

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 June 2019

Public Authority: Department for Exiting the European Union

Address: 9 Downing Street

London

SW1A 2AG

Decision (including any steps ordered)

1. The complainant has requested information on the special advisers in the Department for Exiting the European Union ('DExEU').
2. The Commissioner's decision is that, following the disclosure of some information, DExEU has appropriately withheld the remaining information in reliance of section 40(2) – Personal information.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 15 January 2019 the complainant wrote to DExEU and requested information in the following terms:

"1. Please provide the total amount in expenses claimed by special advisors of your department in each of the last five financial years, and the current financial year to date.

2. Please provide this broken down by named special advisor, and provide for each item, the amount claimed, the supplier, the reason for claim and the date of the expense, as well as any other information held centrally about these transactions in the accounting software used to record and process them."

5. DExEU responded on 12 February 2019. It provided the total amount requested in the request at (1) from its inception in July 2016 to the date of the request and a refusal notice in reliance of section 40(2) in respect of the request at (2).

6. Following an internal review DExEU wrote to the complainant on 15 March 2019 upholding its initial response.

Scope of the case

7. The complainant contacted the Commissioner on 21 March 2019 to complain about the way his request for information had been handled. The complainant explained his view that section 40 does not apply to his request and provided the Commissioner with his reasoning.
8. Following the Commissioner's request for DExEU to reconsider its response it went on to disclose some of the information previously withheld. A subsequent discussion with the Commissioner resulted in DExEU disclosing further information.
9. The Commissioner considers the scope of her investigation to be DExEU's application of section 40(2) to the remaining withheld information comprising the names, employee numbers and email addresses of the special advisers, the supervisor and approver names and employee numbers and corresponding invoice numbers and dates.

Reasons for decision

Section 40 – Personal information

10. Section 40(2) of the 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(3) or 40(4) is satisfied.
11. In this case the relevant condition is contained in section 40(3)(A)(a)¹. 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 set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') ('the DP principles').

The complainant's view

¹ As amended by Schedule 19 Paragraph 58(3) of the Data Protection Act 2018.

12. The complainant explained his consideration that disclosure of the withheld information would be fair, lawful and in the legitimate interest of the public.
13. His reasoning for this is that special advisers are public figures with a crucial role in our political system and thereby warranting a high degree of scrutiny. The complainant pointed to DExEU's requirement that special advisers must disclose their meetings, gifts and hospitality in publicly available filings as support for his reasoning.
14. The complainant concluded from the above that DExEU:

".. does not believe that special advisers have a reasonable expectation of privacy around their professional affairs, and there is no reason that should not also apply to their expenses, as it already does to senior civil servants. There is nothing in the act that specifies that just because a transparency is not explicitly defined in a staff contract, that it would not be a reasonable expectation that this information may be released, given their high profile roles."
15. The complainant considers that there is a clear public interest in the scrutiny of the spending of public money by politically appointed figures. He advised:

"The department has also not properly considered the legitimate interest of the public in releasing this information, given the principle that politically sensitive roles should be subject to the highest level of scrutiny so that the public can be sure these individuals are properly using public money."

The public authority's view

16. DExEU explained to the Commissioner:

"Ministers at DExEU employ a number of special advisers (SpAds). As the *Code of Conduct for Special Advisers*² makes clear, their role is to provide a political perspective to the advice and assistance that Ministers receive. They are temporary civil servants appointed in accordance with Part 1 of the Constitutional Reform and Governance Act 2010"

² *Code of Conduct for Special Advisers* :

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/579768/code-of-conduct-special-advisers-dec-2016.pdf

17. DExEU explained that the withheld information includes the names and contact details of the special advisers alongside the types of expense and amount claimed. It also contains the details of journeys taken by special advisers, including a home address, which justified the claiming of expenses. Also included in the information within the scope of the request are the names of the civil servants who approved the expenses claims and who hold grades below that of senior civil servant, and would therefore not have had a reasonable expectation that their names would be disclosed into the public domain.
18. DExEU acknowledges the broad legitimate interest in openness and transparency in government and the enhancement in public trust in the government that may result from the disclosure of the information within scope. DExEU also appreciates the more specific legitimate interest in the public having a greater knowledge of expenses claims made by identified public officials.
19. DExEU considers that the broad legitimate interest in openness and transparency in government which is identified by the complainant can (and is) achieved through the pro-active disclosure of information by Government in the transparency data which is published³.
20. DExEU considers that the specific legitimate interest in greater knowledge of the expenses claims made by identified special advisers does not override the interests, fundamental rights and freedoms of the data subjects.
21. DExEU further explained that the special advisers making the expenses claims do not have public facing roles at DExEU. Their role is to advise and assist the Ministers who employ them. They serve an ancillary function and operate with a political imperative. They do not sit conventionally within the management structure of the Department. They do not have an executive function like civil servants at senior civil servant grade and above. They cannot authorise expenditure, exercise management powers or statutory or prerogative powers.
22. In addition DExEU advised:

³ <https://www.gov.uk/government/publications?departments%5B%5D=department-for-exiting-the-european-union&publication type=transparency-data>

"We note the convention affirmed previously by the Commissioner and the First Tier Tribunal that, in general terms, those "at the grade of senior civil servant and above would not have a reasonable expectation of anonymity in respect of any document even with sensitive content. We consider it relevant that SpAds do not hold civil service grades. That being so, grade provides no positive indicator that SpAds would have had a reasonable expectation of having personal data disclosed. In the absence of such an indicator, the assessment as to their reasonable expectations must be made with reference to the substance of their roles, which is non-public facing and advisory, rather than executive in character. We consider that their roles point to SpAds not having such expectations of the disclosure of their personal data."

23. DExEU considers that the disclosure of the information already provided, whilst maintaining the exemption at section 40(2) in respect of the withheld information (with the effect that the names of individual special advisers would not be linked to particular expense claims) would uphold the interests, fundamental rights and freedoms of those special advisers.

The Commissioner's considerations

24. 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 FOIA cannot apply.
25. 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 data protection principles under the DPA.

Is the information personal data?

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

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

27. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
28. 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. In this case the Commissioner has seen the information, as identified in paragraph 9 above, and considers that it comprises the personal data of the special advisers and particular DExEU staff members. Therefore the

Commissioner is satisfied that the information relates to identifiable living individuals. This information therefore falls within the definition of 'personal data' in section 2 DPA.

29. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the data protection principles.
30. In the circumstances of this case, having considered the withheld information, the Commissioner considers that the first data protection principle is most relevant here.

Would disclosure contravene the first data protection principle?

31. The first data protection principle under Article 5(1)(a) GDPR states that:-

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"

32. In the case of a 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 (i.e. would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), fair, and transparent.
33. Article 6(1) of the 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" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
34. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

"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".
35. In considering the application of Article 6(1)(f) 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.
36. 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

37. 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.
38. 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.
39. In the circumstances of this case the Commissioner notes both the complainant’s and DExEU’s views. The Commissioner accepts that there is legitimate interest in ensuring that there is appropriate transparency in the spending of public money. She agrees with the views expressed by DExEU in respect of the information already disclosed providing a broad transparency and accountability as the total amount claimed in expenses and the nature of the expenses has been disclosed. Identifying the individuals claiming those limited expenses is a step further.
40. Nevertheless, the Commissioner accepts that there is some legitimate interest in disclosure of this further information.

Is disclosure necessary?

41. ‘Necessary’ means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least restrictive means of achieving the legitimate aim in question.
42. In the circumstances of this case the Commissioner is not convinced that there is a reasonable necessity. The Commissioner considers that

the complainant's legitimate interest in the spending of public money is not principally addressed by disclosure of the remaining withheld information. The amounts involved are not excessive or warranting further scrutiny. The Commissioner is not convinced that disclosure of the identity of the individual claiming the expense, for example of a taxi fare, adds to DExEU's transparency of the spending of public money. There is, therefore, limited necessity in disclosure.

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

43. The Commissioner must balance the legitimate interests in disclosure against the data subjects' 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.
44. In the circumstances of this case, the Commissioner has identified that whilst there is a legitimate interest in ensuring accountability and transparency on the part of DExEU, there is limited necessity in the further disclosure of the withheld information.
45. The Commissioner considers that the data subjects in this case are unlikely to have the expectation of their personal data being disclosed under the FOIA. For the reasons already covered in paragraph 21 above in respect of the role and expectations of the special advisers the Commissioner agrees with DExEU's explanation. Similarly, she considers that the reasonable expectations of the junior civil servants approving the expenses would not be for their names to be disclosed in response to an FOIA request.
46. The Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that the disclosure of the information therefore would not be lawful.
47. Given the conclusion reached above on lawfulness, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair.
48. The Commissioner has therefore decided that DExEU is entitled to rely on section 40(2), by way of section 40(3A)(a), to withhold the remaining requested information.

Right of appeal

49. 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

50. 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.
51. 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

Susan Hughes
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