

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 June 2011

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2WH

Summary

In July 2010 the Cabinet Office published the broad salary details of individuals working for public bodies who earned more than £150,000. The Cabinet Office did not publish these details for 24 individuals as they did not consent to their details being released. The complainant requested their names and the reasons they had given for refusing consent from the Cabinet Office. The Cabinet Office relied on sections 40(2) and 41 to refuse the request. The Commissioner decided that the withheld names were not exempt from disclosure but that the reasons were by virtue of section 40(2). The Commissioner orders the Cabinet Office to disclose the names.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The Cabinet Office ("the public authority") maintains (and the Commissioner accepts) that its policy relating to the publication of senior public sector pay details has been evolving for some time. Publication of the pay of those earning over £150,000 was first considered in the summer of 2009. Relevant individuals were informed by their employer departments about the intention to publish salary details (in £5000 bands). They were asked for their consent and given the opportunity to object.

3. On 1 July 2010 the public authority published the details of individuals working for governmental public bodies who earned more than £150,000¹. However the information for a further 24 individuals was withheld on the basis that they objected to the disclosure of their personal information.

The Request

4. On the 5 July 2010 the complainant requested from the public authority the following information
 - Name, Job Title, Organisation worked for, Annual pay rate including taxable benefits and allowances, and any notes for the 24 individuals whose information was not released along with the rest on 1st July.
 - The reasons this information was not released on the 1st July along with the rest
 - Details of any objections raised by each of the 24 individuals involved. If you cannot provide details, please disclose whether each of the 24 individuals has objected to the release of pay information.
5. The public authority refused the request on 4 August, relying on the section 40(2) and 41 exemptions. On the same day the complainant responded and informed the public authority that she had amended her request to cover only the names of the 24 individuals and the reasons they gave for their objections. In this context the complainant asked the public authority to review its decision not to release the information.
6. On 20 August the public authority informed the complainant of its review decision. The decision being that it would not alter its position of not providing the requested information by relying on sections 40(2) and 41 of the Act.

¹ <http://data.gov.uk/dataset/uk-civil-service-high-earners>

<http://www.cabinetoffice.gov.uk/news/quango-high-earners-revealed>

The Investigation

Scope of the case

7. On 31 August 2010 the complainant contacted the Commissioner to complain about the way her amended request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

"Each of these individuals earns more than the Prime Minister and their salaries are paid for by the taxpayer. The Government has said it is committed to openness and transparency, evidence of which was demonstrated by their decision to reveal the salaries of individuals earning more than £150k in Non Departmental Public Bodies. The public has a right to know who of these bodies is earning over £150 000 in order to ensure the public are well informed about how public money is spent.

Since this case involves the spending of public money I believe it would be fair and lawful for the names to be disclosed, in order to hold the public bodies to account. There is a strong public interest in doing so.

Although disclosing the salaries of these 24 individuals may be a breach of data protection principle and breach of confidence, since they specifically objected to the Cabinet Office doing so, I believe that the disclosure of their names, at the very least, and the reasons for their objections, would in this case be fair and lawful. I suspect they did not specify, in their representations to the Cabinet Office that if this matter were the subject of an FOI request their names should not be disclosed, and therefore releasing their names would not be a breach of confidence.

Lastly the Cabinet Office say they have considered whether they could mount a public interest defence to an action for breach of confidence, but they do not lay this out for me. I believe that public interest weighs on the side of disclosure".

Chronology

8. On the 28 February, 13 May and 23 May 2011 the Commissioner wrote to the public authority asking it to provide a detailed explanation of its refusal of the complainant's request for information as amended and a copy of the withheld information.

9. The public authority provided its substantive response to the Commissioner in correspondence dated 23 May 2011. It explained the background of the government releasing senior public pay deals of those earning in excess of £150,000. Individuals were informed that it was the government's intention to publish salary details (in bands of £5000) of those earning in excess of £150,000 per annum. These individuals were given the opportunity to consent or object to the proposed release. Twenty four individuals objected to the release of the information and this formed the basis of its reliance on sections 40(2) and 41 of the Act. In particular it relied on section 40(2) to withhold all the requested information and, for the reasons for the individuals withholding consent, it also relied on section 41. The public authority also provided the Commissioner with a copy of the withheld information.

