

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date: 30 July 2020**

**Public Authority: Department of Finance (NI)**

**Address: Clare House  
303 Airport Road  
Belfast  
BT3 9ED**

#### **Decision (including any steps ordered)**

---

1. The complainant has requested information from the Department of Finance (the "Department") regarding a grievance process. The Department refused to disclose the requested information, citing section 40(2) of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the Department has correctly applied section 40(2) of the FOIA to the requested information.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

---

4. The complainant made a request for information on 22 January 2020, which was made in the following terms:-

"Under freedom of information, can I request all information including interview notes and statements that were used in the decision making process of this grievance.

Can I also request under freedom of information the names, rank and job role of all those that were interviewed in relation to the evidence gathering for this decision making process."

5. The Department responded on 5 February 2020 and refused to disclose the requested information, citing section 40(2) of the FOIA (personal data of third parties) as a basis for non-disclosure.
6. On 12 February 2020, the complainant sought an internal review of the Department's decision not to disclose the requested information. The reviewer upheld the original decision, which was communicated to the complainant in the Department's letter of 20 February 2020.

### **Scope of the case**

7. The complainant contacted the Commissioner on 23 February 2020 to complain about the way in which the Department had handled his request for information.
8. The Commissioner has considered the Department's handling of the complainant's request and in particular its application of section 40 of the FOIA to the requested information.

### **Reasons for decision**

#### **Section 40(2) – third party personal data**

9. 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(3A)(3B) or 40(4A) is satisfied.
10. The Commissioner has ascertained from the Department that the requested information constitutes the personal data of third parties.
11. In this case, the relevant condition is contained in section 40(3A)(a). 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 ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
12. The first step for the Commissioner is to determine whether the requested information constitutes personal data as defined by the Data

Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.

13. 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 DP principles.

***Is the information personal data?***

14. Section 3(2) of the DPA defines personal data as:

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. An identifiable living individual 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 the individual.
17. 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.
18. The Commissioner is satisfied that this information is the personal data of individuals. The Department states that the individuals are likely to be able to be identified from the requested information together with other information which the complainant would or would be likely to have in his possession. The Commissioner is satisfied that the individuals would clearly be able to be identified from their names, rank and job roles, as these are clearly personal data, also from the notes of evidence they provided. She is satisfied that it is not possible to anonymise the information in order to prevent the relevant individuals being identified.
19. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that all of the withheld information relates to certain living individuals. She is satisfied that this information both relates to and identifies them. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

20. The fact that information constitutes the personal data of identifiable living individuals 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 DP principles.

**Would disclosure of the requested information contravene principle (a)?**

21. Article 5(1)(a) of the GDPR states that:

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

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

**Lawful processing: Article 6(1)(f) of the GDPR**

24. 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"* lawful bases for processing listed in the Article applies.
25. The Commissioner considers that the lawful basis 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".*

26. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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.
27. 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*

28. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
29. In this case, the complainant was seeking information which related to a specific decision-making process within the Northern Ireland Civil Service. The Department did not consider that there was a legitimate interest in the complainant or the public being provided with the withheld information. The Commissioner, however, disagrees, and considers that there is a legitimate interest to the complainant, as the information relates to a meeting he attended and a grievance arising from same, and also to the public, in seeing how the Northern Ireland Civil Service's decision-making processes operate in a specific instance such as the one in question.

#### *Is disclosure necessary?*

30. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
31. In this case, the Commissioner is satisfied that the requested information would not be available to the complainant or to the public other than through a freedom of information request. The complainant states that, having attended the meeting, he is aware of the identity of the other attendees and cannot therefore understand why the requested information is not being provided to him. However, disclosure under the FOIA constitutes disclosure into the public domain and the Commissioner is mindful of this. The Commissioner notes that the complainant has also made a Subject Access Request (SAR) to the Department, however any outcome of this would not provide him with third party personal data, only his own personal data.
32. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, i.e. adversely affect their interests, rights and freedoms, are likely to override legitimate interests in disclosure.
33. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
34. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

35. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
36. The Department states that, although the requested information relates to their public rather than their private lives, the individuals concerned would have had a reasonable expectation that their personal information would be treated with the highest security and confidence and would not be disclosed into the public domain. It also states that disclosure of the requested information would be likely to impact upon the private lives of those individuals and would cause them unjustified distress.
37. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
38. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

**The Commissioner's view**

39. The Commissioner has therefore decided that the Department was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

## **Right of appeal**

40. 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: 0116 249 4253

Email: [GRC@justice.gov.uk](mailto:GRC@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

41. 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.
42. 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 .....**

**Deirdre Collins**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**