

18 August 2023

I write further to your correspondence dated 10 August 2023 in which you confirmed that you would like us to conduct an internal review of our response to your information request, handled by the Information Access team under the above case reference number.

My name is Ian Goddard and I am an Information Access Group Manager. I can confirm that I have had no prior involvement in the handling of this request.

You have challenged our decision to withhold information at parts 3 (b), (c) and (d) of your request under the exemption at section 40(2) of the FOIA. Section 40(2) exempts information in response to a request if it is personal data belonging to an individual other than yourself and it satisfies one of the conditions listed in the legislation.

In brief, it is your view that it is not possible to identify any of the data subjects concerned, were we to disclose the information you have requested (with the exception of someone committing an offence under s170/171 of the DPA18) and therefore it does not constitute personal data. As a result you contend that the exemption at section 40 cannot apply.

I'm afraid I must disagree with your contention. Personal data is defined in the UK GDPR as:

*"any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person 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 that natural person".*

As Ms Coggrave explained in her response, the ICO's [draft anonymisation guidance](#) advises that simply removing direct identifiers from a dataset is insufficient to ensure effective anonymisation. If it is possible to link any individuals to information in the dataset that relates to them, then the data is personal data. This guidance also discusses the concept of 'linkability' and 'inferences' in considering whether information is personal data or not. Whilst disclosure of the requested information in isolation may seem to be non-identifying, in my view, it could lead to identification when combined with other data in the public domain, information that we are likely to disclose, or that the requester (or others) is already aware of and has access to. This risk is increased by the limited and specific types of outcome from investigations of this nature, as detailed in our [disciplinary policy](#)).

Whilst you have made the argument that it would be impossible for anyone outside those involved in the investigation/disciplinary process to identify an individual without committing an offence, I disagree that this is the case. When examining the possibility of identification, we must consider the "Motivated Intruder Test". This test starts with a hypothesis that there exists a person who wishes to identify the individuals covered by the disputed information. The person is willing to devote a considerable amount of time and resources to the process of identification. They may have some inside knowledge (i.e. information not already in the public domain) but will not resort to illegality – they are determined but not reckless. We must also consider, as per the [draft anonymisation guidance](#) referenced above: "*whether the specific knowledge of others, such as doctors, family members, friends and colleagues could be sufficient additional information that may allow inferences to be drawn.*".

In this case, the short time frame set out in your request, the limited grade profiles you have asked about and the specific nature of the outcomes; coupled with other data in the public domain, information that we are likely to disclose under FOIA or otherwise (for example, information in relation to time in post, previous positions at the ICO etc), and information that ICO employees would have access to as a matter of course (e.g calendar information, out of office messages etc), leads me to conclude that there is a distinct likelihood that individuals would be able to be indirectly identified by disclosure of this information. There is a strong possibility that there are likely to be other staff employed by the ICO, who, if sufficiently motivated to do so, would be able to piece

together the specific information requested with other information already known to them, or in the public domain, in order to identify the individuals concerned. The same considerations, in my view, would allow you, or others, to draw inferences and link which outcomes relate to specific individuals and therefore there is a more than hypothetical risk of individuals being identified.

Consequently, I maintain that the requested information is personal data and I have gone on to consider the application of the exemption.

As explained above, section 40(2) exempts information in response to a request if it is personal data belonging to an individual other than yourself and it satisfies one of the conditions listed in the legislation. The condition contained in section 40(3A)(a) applies - that disclosure would breach one of the data protection principles. The principle is that -

*"Personal data shall be processed lawfully, fairly and in a transparent manner..."*

In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful. Article 6(1) of the UK 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.

The 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".*

In order to assess whether this lawful basis is engaged we need to consider three key questions:

(i) Purpose: what is the legitimate interest in the disclosure of the information?

(ii) Necessity: is disclosure necessary for that purpose?

(iii) Balancing test: does the legitimate interest outweigh the interests and rights of the individual?

I have considered these questions in detail below.

(i) Purpose: what is the legitimate interest in the disclosure of the information?

