service-annual-and-report-and-accounts-2017-18>



runs contrary to their reasonable expectations about disclosure of their identity and connection or otherwise to NIPS.

46. The Commissioner also recognises the importance of maintaining a policy of NCND – neither confirm nor deny – for information of this type. It would undermine the strategy of protecting staff identity if an NCND approach is taken only where information is held. By taking a clear NCND approach to all cases, regardless of whether information is actually held or not, it serves to disguise whether information is held and further protects information about living identifiable individuals (whether or not they work for NIPS) from being disclosed.
47. The Commissioner notes a recent exchange of correspondence published on the question of pay in this sector.<sup>5</sup> She is satisfied that alternative measures for addressing publically the question of pay without specific reference to individuals is available. She also notes the annual report and accounts at Note 4 which informs this subject.
48. 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).
49. Given the above conclusion that disclosure of personal data in this case would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

## **Conclusion**

50. In light of the above, the Commissioner has concluded that DoJ held information of this type at the time of the request for the purposes of the FOIA but was entitled to refuse to confirm or deny whether it held the requested information on the basis of section 40(5B).

## **Right of appeal**

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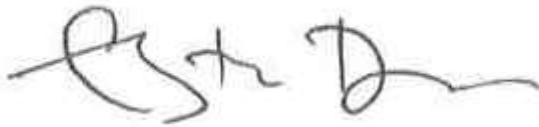
51. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:
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<sup>5</sup> <https://www.gov.uk/government/publications/northern-ireland-prison-service-2017-to-2018-pay-award>

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504  
Fax: 0870 739 5836  
Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

52. 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.
53. 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**

**Elizabeth Hogan  
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