Analysis

Exemptions

10. The full text of section 40(2) is available in the Legal Annex at the end of this Notice.
11. The public authority argues that the names of the 24 individuals and their reasons for not consenting to the disclosure of their salary details are exempt from disclosure under Section 40(2) of the Act.
12. Section 40(2) of the Act specifies that the personal information of a third party must not be disclosed if to do so would contravene any of the data protection principles. The first and most relevant principle of the Data Protection Act 1998 (the 'DPA') states that personal data must be processed fairly and lawfully.

Is the information personal data?

13. Section 1(1) of the DPA provides the following definition of personal data:

"personal data' means data which relate to a living individual who can be identified-
(a) from those data, or
(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller."

14. The above provides two criteria that must be fulfilled for information to constitute personal data; the information must relate to an individual, and that individual must be identifiable either from that information directly, or from that information combined with other information available to the holder of that information. In view of this, the names and their recorded reasons for their non consent is personal data.
15. The public authority argued that the names of the 24 individuals and the reasons they gave for their objections are exempt as disclosure would breach the first data protection principle, which is that it would be unfair to release the information. The Commissioner will consider the two items of information separately
16. However, the fact that the information constitutes personal data does not automatically exclude it from disclosure. The second element of the test is to determine whether disclosure would contravene any of the data protection principles. The first data protection principle states:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in schedule 2 is met, and*
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."*

Names of the 24 individuals

17. The Commissioner has first considered whether disclosure would be fair. In considering whether a disclosure is fair under the first principle of the Data Protection Act 1998 for the purposes of section 40, it is useful to balance the consequences of any disclosure and the reasonable expectations of the data subject with general principles of accountability and transparency.
18. The public authority has not put forward any adverse consequences that would be likely to be sustained by the individuals if their names were released. However it is apparent to the Commissioner that releasing the names would probably result in some increased attention and focus on those named individuals. There may well be criticism from the media and other commentators but there is no evidence that the attention would mean that disclosing the names would be unfair. The Commissioner has not been able to discern any differing adverse consequences looking at the reasons for non consent given by the relevant individuals, where possible.
19. The public authority asserts that that the reasonable expectation of the individuals at the time they were asked to consent to the publication of

their data may have been that if they did not consent their salary information would not be disclosed. Additionally it considers that it would be unfair to have released the names via the information request made by the complainant on the 5 July 2010 when it had not released the individual's names on the 1 July 2010. The public authority therefore, for the preceding reasons, states that the 24 individuals "had a reasonable and legitimate expectation" that their names were not to be released and therefore to release the information would be unfair. However the Commissioner notes that the public authority has not addressed a central issue in relation to consent. That is, do the named individuals consent to being identified as one of those who did not consent to the publication of their broad salary details? Accordingly the Commissioner must find that the individuals have not given such consent.

20. Where the data subject has not expressed consent to the disclosure of their personal data the Commissioner adopts the following approach when considering fairness:
 - Non- expression of consent is not absolutely determinative as to whether the data subject's personal data will be disclosed.
 - It also remains important to still consider whether it would be reasonable for the data subject to object to the disclosure

21. Having regard to the matters laid out above it is the Commissioner's position that the data subject's non- expression of consent to the information release is not solely determinative as to whether the release would be fair or not. The non- expression of consent is one factor that has to be weighed against those factors which focus on the public interest in releasing the information. Those who receive some of the highest salaries in the public sector should expect certain information on their public or work life to be made public, including detail of their remuneration. If it was the expectation of these senior public officials that their names would not be released, it would not be a reasonable one. It should also be noted the information disclosed will not reveal an exact salary paid. Public policy has been clearly articulated in terms of greater transparency for public expenditure (including salary information) for many years. The Commissioner finds that there is a widespread expectation that those earning over £150,000 in the public sector will be named as earning over that amount. The Commissioner notes that the salary of most Chief Executives in government agencies and NDPBs will be published in the annual report of their organisation and in local government legislation

was passed in 2009 stating that all Senior Employees who earn over £150,000 should be named².