I consider that a legitimate interest is being pursued via this request. I acknowledge that members of the public may wish to understand the circumstances surrounding any investigation/disciplinary process and that disciplinary outcomes are consistent and fairly applied.

(ii) Necessity: is disclosure necessary for that purpose?

I am not persuaded that disclosure of personal data of the nature requested is necessary to meet this legitimate interest. I note the test is one of 'reasonable necessity' which involves the consideration of alternative measures and disclosure would not be necessary if the legitimate aim could be achieved by something else.

In this instance, we have provided the numbers of individuals who have been, or are, subject to investigations/disciplinary procedures and we also publish detailed information about our disciplinary, grievance and dispute resolution procedures on our website. In addition, for those going through such a process, and wish to challenge the fairness or consistency of outcome there are valid routes for appealing a decision.

This allows for appropriate scrutiny of the way in which the ICO conducts its investigation/disciplinary processes, without disclosing information in a way that would be overly intrusive and be unduly detrimental to individuals.

Therefore, in my view, there are other, more appropriate means to scrutinise and challenge the consistency of the investigation/disciplinary process available, and which would be less privacy intrusive.

(iii) Balancing test: does the legitimate interest outweigh the interests and rights of the individual?

In relation to the third part of the test, even if we were to accept that disclosure is necessary to meet a legitimate interest, we consider this

would be significantly outweighed by the rights and freedoms of the individuals who would be affected by this disclosure.

In my view, employees would have a very strong and reasonable expectation that information relating to disciplinary matters would remain private between themselves and their employer. We set out in our [employee-information-disclosure-policy.pdf \(ico.org.uk\)](#) that we are unlikely to disclose this type of information under FOIA. As a result employees would have no expectation that such information would be disclosed to the wider public. This approach was recognised by Tribunal in the case of *Rob Waugh v Information Commissioner and Doncaster College (EA/2008/0038, 29 December 2008)*, which found: "there is a recognised expectation that the internal disciplinary matters of an individual will be private." We consider that disclosure of the requested information has the potential to cause the individuals considerable harm and distress for obvious and apparent reasons.

We also consider that providing the exact data would not provide sufficient information for the public to scrutinise the disciplinary process, and therefore disclosure of this information would not succeed in meeting this legitimate interest. This is because each case would be different and judged on its own merits and circumstances, and in order to further scrutinise and analyse the disciplinary process, extensive amounts of data for each case would be required. Disclosure of this personal data would certainly be a breach of the rights of the data subjects, not to mention the reasonable expectation that their employers keep this information confidential.

Therefore, whilst we recognise there is a legitimate interest in disclosure of the requested information, such legitimate interests must be weighed up against the distress disclosure would cause and the intrusion into the private lives of those data subjects. In my view, disclosure would cause significant distress and intrusion, and any legitimate interest in this type of information is greatly outweighed by these effects.

I therefore find that the exemption at section 40(2) has been correctly applied. In the circumstances of this request, there is no strong legitimate interest that would override the prejudice to the rights and freedoms of the data subjects. Consequently, we do not have a lawful basis under which to disclose this information and I do not consider that disclosing this information to you, and consequently the public, is necessary or justified in order to satisfy your information request and the requirements of the FOIA.

For these reasons I do not uphold your internal review request. I realise that this response may be disappointing to you but I hope our reasoning is clear.


[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



## **Complaint procedure**

If you are dissatisfied with the outcome of this review you can make a formal complaint with the ICO in its capacity as the regulator of the Freedom of Information Act 2000.

To make such an application, please write to our Customer Contact Team at the address below, or visit the 'Make a complaint' section of our website: <https://ico.org.uk/make-a-complaint/>

Please ensure you attach any documents requested to progress your complaint when submitting your complaint.

## **Your information**

Please note that our [Privacy notice](#) explains what we do with the personal data you provide to us and what your rights are.

This includes entries regarding the specific purpose and legal basis for the ICO processing information that people that have provided us with, such as an [information requester](#).

The length of time we keep information is laid out in our retention schedule, which can be found [here](#).

Yours sincerely

Ian Goddard  
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Department

Corporate Strategy and Planning Service

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