

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 October 2020

Public Authority: HM Revenue & Customs
Address: 100 Parliament St
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant submitted two requests to HM Revenue and Customs (HMRC) both of which sought details of allegations and investigations into HMRC staff who were alleged to have committed a number of specified offences when applying for jobs. HMRC refused the first request on the basis of section 12(1) (appropriate cost limit) and argued that the information falling within the scope of the second request was exempt from disclosure on the basis of section 40(2) (personal data) of FOIA.
2. The Commissioner's decision is that HMRC is entitled to refuse the first request on the basis of section 12(1) of FOIA and that the information sought by the second request is exempt from disclosure on the basis of section 40(2) of FOIA.
3. The Commissioner does not require HMRC to take any steps.

Request and response

4. The complainant submitted the following request to HMRC on 3 December 2019:

'Please provide the following information/data about any allegations, subsequent investigations by Internal Governance (IG) and any consequent disciplinary actions and its outcome in the matters relating to allegations of plagiarising a competency/behaviour example, failure to discuss their job application with their manager and failure to update their manager's email address correctly on the job portal by any HMRC employees in CCG, ISBC and Campaigns and Projects (C&P – including Leeds C&P location). Please provide the information/data for the last six years (going back to 1 January 2012), if not possible for six years, please provide for the last 12 months (going back to 1 January 2019).

- 1. How many cases of any of the allegations mentioned above were discovered? Please provide the number of employees and their equality data where known such as ethnicity, religious belief or faith, or no faith, gender and disability where declared and/or known?*
- 2. How many of the cases relating to plagiarising were referred for further formal investigation by IG?*
- 3. How many of the cases relating to failure to discuss with the manager were referred for further investigation by IG?*
- 4. How many of the cases relating to failure to update the manager's email address were referred for further investigation by IG?*
- 5. What action was taken in each case for any of these allegations where held to be true by IG and the decision manager?*
- 6. How many of these decisions were a formal written formal warning for 24 months?*
- 7. How many of these were dismissal?*
- 8. How many of these resulted in no further action by the decision manager or the appeal manager?*
- 9. How many of these were the cases where mitigating circumstances including any disability and mental health were presented by the employee?*
- 10. Please also provide the equality data as above in (1) of the investigation officer at IG, decision manager and appeal manager where available?*

5. HMRC responded on 18 December 2019 and explained that it considered section 12(1) of FOIA to apply to this request because it the estimated time of complying with it would exceed the appropriate cost limit. HMRC explained that it could not envisage a way in which the request could be refined to bring it within the cost limit. However, outside of FOIA, HMRC did address some of the complainant's questions. This was based on limited information held by its Internal Governance (IG) team albeit it explained that due to the low numbers involved it could not provide actual figures as doing so would likely breach the General Data Protection Regulation (GDPR). Instead it explained that for the data it did hold the numbers in question were lower than five.

6. The complainant contacted HMRC on 22 December 2019 and asked it to conduct an internal review of the refusal of his request on the basis of section 12(1). He also included the following revised request:

'I would request if you cannot provide HMRC wide information, please only provide information in relation to C&P Leeds i.e, 3 Wellington Place, Leeds, LS1 4AP – this is a new location set up in January 2019. I am requesting if you could only provide the information such as the number of cases for the alleged plagiarising and failure to discuss application with their manager and updating their manager's email address correctly by employees were formally investigated by IG, the decision by the decision manager and any subsequent appeal outcome.

I believe the question 10 on my original request contains 'Special data' or details. I believe this is not covered by 'absolute exemption'. Therefore, where there is a consent in place for the individuals, a 'public interest' test is required. I believe in this case there is public interest for the individuals' details, and further individuals cannot be identified by these details alone.'

7. HMRC informed him of the outcome of the internal review on 23 January 2020. The review upheld the application of section 12(1) to the original request. With regard to the revised request, HMRC confirmed that the numbers sought for each of the instances was less than five. However, it argued that providing exact numbers would identify the staff involved and that such information was exempt from disclosure on the basis of section 40(2) of FOIA. It also argued that releasing the decisions or appeals outcomes could also risk identifying the same individuals. HMRC noted that the complainant had also requested equality data for the IG investigation officer, decision manager and appeal manager where available, involved in the fewer than five cases. HMRC argued that as the number of cases was low it stands to reason that the number of investigation officers, decision managers and appeal managers will be the same or less. For this reason, HMRC argued that providing equality data for these individuals could also risk identifying them and it considered this information to be exempt under section 40(2) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 7 February 2020 in order to complain about HMRC's handling of both his original request of 3 December 2019 and its handling of his revised request of 22 December 2019. He argued that HMRC could comply with his original request within the cost limit and argued that disclosure of the information sought by his revised request would not lead to any

individual being identified and therefore section 40(2) of FOIA did not apply.

Reasons for decision

The original request

Section 12 – cost of compliance

9. Section 12(1) of FOIA states that:

'Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.'

10. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') at £600 for central government departments such as HMRC. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12 effectively imposes a time limit of 24 hours.

11. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) of the Fees Regulations states that an authority can only take into account the costs it reasonably expects to incur in:

- determining whether it holds the information;
- locating the information, or a document containing it;
- retrieving the information, or a document containing it; and
- extracting the information from a document containing it.

12. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be '*sensible, realistic and supported by cogent evidence*'.¹

¹ Paragraph 12 of EA/2007/0004.

13. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether, despite this being the case, there is a public interest in the disclosure of the information.

HMRC's position

14. HMRC explained that disciplinary allegations will first be considered at a local level by managers within teams across the department. If preliminary enquiries warrant IG involvement, then a referral will be made. Otherwise the entire matter will be dealt with locally and concluded with an outcome such as an informal warning being issued.
15. HMRC explained that the IG team receives and assesses information relating to staff conduct from a range of sources such as external complaints, other government departments and internal reports. Some of the externally received information indicating potential criminality or serious gross misconduct may not require IG investigation, instead it will be passed to relevant teams for managers to deal with locally.
16. HMRC explained that once an allegation is accepted for IG investigation, that decision will be officially recorded. However, there is no requirement for matters dealt with locally to be reported for the purpose of data collation.
17. HMRC explained that its human resources guidance stated that:

'24. Instances where minor misconduct is identified may not require the manager to take formal action. The matter can be addressed quickly and informally through, for example, a discussion about expectations and standards of behaviour or through counselling, training, coaching or mentoring.'

25. However, managers should also advise employees that further misconduct may lead to formal action being taken in future. A note of all management action should be kept locally and securely either electronically or in hard copy and a copy given to the employee. This can be held for one year and passed to a new manager if the job holder moves to a new post within the year. As this is informal action, the note should not be placed on the employee's personal HR file (held centrally) at this time.'

18. HMRC noted that part of the request asked it to identify allegations of:
 - plagiarising a competency/behaviour example;
 - failure to discuss a job application with a manager; and
 - failure to update a manager's email address correctly on the job portal

by any employees within its Customer Compliance Group, further specifying two directorates of this customer group, namely Individuals and Small Business Compliance (ISBC), and Campaigns and Projects (C&P).

19. HMRC explained that it had considered the smaller directorate, namely C&P, when determining whether this request could be answered within the cost limit.
20. HMRC explained that C&P has around 2,500 staff, which means approximately 250 managers. It explained that managers change quite regularly, but a record of dealing with such allegations would be kept in staff files. This means in order to collate the requested data, as a minimum it would have to ask C&P managers to review staff files and identify disciplinary conversations. However, HMRC explained that this would not include former C&P staff who have moved business area as their personal file would have been transferred with them. In such circumstances in order to identify these people HMRC explained that it would have to search personnel records. HMRC explained that even if initial disciplinary discussions could be identified within the cost limit, the individual details would then need to be provided to Human Resources in order to extract details such as gender and ethnicity.
21. Furthermore, HMRC emphasised that this estimate only considered the information relating to staff in the smallest directorate specified, C&P. It emphasised that the request also included all other staff within its Customer Compliance Group including the other directorate specified, namely Individuals and Small Business Compliance.

The Commissioner's position

22. The Commissioner accepts that in order to fulfil this request HMRC would have to get managers within C&P to review staff files to identify disciplinary conversations. Given that there are around 2,500 staff working in that area of the organisation, assuming it took – at a conservative estimate – 3 minutes to locate each file and identify any relevant information then the appropriate cost limit would be exceeded by some margin: 3 minutes x 2500 files = 7500 minutes or 125 hours. Even if it only took 1 minute to locate and extract any relevant information from each staff file, an estimate which the Commissioner accepts is arguably too low given the work involved, then the appropriate cost limit would still be exceeded: 1 minute x 2500 files = 2500 minutes or 41.6 hours. Furthermore, as HMRC explained simply asking the 250 managers within C&P may not locate all relevant information for staff working within that directorate at the time of the

request. Rather, due to staff movement within the organisation in order to locate *all* staff it may be necessary to check personnel files.

23. Moreover, the Commissioner considers that it is also important to note that such a process would only locate information for staff within the smaller of the directorates falling within the scope of the request. The same process would have to be repeated for the larger ISBC directorate.
24. The Commissioner is therefore satisfied that it would clearly take significantly more than 24 hours to fulfil this request and thus it would clearly exceed the appropriate cost limit for HMRC to comply with the original request. The Commissioner therefore accepts that HMRC can rely on section 12(1) of FOIA to refuse to comply with the request.

The refined request

Section 40 – personal data

25. Section 40(2) of 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.
26. In this case the relevant condition is contained in section 40(3A)(a)². 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 GDPR.
27. 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 FOIA cannot apply.
28. 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?

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

² As amended by Schedule 19 Paragraph 58(3) DPA.

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

30. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
31. 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.
32. 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.
33. To recap, the information sought by this request consisted of the number of staff in C&P based in one office in Leeds who had been investigated for:
 - alleged plagiarism of a competency/behaviour example;
 - the failure to discuss a job application with a manager; or
 - the failure to update a manager's email address correctly on the job portal.
34. The request also sought:
 - the decisions or appeals outcomes for each of the cases; and
 - diversity information for the IG investigation officer, decision manager and appeal manager.
35. HMRC explained that its policy is that in circumstances where a request is made for information and the total figure amounts to five people or fewer, it must consider whether this could lead to the identification of individuals and whether disclosure of the information would be in breach of its statutory obligations under the DPA.
36. HMRC argued that in the particular circumstances of this case it considered the risk of identification of those individuals subject to investigation for the three categories described by the complainant to be heightened as the information relates to one business area in a single office, with staff numbers of only 500 persons. It also explained that at the time of the request this office had been open for less than twelve months. HMRC argued that revealing decision or appeal outcomes could also risk public identification. Furthermore, HMRC argued that as the number of IG investigation officers, decision managers and appeal

managers would be low providing any equality data risked identification of those individuals.

37. The Commissioner is satisfied that if HMRC confirmed the number of cases investigated under each of the circumstances identified by the complainant then there is a genuine risk of wider identification, particularly at the office referred to in the request. She has reached this conclusion given the specific nature of circumstances that the complainant has described and the fact that the C&P staff at that location have only been in post for 12 months. The Commissioner also agrees with HMRC that the disclosure of the decision or appeal outcome for each case would have a similar risk.
38. Similarly, the Commissioner accepts that given the small numbers of IG staff involved in investigating such cases, disclosure of their diversity information could lead to them being identified, by colleagues, as having investigated such cases.
39. The Commissioner is therefore satisfied that all of the information sought by the complainant's revised request falls within the definition of 'personal data' in section 3(2) of the DPA.
40. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
41. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

42. 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'.

43. 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.
44. 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.
45. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

46. Information relating to special category data is given special status in the GDPR.
47. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
48. In the Commissioner's view the diversity information sought by the complainant clearly constitutes special category data. However, the other information sought by the complainant, ie the number of cases he described and their outcomes, is not.
49. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
50. The Commissioner considers that the only conditions that could be relevant to a disclosure under FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
51. The Commissioner has seen no evidence or indication that there is a specific consent to such data being disclosed to the world in response to a FOIA request or that such information has deliberately been made public.
52. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing the special category data falling within the scope of this request, ie the diversity information of the IG staff, would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.
53. The Commissioner has however gone on to consider whether the disclosure of the remaining withheld information, which is not special category data, would contravene any of the DP principles.
54. As explained above, 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.
55. 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*³.

56. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under 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.
57. 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

58. In considering any legitimate interest(s) in the disclosure of the requested information under 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.
59. 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.

³ 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".

60. The Commissioner accepts that the complainant has an interest in disclosure of the information, ie in order to understand the nature of workplace investigations in one area of HMRC. Whilst the Commissioner considers this to be a rather niche interest, she is prepared to accept that it is a legitimate one.

Is disclosure necessary?

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

62. The Commissioner accepts that disclosure of the withheld information is arguably necessary in order to meet the legitimate interest which is identified above.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

63. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

64. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;
- whether the information is already in the public domain;
- whether the information is already known to some individuals;
- whether the individual expressed concern to the disclosure; and
- the reasonable expectations of the individual.

65. In the Commissioner's view, a key issue is whether those concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

66. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

67. HMRC argued that anyone involved in IG cases would reasonably expect that their personal data would not be put into the public domain and that such a disclosure would be unfair processing.
68. The Commissioner agrees that employees within HMRC would have a clear expectation that the fact they had been subject to investigation by IG is not something that they would expect to be put into the public domain. Furthermore, disclosure of information sought by the complainant would provide specific details of the nature of any investigation and its outcome. The Commissioner accepts that disclosure of such information would be potentially distressing for those involved.
69. Whilst the Commissioner accepts that there is a legitimate interest in the disclosure of the information, in her view it is clearly insufficient to outweigh the fundamental rights and freedoms of the those subject to IG investigations. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
70. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
71. The Commissioner has therefore decided that HMRC was entitled to withhold the remaining information under section 40(2), by way of section 40(3A)(a).

Right of appeal

72. 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

73. 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.
74. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF