

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 May 2023

Public Authority: Department of Finance
Address: 2nd Floor West Clare House
303 Airport Road West
Belfast
BT3 9ED

Decision (including any steps ordered)

1. The complainant requested information in the form of a series of questions about an external recruitment competition held by the Department of Finance ("the DOF") relating to HR Workstream Lead roles. The DOF cited section 40(2) (personal information) of FOIA to withhold the requested information.
2. The Commissioner's decision is that the DOF is entitled to rely on section 40(2) of FOIA to withhold the requested information and has complied with section 1(1) of FOIA.
3. The Commissioner does not require any steps to be taken as a result of this decision.

Request and response

4. On 2 February 2023, the complainant wrote to the DOF and requested information in the following terms:

“In respect of this competition, how many candidates scored the following at interview (overall assessment score):

78 and above;

70 to 77;

60 to 69;

59 and below.”

5. The DOF responded on 21 February 2023 citing section 40(2) of FOIA to withhold the information requested and explained its reliance on the exemption cited.
6. On 13 March 2023 at internal review, the DOF upheld its reliance on section 40(2) of FOIA to withhold information in scope of the request and explained that the numbers invited to interview were low (fewer than 10) and that identification of these individuals would be likely given the particular circumstances of the request.

Reasons for decision

Section 40(2) – personal information

7. 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.
8. 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 UK General Data Protection Regulation ('UK GDPR').

9. 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.
10. 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?

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

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

12. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
13. 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.
14. 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.
15. In this case the withheld information is the number of candidates whose scores were in a specific range when shortlisted for interview in a recruitment competition, which may not appear to constitute personal data. However, whilst the names of the individuals are not given, having considered the DOF's submissions, the Commissioner is satisfied that data subjects could be directly identified by the complainant and wider public if this information were to be disclosed.
16. Having considered the information available to him, the Commissioner is satisfied that this information falls within the definition of 'personal data' in section 3(2) of the DPA.

17. 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.
18. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

19. 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.”

20. 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.
21. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

22. 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”

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”

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

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

24. 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

25. 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.

26. 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. 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.

27. In this case, the DOF recognises that there is a legitimate interest in openness and transparency, as well as its accountability for the recruitment exercise.

Is disclosure necessary?

28. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

29. In this case, the information being withheld is about the scores of candidates (fewer than 10) who had been shortlisted for interview during a recruitment competition, being broken down into specific ranges. The DOF says that it is not necessary to disclose the small numbers involved within specific score ranges, in order to fulfil the legitimate interest being pursued.
30. Having considered the views of the DOF and the requester, the Commissioner accepts that disclosure of the withheld information is necessary for the requester to understand the detail of the recruitment data, including fairness, transparency and accountability in the process.

Balancing test

31. Having determined that disclosure is necessary, to the Commissioner must now 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.
32. 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.
33. Based on the above analysis, the Commissioner considers that disclosing the requested information when placed into the context of the complainant's knowledge, may lead to the direct identification of persons involved in the interview process. Interview processes are a confidential and formal way for an employer to assess the suitability of candidates for a particular role and individuals engaged in the interview process have a reasonable expectation that their personal data will not be shared outside that context.
34. The Commissioner also notes that this is primarily a private matter between a recruiter and candidate and of little wider significance or interest to the public; therefore disclosure of the information under the FOIA, which would be a disclosure to the world at large, is not proportionate.
35. Having considered both the DOF's explanations concerning the likelihood of identification due to the small numbers involved and the requester's knowledge of the process and those involved, the Commissioner has determined that there is insufficient legitimate interest to outweigh the

fundamental rights and freedoms of the individuals in this specific case .
Consequently there is no legal basis for the DOF to disclose the withheld information and to do so would be in breach of principle (a).

36. The Commissioner's decision is that DOF is entitled to rely on section 40(2) to withhold the requested 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: 0300 1234504

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

Joanna Marshall
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF