

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 December 2017

Public Authority: Environment Agency
Address: Horizon House
Deanery Road
Bristol
Avon, BS1 5AH

Decision (including any steps ordered)

1. The complainant has requested information on the successful candidates for a position he applied for. The Environment Agency (EA) refused to provide the requested 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 the EA has correctly applied section 40(2) of FOIA to the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 26 June 2017 the complainant made the following request for information:

'Please provide the following:

1. Whether the successful candidate for Senior Environmental Project Manager (for which I was interviewed in March) is now in post?

2. Whether the successful candidate has more or less than 20 years' experience (either as an employee or consultant) delivering high-profile Environment Agency projects?

3. Whether the successful candidate has delivered, or been instrumental in the delivery of, Environment Agency projects with a capital budget exceeding £20 million?

4. Whether the successful candidate has given more than four published papers at Defra / Environment Agency conferences on Environment Agency projects which they have personally led?

5. Whether the successful candidate has a LinkedIn profile in which they have chosen to put details of their experience in the public domain?

6. If the answer to Question 5 is affirmative, any information that is sufficient to identify that LinkedIn profile.

7. What is the name of the successful candidate?'

5. On 27 June 2017 the EA confirmed that (Q1) the posts were filled and that employment had commenced. In response to Q2-Q7, the EA reaffirmed that *'the offer was made after a robust selection process where, based on a competency approach relevant skills and experience were taken into account.'* The EA could not comment on whether individuals with the EA have LinkedIn profiles. The EA refused to disclose the names of the successful candidates or specific details of their employment history or qualifications citing the exemption section 40(2)(Personal data) of the FOIA.

6. On 29 June 2017 the complainant requested an internal review. He argued that:

'a) If the name of the individual is not given then items 2 to 4 are not personal data as they are not attributable to any identifiable individual.

b) The Environment Agency has, or can readily find, the answer to question 5, for example by an online search taking maybe 30 seconds or by asking the successful candidate (who is now an employee).

c) If the answer to question 5 is "yes" then the answers to questions 2 to 4 are already in the public domain and cannot be exempt from disclosure.

d) Question 6 simply seeks to be directed to the relevant public domain information and is therefore not exempt from disclosure.

e) There is a legitimate public interest in knowing what background and experience is needed to fill Environment Agency vacancies and in the Environment Agency being able to demonstrate that candidates with most suitable backgrounds and experience were appointed.'

7. On 24 August 2017 the EA provided the outcome of the internal review which upheld its decision to cite section 40(2) (Personal Information) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 5 September 2017 to complain about the way his request for information had been handled. He argued that:

'The Environment Agency's claim that the recruitment process was "robust" is not a reason for refusing disclosure of this information...The public interest in transparency in recruitment and being able to demonstrate that the most suitable candidates were appointed outweighs the considerations cited by the Environment Agency.'

9. The EA explained to the Commissioner that there were 12 vacancies nationwide and there were 3 vacancies in the area that the complainant applied for. Therefore, the withheld information concerns 3 successful candidates.
10. As part of its submissions to the Commissioner, the EA confirmed that although it had applied section 40 to Q2-Q7 of the request, it did not hold information in relation to Q4 and Q5. (Q4 - Whether the successful candidate has given more than four published papers at Defra / Environment Agency conferences on Environment Agency projects which they have personally led? Q5 - Whether the successful candidate has a LinkedIn profile in which they have chosen to put details of their experience in the public domain?)
11. The EA explained that *'this information was not required as part of the eligibility criteria for the vacancies and it was not collected either on the application forms or at interview stage. As we do not hold the information, there is no obligation to obtain it in order to provide it in response to a request for information under the freedom of information regime.'*
12. On 14 December 2017 the EA sent a further letter to the complainant to confirm that it did not hold information in relation to Q4 and Q5.
13. The Commissioner has viewed the withheld information (the applications of the 3 successful candidates) and considers that it does not hold information within the scope of Q4 and Q5 of the request.
14. As Q6 is dependent on an affirmative response to Q5, the Commissioner considers the scope of this case to be to determine if the EA has

correctly applied section 40(2) FOIA to the withheld information at Q2, Q3 and Q7 of the original request.

Reasons for decision

Section 40(2) – Third party personal data

15. 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).
16. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

“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, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.’

Is the withheld information personal data

17. The two main elements of personal data are that the information must ‘relate’ to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
18. In this case, the withheld information is about the 3 successful candidates for the positions of Senior Environmental Project Manager. The information identifies the post holders and relates to their suitability for the posts.
19. The Commissioner is satisfied that the information withheld under section 40(2) is information from which living data subjects would be identifiable.

Sensitive personal data

20. Any consideration of fairness must first determine whether the requested information is defined as sensitive under the DPA. Section 2 of the DPA defines sensitive personal data as information which relates to:
- (a) racial or ethnic origin
 - (b) political opinions
 - (c) religious beliefs
 - (d) trade union membership
 - (e) physical or mental health
 - (f) sexual life
 - (g) criminal offences, sentences, proceedings or allegations.
21. The requested information does not appear to fall into any of these categories of sensitive personal data and therefore the Commissioner does not consider the withheld information to be sensitive personal data.

Would disclosure breach the Data Protection Principles?

22. 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.
23. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individuals, the potential consequences of the disclosure and whether there is legitimate public interest in the disclosure of the information in question.

Reasonable expectations

24. Whether an individual might reasonably expect to have their personal data released depends on a number of factors. These include whether the information relates to an employee in their professional role or to them as individuals, the individual's seniority or whether they are in a public facing role.
25. The information in this case concerns the professional experience of named individuals as provided to the EA during their application for employment. The EA *'consider that the information is confidential and should not be disclosed to the world at large... and has not been made publicly available by us.'*
26. The EA have explained that it *'is not aware of whether the successful candidates have made information about their professional experience publically available as we have no legitimate reason to ask, and the information was not volunteered to us.'*

27. The complainant had asked the EA to find out if the candidates have a LinkedIn profile (Q5 and Q6 of the request). The Commissioner notes that there is no requirement under FOIA for the EA to do so as FOIA only provides access to recorded information held by the public authority.
28. The EA has stated that candidates who apply to them for jobs or who become their employees, have an expectation that the personal data provided as part of the recruitment process would not be made available to the world at large. All candidates receive a data protection notice which sets out for what purposes their personal data will be used. The Commissioner was provided with a copy of this (SSCL Recruitment Service Implementation Environment Agency Data Protection) which details how the information is used in the selection process and refers to the DPA.
29. The EA stated that the posts are the first level of manager (junior) graded at level 5 in the staff grading structure (1-7) with grade 7 for middle managers. Executive managers are above the staff grades 1-7.
30. The EA stated that it would usually disclose the names of its employees as they relate to the carrying out of professional duties at grade 5, in order to be open and transparent, unless there is a specific reason not to release information. For example, the EA would not automatically release the identities of employees working in certain types of enforcement or in nuclear regulation because of the potential for harm.

'Although the appointees in this matter do not work in a 'sensitive' role, we consider that there is a risk of distress and harassment to the successful candidates if their personal data were to be disclosed in response to this request.'
31. The EA referred to the *'targeted nature of the questions in this request, the personal motives that appear to be being pursued by [complainant], and the likelihood that the successful candidates could be approached and potentially harassed about their appointment to the positions, we consider that disclosure of even the names of the successful candidates would be a breach of the DPA.'*
32. The Commissioner understands that there is no expectation from these individuals that their personal data in the withheld information would be disclosed to the public.

Consequences of disclosure/Damage and distress
33. Disclosure is unlikely to be fair if it would have unjustified adverse effects on the named individuals.

34. The EA has argued that *'the consequences of disclosure of this information could be both damaging and distressing to the individuals concerned, due to the targeted nature of [complainant]'s questions. We consider that such damage and distress would be unnecessary and unjustified.'*
35. Upon viewing the contents of the withheld information in the candidates' applications and considering the specific details of the complainant's requests and his dissatisfaction with the EA recruitment process, the Commissioner accepts that disclosure is potentially distressing for the named individuals.

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

36. 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 individuals. 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.
37. In this case, the complainant has made it clear that he wishes to understand why the other candidates were appointed and does not accept that the EA had a robust selection process:

'The purpose of requesting this information is to better understand the background and experience required to succeed in applying for vacancies in Environment Agency. If it is the case that the individual(s) appointed has more relevant experience than I do then I will drop my complaint...

Moreover, I have a legitimate private interest in being able to challenge a discriminatory outcome, if that is what has occurred...I cannot exercise my statutory right to this remedy if I am denied the relevant evidence.'

38. The EA stated that, as part of its recruitment process, it provides all prospective employees with information that clearly sets out the qualifications and experience that is necessary for each post. The EA has also stated that the complainant has received several responses about the recruitment process explaining that the EA operates competency based interviews and that he has received interview feedback outside of FOIA.
39. 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.

40. Having considered the EA'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 EA has put forward for protecting the individuals' personal data, namely:

- the individuals' likely expectation about how their personal data will be managed
- the individuals' lack of consent to its release; and
- the possible negative consequences to the individuals of releasing the information.

41. The Commissioner is satisfied that on balance, the legitimate public interest would not outweigh the interests of the individuals and that it would not be fair to disclose the requested information in this case.

Conclusions

42. 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 individuals concerned. The Commissioner upholds the EA's application of the exemption provided at section 40(2) of the FOIA.

Right of appeal

43. 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

44. 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.
45. 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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