

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 May 2023

Public Authority: Department for Work and Pensions
Address: Caxton Hill
Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested information about grievances recorded at Child Maintenance Group ("CMG") Leicester. The Department for Work and Pensions ("DWP") refused to provide the requested information, citing section 40(2)(personal information) of FOIA as a basis for doing so.
2. The Commissioner's decision is that DWP is entitled to rely on section 40(2) to withhold the requested information.
3. The Commissioner does not require further steps.

Request and response

4. On 3 December 2022, the complainant wrote to DWP and requested information in the following terms:

"Between 1 June 2022 and 26 October 2022, how many grievances were identified within CMG Leicester"
5. DWP responded on 20 December 2022. It stated that it held information within scope of the request, however it was exempt from disclosure on the basis that the number of grievances was small and disclosure could inadvertently result in the release of personal information. DWP stated

that its system records identified less than 10 grievances for the Midlands area for the time period given in the request.

6. Following an internal review DWP wrote to the complainant on 11 January 2023. It stated that it was upholding its position.

Scope of the case

7. The complainant contacted the Commissioner on 28 January 2023 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to determine whether DWP is entitled to rely on section 40(2) to withhold the requested information.

Reasons for decision

Section 40 personal information

9. Section 40(2) of 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. 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').
11. 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 of the FOIA cannot apply.

Is the information personal data?

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

“any information relating to an identified or identifiable living individual”

13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

14. 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.
15. 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.
16. The Commissioner recognises that small numbers carry a greater risk of identification than larger ones – but that does not mean that every small number identifies any individual. Whether individuals can be identified will depend on the particular facts, such as the size of the overall dataset, the number of data points that have been requested, and the information already in the public domain that could potentially be cross-referenced with the disclosed information. It is not sufficient for there to be only a hypothetical risk of identification. If there is no realistic route to identification, the information is not personal data, regardless of its sensitivity. This is consistent with the binding Upper Tribunal ruling in *Information Commissioner v Miller* [2018] UKUT 229 (AAC).
17. When considering the possibility of identification, the Commissioner applies the “Motivated Intruder Test.” This test starts with a hypothesis that there exists a person who wishes to identify the individuals covered by the disputed information. The person is willing to devote a considerable amount of time and resources to the process of identification. They may have some inside knowledge (i.e. information not already in the public domain) but will not resort to illegality – they are determined but not reckless. The Commissioner looks to see how such a person would go about identifying the individuals involved.
18. In its submissions to the Commissioner, DWP explained that, in accordance with its departmental protocols, it does not supply the extremes of numbers regardless of whether they are high or low, as to do so may result in the disclosure of personal information. For this reason it had informed the complainant that the number of grievances recorded for the Midlands geographical area was less than 10.
19. It stated that it had declined to provide the numbers of grievances recorded at CMG Leicester as it was of the position that, due to the number of staff based there (300), it would increase the likelihood of personal data being inadvertently disclosed.
20. DWP explained that, while FOIA is an applicant blind process, it was aware that the complainant is a serving member of staff who had been involved in an internal grievance process with another member of staff,

and that the request had been made following unsuccessful attempts to obtain the information internally. It stated that the complainant had notified local management ahead of making their request. DWP maintained that the number of data points requested (number of grievances, timeframe and location) would enable the complainant to identify any individuals involved in the grievance procedure. DWP informed the Commissioner that there isn't any information available in the public domain that, when combined with the withheld information, would enable identification of individuals.

21. In this case, having considered DWP's submissions, the Commissioner is satisfied that the information relates to individual persons. While the names of the individuals are not given, the Commissioner accepts that the data sought, combined with the information already known to the complainant, could identify individual persons and is therefore personal data.
22. The fact that information constitutes the personal data of an identifiable person does not automatically exempt it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the data protection principles. The Commissioner has focussed here on principle (a), which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
23. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary and whether those interests override the rights and freedoms of the individuals whose personal information it is.

Legitimate interest and necessity

24. 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.
25. 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.

26. The Commissioner recognises that the complainant has a legitimate interest in the information in order to establish details about grievances raised at a particular office location. DWP acknowledged that there is a public interest and a duty of transparency in conducting of Departmental business, including its internal human resourcing policies.
27. The Commissioner understands that disclosure of the information is necessary to meet the complainant's legitimate interests, particularly as they have sought to obtain the requested information via internal methods and have been unsuccessful in doing so.

Balancing test

28. It is necessary to balance the legitimate interests in disclosure against the fundamental rights and freedoms of the data subjects. In doing so, it is necessary to consider the impact of disclosure.
29. In the Commissioner's view, a key issue when considering the balancing test is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to the individuals, taking into account whether or not they have consented to disclosure.
30. Based on the above analysis, the Commissioner considers that disclosing the requested information when placed into the context of the complainant's circumstances, may lead to the direct identification of persons involved in the grievance process. Grievance procedures are a confidential and formal way for an employee to raise a complaint against the Department, a manager or colleague and individuals engaged in the grievance procedure have a reasonable expectation that their personal data will not be shared.
31. The Commissioner also notes that this appears to be a primarily private matter and of little wider significance or interest to the public, therefore disclosure of the information under FOIA mechanism is not proportionate.
32. The Commissioner's decision is that DWP is entitled to rely on section 40(2) to withhold the requested information.

Right of appeal

33. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

34. 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.
35. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF