

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 August 2019

Public Authority: Department for Environment, Food & Rural Affairs

Address: Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested an investigatory report written by the Department for the Environment, Food & Rural Affairs ("Defra"). Defra refused to provide this information and withheld the entirety of the report under section 41(1) (information provided in confidence) and section 40(2) (personal information).
2. The Commissioner's decision is that Defra has correctly applied section 41(1) and section 40(2) to the withheld information. The Commissioner has additionally found that section 40(1) applied to the withheld information and was therefore exempt from disclosure under the FOIA. She has also decided that Defra breached section 17(1) of the FOIA by not issuing a refusal notice stating what exemptions were being relied on within 20 working days. The Commissioner requires no steps to be taken.

Request and response

3. On 15 October 2018 the complainant made an information request which cannot be reproduced here due to its personal nature. The request is therefore contained in a confidential annex. Part of the request was a subject access which has been considered by the Commissioner separately under data protection legislation. The FOIA part of the request was for an internal investigation report that had been written by Defra resulting from an anonymous whistleblower's complaint.
4. On 12 November 2018 Defra wrote to the complainant to say that it was considering applying section 30(1)(a) of the FOIA (investigations and proceedings conducted by public authorities) and needed up to 20 working days extra as it was allowed to do under the legislation. In the event, this exemption was not applied. It also said it was considering applying sections 41 and 40(2).
5. Defra responded on 11 December 2018 explaining that it was dealing with the personal data elements of the request separately. It refused to provide the requested information from part one of the request (the report) citing section 41(1) and section 40(2)/40(3A) of the FOIA.
6. The complainant requested a review on 13 December 2019 and Defra provided an internal review on 16 January 2019 in which it maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 17 January 2019 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of this complaint to be whether Defra was entitled to apply section 41 and section 40 to withhold the requested information.

Reasons for decision

Section 41 – information provided in confidence

9. Section 41(1) of FOIA provides that –

*"(a) Information is exempt information if 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".*

10. The Commissioner's advice on section 41 states that "information will be covered by Section 41 if –

- *it was obtained by the authority from any other person,*
- *its disclosure would constitute a breach of confidence.*
- *a legal person could bring a court action for that breach of confidence, and*
- *that court action would be likely to succeed."*

Was the information obtained from any other person?

11. Section 41(1)(a) states that the information must have been obtained from "any other person". In this case, the Defra Investigation Service investigation report was derived from this information. It consists of a breakdown of the concerns raised by an anonymous whistleblower, the investigative areas and actions identified by Defra emerging from interviews with staff and a final outcome for each concern. Defra was provided with information by staff at Natural England in order to produce the final report. Defra is Natural England's sponsoring department and is a separate legal entity to Defra under the FOIA and therefore, in Defra's view, most of the information was obtained by it solely from another person.

12. Defra argues that the concerns were derived from the whistleblower, but that the investigative areas and actions originated from Defra's analysis. Although the investigative areas and analysis were not generated by another person, it contends that disclosure of those areas will infer the content from which it was derived. The Commissioner takes this to mean that any disclosure has the potential to reveal some of the confidential information it was derived from.

13. Having established that the withheld information was obtained from another person, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under FOIA), would constitute a breach of confidence 'actionable' by that or any other person.

Would disclosure constitute an actionable claim for breach of confidence

14. The usual test for section 41 cases is set out in the case of *Coco v Clark [1969] RPC 41* which sets out three elements which must be present in order that a claim can be made. According to the decision in this case a breach of confidence will be actionable if:

- the information has the necessary quality of confidence;
- the information was imparted in circumstances importing an obligation of confidence; and
- there was an unauthorised use of the information to the detriment of the confider.

However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed.

Does the information have the necessary quality of confidence?

15. In order for information to have the necessary quality of confidence, it must be more than trivial and not otherwise accessible. The Commissioner has had sight of the withheld information which is an investigative report outlined in paragraph 11 above. Defra was provided with information by staff at Natural England in order to produce the final report. It should be noted that there is a quantity of personal information within the report. The information is not trivial.
16. The Commissioner has considered whether the information is otherwise accessible. Defra has confirmed that the document has had a very limited and restricted circulation within the Defra group. The Commissioner understands that it has been seen by very few individuals, although clearly it is known about by other individuals, including the complainant.

Was the information imparted in circumstances importing an obligation of confidence?

17. Defra argues that information from both the whistleblower and staff at Natural England was imparted in circumstances giving rise to an obligation of confidence. Defra took into consideration the fact that individuals who provided information to the investigators had an expectation of confidentiality. Reassurance is also given to whistleblowers who are encouraged to raise concerns (anonymously if they don't want to be identified) that any information will be protected without fear of reprisal.
18. Defra's view is that the nature of the allegations, the way in which they were made via a formal whistleblowing procedure and the circumstances in which evidence was gathered from individuals to form the outcomes of the investigation, carry the necessary quality of confidence.

Would disclosure be detrimental to the confider?

19. The nature of the information is professional rather than personal. Any disclosure has to be assessed against the detriment to the confider's professional life and reputation.
20. Defra argues that the investigation was as a result of an anonymous communication and thus there is an expectation on the part of the whistleblower that their identity remain anonymous. If the report was disclosed under the FOIA it would be publicly accessible to all and therefore could lead to the whistleblower being identified. This could have a detrimental and irreparable effect on the expectation of confidence. Defra states that whistleblowers would be dissuaded from coming forward. Disclosing the information would be an unauthorised use of that information and a detriment to the confider and, consequently, actionable.
21. The complainant's view is that the whistleblower is anonymous, consequently an individual could not be identified.
22. The Commissioner agrees with Defra that there is the potential for identification and a significant detriment if the whistleblower was identified. The named third party confiders are also likely to suffer detriment because of what they disclosed to the investigators.
23. Although section 41 is an absolute exemption and is not subject to consideration of the public interest test under the FOIA, there exists a recognised defence to an actionable breach of confidence if there is an overriding public interest in the information being disclosed. The Commissioner has therefore gone on to consider this below.

Is there a public interest defence for disclosure?

24. Defra's view concerning whether there was a public interest defence for disclosure was provided by its referral of the Commissioner to her decision notice FS50696135 where the public authority had withheld an investigative report in broadly similar circumstances. In that case the public authority had argued that the disclosure of information gained through the course of such an investigation may have a negative impact on the effectiveness of future investigations if it resulted in reticence on the part of those being interviewed. Disclosure could mean that information is not provided for fear that it will be placed in the public domain.
25. The complainant's view is that his rights are being ignored, that he has a legitimate grievance and that he has no recourse to justice unless the requested information is disclosed. The Commissioner has read the supporting documentation provided by the complainant but it largely

relates to personal matters that cannot be considered here. They do not relate to the wider public interest.

26. The Commissioner is aware that the complainant believes that he has not been able to see information that he considers will help support his personal issues that are outside the Commissioner's remit. He also suggests that some individuals who were interviewed as part of the investigation have seen the report whilst he has not been provided with it. Defra has been unable to specify how many individuals have seen the report but has indicated that it had been seen by a limited number of individuals apart from the author/s. It would appear to the Commissioner that any other conduct would not be compatible with the integrity of such an investigation.
27. There is always the possibility that the whistleblower could be identified, despite anonymity, by individuals able to make deductions from having access to the whole report. Additionally there is the principle of confidentiality for those who provided evidence to the investigators. The Commissioner has considered the fact that there is a public interest in the matters identified in the report as they relate to public money. However, she considers that the potential detriment to the whistleblower and the various individuals identified overrides the disclosure of what occurred.
28. Although the Commissioner understands the complainant's viewpoint that this information should be disclosed, there is a stronger public interest in keeping the confidential nature of the investigatory process and maintaining the exemption.
29. For the reasons provided above, the Commissioner has found that section 41(1) is engaged and has therefore not gone on to consider the application of section 40(2) with regard to either the whistleblower or those other individuals who were interviewed and provided information in confidence.

Section 40(2) – third party personal data

30. The Commissioner has gone on to consider under section 40(2) solely the report authors and the individuals named on the distribution list to receive the report. Defra has not considered them separately from its arguments concerning all third party personal information in the report.
31. 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.

32. 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 General Data Protection Regulation ('GDPR').
33. 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.
34. 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?

35. Section 3(2) of the DPA defines personal data as:

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

The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

36. 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.
37. 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.
38. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that this information names and therefore clearly identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

39. 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.

40. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

41. 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".

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.

42. 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

43. 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.

44. 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".

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

45. 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.
46. 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

47. 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.
48. 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.
49. There is a legitimate interest in the disclosure of the report which has been discussed in paragraph 27. There is also the legitimate interest identified by the complainant relating to his own desire to know who has seen this report and why he has been unable to do so.

Is disclosure necessary?

50. 'Necessary' means more than desirable but less than indispensable or of absolute necessity. Accordingly, the test is one of reasonable necessity
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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".

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.

51. Defra has not provided a specific argument regarding the names of the report authors and those to whom the report was distributed. Firstly, it is the Commissioner's view that disclosure of these names alone would not serve the wider interests of the public and would be an unnecessary disclosure of the personal data of those tasked to investigate and act on a whistleblower's concerns.
52. The complainant wants to know who read the final report because he believes that this would support his own contention that it should be disclosed to him. However, Defra cannot confirm who has seen the report. Additionally, without the disclosure of the report, the disclosure of the names of the authors and those on the distribution list is unnecessary. It will not aid his legitimate interests without the report itself being disclosed. Neither will it tell him exactly who has seen it.
53. 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).
54. The Commissioner has therefore decided that Defra was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 40(1) – first party personal data

55. Part of the report, however, includes the personal information of the complainant which was not considered by Defra as part of the FOIA request but looked at under data protection legislation. However, it does form part of the FOIA request.
56. Section 40(1) of the FOIA states that:

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."
57. Section 2(2) of the Data Protection Act 2018 defines personal data as –

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

58. Any information that includes first person personal data (in this case, the complainant's) is exempt under the FOIA as this can only be accessed via data protection legislation. There is no requirement for the Commissioner to consider the balance of public interest because section 40(1) is an absolute exemption.

Section 17

59. Section 17(1) of FOIA requires a public authority that is seeking to refuse to comply with a request to issue a refusal notice stating that this is the case within 20 working days.
60. Defra stated that it was "*considering*" applying section 30, 41 and 40 to the requested information. As additional time was taken to consider the public interest regarding section 30, Defra did not clearly specify that it was relying on sections 41(1) and 40(2) until beyond the time for complying with section 1(1).

Other matters

61. Whilst the Commissioner is aware that a public authority is well within its rights under the legislation to extend the timeframe to consider the public interest, in this case section 30 was not ultimately applied and no explanation provided, despite Defra having taken the extra time.

Right of appeal

62. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

63. 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.
64. 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

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