22. The Commissioner also accepts that there is a question as to whether the individuals had a reasonable expectation that they would not be named as one of the 24 who had not consented, not just named as someone earning over £150,000. However, the Commissioner still cannot accept this was a reasonable expectation.
23. There is a strong legitimate public interest in the public knowing how its money is spent, how public sector salaries compare with those in other areas, and how money is distributed between different levels of staff. This is facilitated by the public knowing which individuals (in this case the "non-consenters") draw a relatively high salary from the public purse. On balance, it is the Commissioner's decision that, releasing this requested information would be fair.
24. The Commissioner next considered whether disclosure would be lawful. The most obvious example of where disclosure is likely to be unlawful is if disclosure would contravene a statutory prohibition. However, the Commissioner is not aware of any statutory prohibition which would serve to prevent disclosure in a case like this.
25. The Commissioner next considers whether disclosure of the names would meet a condition in schedule 2 of the DPA. The condition which is most likely to be relevant is the 6th condition. The 6th condition is that:

"The processing is necessary for the purposes of the legitimate interests pursued by the data controller or by the third party or third parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

26. The Commissioner's approach is to consider whether the 6th condition is met by way of the following 3 part test which must be satisfied:
 - there must be legitimate interests in disclosing the information,
 - the disclosure must be necessary for a legitimate interest of the public and,

² Accounts and Audit (Amendment No. 2) (England) Regulations 2009

- even where the disclosure is necessary it nevertheless must not cause unwarranted interference (or prejudice) to the rights, freedoms and legitimate interests of the data subject(s).
27. As regards the legitimate interests in disclosure the Commissioner considers that this is met by the need for transparency and accountability in knowing who commands, by public sector standards, such high remuneration from the public purse and this will be facilitated via this information disclosure. This disclosure, as the public authority acknowledges reassures the public that the use of public money is properly accounted for, monitored, traced and itemised. The Commissioner is not aware of any other alternative means by which this level of transparency and accountability could be achieved and therefore has concluded that disclosure is necessary for these legitimate interests. Whilst this general public interest is always strong, the level of public interest in this case was higher considering the level of public debate surrounding the austerity measures the public sector was facing at the time of the request was made.
28. The Commissioner has already indicated, when considering the issue of fairness, that disclosure would not cause unwarranted interference to the rights and freedoms of the data subjects. Therefore he is satisfied that disclosure would meet the 6th condition of schedule 2.
29. The Commissioner has concluded that disclosure of the information would not contravene the first data protection principle and therefore section 40(2) is not engaged.

Reasons for non-consent

30. The public authority explains that this information requested (i.e. the reasons for non-consent to disclosure of their broad salary details) were originally collated by government departments who were seeking the consent of its employees to release information about their salary. The public authority concedes that it has not been able to establish with any certainty what was agreed between the relevant individuals and their employer departments as to whether the reasons for not consenting should be made public. In these circumstances, it goes on to say, to release the recorded reasons why consent was withheld "would undermine the duty of trust and confidence which exists between employer and employee and would prejudice the interests of the data subject". Additionally it would not be in the interests of the data controllers (the employer departments) to release this information as it may (by breaking any assurances given) jeopardise or strain its relationship with particular employees.

31. A key factor is fairness and in this particular set of circumstances the Commissioner's decision is that it would be unfair to the data subject. It is reasonable that the data subjects, when giving the reasons for not consenting, believed that these reasons were not for consumption by the public. The information, it appears to the Commissioner, to have been generated in circumstances of trust and circumspection between the employer and employee. Disclosing this information would be a greater intrusion into the privacy of the data subjects. The Commissioner considers that the public interest in disclosing this information is legitimate but much less strong than the names. There is some benefit in the public understanding why senior public sector executives were not willing to consent to disclosure, but curiosity or what interests the public is not relevant. The factors related to transparency and accountability in relation to the spending of public money have much less relevance.
32. As the Commissioner has found that Section 40(2) applies to the recorded reasons why consent was withheld he need not go on to consider the applicability of section 41 of the Act.

Procedural Requirements

33. By not releasing the names of individuals who did not consent to the disclosure of their salary details within twenty working days of the request it breached section 1(1)(b) and section 10(1) of the Act.

The Decision

34. The Commissioner's decision is that it correctly withheld the reasons of why individuals did not consent to the disclosure of their salary details.
35. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- It incorrectly withheld the names of individuals who did not consent to the disclosure of their salary details. It therefore breached section 1(1)(b) and section 10(1) in not providing this information within twenty working days.

Steps Required

36. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- Disclose the names of those individuals who earned over £150,000 who did not consent to the disclosure of their salary details in July 2010.
37. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

38. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Dated the 20th day of June 2011

Signed

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled -

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Time for Compliance

Section 10(1) provides that -

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Section 40(1) provides 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."

Section 40(2) provides that -

"Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (a) either the first or the second condition below is satisfied."

Section 40(3) provides that -

"The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a

member of the public otherwise than under this Act would contravene-

1. any of the data protection principles, or

1. section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

Section 41(1) provides that –

"Information is exempt information if-

(a) 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."

Section 41(2) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence."