

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 May 2023

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant has requested information from the Ministry of Justice (the MoJ) relating to the decision not to publish guidance.
2. The Commissioner's decision is that the MoJ was entitled to rely on section 40(2) when refusing this request.
3. The Commissioner does not require further steps.

Request and response

4. On 19 August 2022, the complainant wrote to MoJ and requested information in the following terms:

"Internal documents which explain the failure to publish Guidance promised to Legal Aid Providers as part of training sessions on the 2017 Standard [Crime] Contract Standard Terms delivered to those Providers.

I do not seek outward facing documents other than FAQ's in relation to the procurement of the 2017 Standard [Crime] Contract."
5. The MoJ responded on 16 September 2022. It provided some information within the scope of the request, but advised the remaining information was exempt under section 40(2) and section 21. It further advised that some additional redactions had been made, where information fell out of the scope of the request.

6. Following an internal review, the MoJ wrote to the complainant on 18 October 2022. It stated that it was upholding its original decision.

Scope of the case

7. The complainant contacted the Commissioner on 25 March 2023 to complain about the way their request for information had been handled.
8. The complainant was concerned with the level of redactions made to the information that was disclosed.
9. The Commissioner considers that the scope of his investigation is to consider whether the MoJ was correct when relying on section 40(2) to refuse to provide some information.
10. The Commissioner will also consider whether the MoJ was correct when advising the remaining information was not in the scope of the request.

Reasons for decision

Out of Scope

11. Having reviewed all the withheld information, the Commissioner is satisfied that some of the information does not fall within the scope of the request and therefore the MoJ has redacted this information appropriately.
12. The remaining information has been refused under section 40(2), which the Commissioner will now consider.

Section 40 personal information

13. 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.
14. In this case the relevant condition is contained in section 40(3A)(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

¹ As amended by Schedule 19 Paragraph 58(3) DPA

processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('UK GDPR').

15. 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 FOIA cannot apply.
16. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. 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.
20. 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.
21. In the circumstances of this case, the withheld information is names or personal email addresses of individuals. The Commissioner is satisfied that the information relates to the data subject(s) and therefore this information falls within the definition of 'personal data' in section 3(2) of the DPA.
22. 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 DP principles.
23. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

25. In the case of an 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.
26. 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

27. 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"²

28. In considering the application of Article 6(1)(f) of the UK 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;

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

29. 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

30. 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.

31. 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.

32. The Commissioner acknowledges that there is a wider legitimate interest in the release of the requested information, this demonstrate that the MoJ is acting in a transparent manner and would ensure accountability.

33. The Commissioner is therefore satisfied that there is a legitimate interest in the requested information, he will now go onto to consider the necessity test.

Is disclosure necessary?

34. '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.

35. The Commissioner is satisfied that the information disclosed already meets the legitimate interests of the complainant, the redacted information is either names of individuals or email addresses, which the complainant has not expressed any legitimate interests in.

36. The Commissioner is therefore satisfied that the MoJ was entitled to rely on Section 40(2) when refusing to provide this information.

Right of appeal

37. 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

38. 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.
39. 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

Alice Gradwell
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