

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 November 2015

Public Authority: Driver & Vehicle Licensing Agency
(An executive agency of the Department for Transport)

Address: Longview Road
Morrison
Swansea
SA99 1AW

Decision (including any steps ordered)

1. The complainant requested information about counsel fees. The Driver & Vehicle Licensing Agency (DVLA) withheld the information, citing the exemption under section 40(2) of the FOIA (third party personal data) as its basis for doing so.
2. The Commissioner's decision is that DVLA has correctly applied this exemption and does not require the Trust to take any steps.

Request and response

3. On 3 July 2015 the complainant requested the following information under FOIA:

'FOIR4680 - Freedom of Information Request

How much did the DVLA counsel charge?'

4. On 20 July 2015 DVLA responded as follows:

'This information is being withheld under section 40(2) of the FOIA because it is considered to be personal information of a third party. It would not be fair or lawful for DVLA to reveal the amount paid to counsel as releasing this information would breach the first principle of the Data Protection Act 1998.'

5. On 20 July 2015, the complainant requested an internal review.
6. On 17 August 2015 DVLA provided the outcome of the internal review. It refused to provide the requested information and cited section 40(2) (Personal Information) of the FOIA:

'DVLA maintains that any information held relating to Counsel fees in the case you referenced in a previous FOI request to DVLA (Ref: FOIR4680) is considered to be personal information. Therefore DVLA remains of the opinion that information falling in scope of your request is exempt under section 40(2) of the FOI Act.

You should be aware that Counsel, unless employed directly by for example Government or industry, are self-employed. Therefore their rates are their individual wages for a particular case.'

7. On 17 August 2015 the complainant contacted the Information Commissioner.
8. On 28 October, during the investigation by the Commissioner, DVLA released the total amount of costs agreed between the parties, which included the Counsel fees:

'DVLA maintains that this information is exempt from disclosure under section 40(2) of the Freedom of Information Act 2000. However, DVLA can now disclose the total amount of costs agreed between the parties.

Following the Judgment in CO/4140/2013 R (Duff) v Secretary of State for Transport, DVLA has received settlement of costs of £25,000 in the case; this amount would include Counsel fees. As both parties agreed to the costs settlement, a formal costs assessment was not required.'

Scope of the case

9. The focus of the Commissioner's investigation is to determine whether DVLA is entitled to rely on section 40(2) of the FOIA as a basis for refusing to disclose the withheld information.

Reasons for decision

Section 40(2) – Third party personal data

10. This exemption provides that any third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act (DPA).

Is the withheld information personal data

11. Personal data is defined by the DPA as any information relating to a living and identifiable individual.
12. DVLA has explained that Counsel is a self-employed individual and therefore the rates are his individual wages for a particular case.
13. The Commissioner is satisfied that the fees are clearly the personal data of the named Counsel.

Would disclosure breach the Data Protection Principles?

14. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness.
15. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual, the potential consequences of the disclosure and whether there is legitimate public interest in the disclosure of the information in question.

Reasonable expectations

16. In this case, DVLA has stated that the Counsel was not 'directly employed or salaried by DVLA or central government'. The Counsel fees related to the individual's private life because Counsel is a self-employed individual. It is already in the public domain that this named Counsel represented the Secretary of State in proceedings, but the amount paid in fees is not in the public domain.
17. DVLA explained that although the complainant could possibly establish the Counsel's hourly rate, he would not know the total amount paid for the work. Counsel would have the reasonable expectation that his personal data, his final salary for work done, is not disclosed into the public domain.
18. DVLA stated that '*there is a general expectation of privacy when submitting invoices for payment especially when concerned with payment of salaries and it is not the practice or custom of DVLA to routinely publish precise salary details of individual's that would also include VAT rates...[and Counsel] has not been asked whether he is willing to consent to the disclosure of their personal data.*'

19. Therefore the Commissioner understands that DVLA would not routinely make public such information and the individual in this case has not consented to such a disclosure.

Consequences of disclosure

20. Disclosure is unlikely to be fair if it would have unjustified adverse effects on the individual. Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life. If an authority wishes to claim that disclosure would be unfair because of the adverse consequences on the employees concerned, it must be able to put forward some justification for this claim.
21. The DVLA has provided the Commissioner with an explanation as to the possible consequences of disclosure: 'A consequence of disclosing the information would be likely to affect (redacted name of Counsel)'s commercial interests as his rates are negotiable. Again referring to The Bar Council website extract, Barristers/Counsel are able to '*offer (emphasis added) competitive rates*'. DVLA has not relied on section 43(2) of the FOIA because by their very nature, Counsel fees constitute their salary and are therefore considered to be their personal information. Information of this nature is not already in the public domain.'
22. The Commissioner is satisfied that named Counsel would have a reasonable expectation that his fees for this particular case would not be placed into the public domain by disclosure under the FOIA. Therefore he considers that disclosure of this information would be an unfair invasion of the privacy of the individual, and as such may cause him some distress.

Balancing the rights and freedoms of the individual with the legitimate interests in disclosure

23. Given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
24. The complainant has argued that it is in the public interest to be '*able to see how public money is spent, in this case, on an external contractor. Release of such information helps to ensure that public bodies do not spend public money in inappropriate way. ... DVLA employee(s) could,*

hypothetically, pay a million pounds to a barrister who is their spouse(s), for five minutes of work and then hide behind 'personal data'.

25. DVLA has stated that *'while it is considered not to be in the public interest to disclose Counsel's salary, DVLA has considered it in the public interest to disclose the total costs of proceedings to DVLA.'* DVLA provided this information (£25,000) to the complainant on 28 October 2015.
26. The Commissioner accepts that there is a legitimate interest in overall transparency in the way a public authority such as DVLA conducts its business. However, there is no presumption that this should automatically take priority over personal privacy. The Commissioner considers each case on its merits.
27. In this case, the Commissioner is not convinced that the specific information requested, while of significant interest to the complainant, is of sufficient wider public interest to warrant overriding the protection of the third party personal data of the named Counsel.
28. Having considered DVLA's submission and the views of the complainant the Commissioner is satisfied that the complainant's arguments for disclosing the specific information in this case are not as compelling as those that the Trust has put forward for protecting the individuals' personal data, namely:
 - the individual's likely expectation about how their personal data will be managed, implicit in their role as a self-employed Counsel;
 - the individual's lack of consent to its release; and
 - the possible negative consequences to the individual of releasing the information.
29. The Commissioner is satisfied that on balance, the legitimate public interest would not outweigh the interests of the named Counsel and that it would not be fair to disclose the requested information in this case.

Conclusions

30. Balancing the above, the Commissioner is satisfied that the named Counsel would have no reasonable expectation that the information in question would be disclosed to the world at large.
31. Therefore, the Commissioner is satisfied that the withheld information is personal data and that disclosure would breach the first data protection principle as it would be unfair to the individual concerned. The Commissioner upholds the DVLA's application of the exemption provided at section 40(2) of the FOIA.

Other Matters

32. The Commissioner reminds DVLA that he is able to view all the withheld information as part of his investigation.

33. Schedule 2, paragraph 18 of FOIA amended section 58 of the Data Protection Act (DPA) so that section 58 of the DPA now read as follows:

“No enactment or rule of law prohibiting the disclosure of information shall preclude a person from furnishing the Commissioner or the Tribunal with any information necessary for the discharge of functions under this Act or the Freedom of Information Act 2000.”

Right of appeal

34. 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

35. 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.
36. 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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