

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 November 2023

Public Authority: Oxford Direct Services Ltd ('ODSL')

Address: St Aldates Chambers
109 St Aldates
Oxford
OX1 1DS

Decision (including any steps ordered)

1. The complainant has requested, from Oxford Direct Services Limited ('ODSL'), information relating to its implementation of furlough. ODSL refused the request under sections 40(2) – third party personal data, 43(2) – commercial interests, and 36(2)(b) and (c) – effective conduct of public affairs, of FOIA.
2. The Commissioner's decision is that ODSL was correct to apply section 40(2) to withhold relevant information, however it was not correct to apply section 43(2) and section 36(2)(b) or (c) as its basis for refusing to provide any of the requested information.
3. The Commissioner requires ODSL to take the following steps to ensure compliance with the legislation.
 - To disclose the information withheld under section 43(2) and section 36(2).
4. ODSL must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner

making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 8 May 2023, the complainant wrote to ODSL and requested information in the following terms:

"Please provide copies of all emails sent and received between 20 March 2020 and 30 June 2020 by the Managing Director of Oxford Direct Services Ltd that contained the word "furlough" in either the subject header or the body of the text. Do not limit information provided to generic templates and publicly available documents, although this should be included".
6. ODSL responded on 26 May 2023. It disclosed some information falling within the scope of the request; however, it withheld other information and cited the exemptions in section 40(2) – personal data of third parties, section 41 – information provided in confidence, and section 43(2) – commercial interests, of FOIA.
7. Following an internal review, ODSL wrote to the complainant on 27 June 2023. It upheld its initial decision.

Scope of the case

8. The complainant contacted the Commissioner on 20 June 2023, to complain about the way their request for information had been handled.
9. During the course of the Commissioner's investigation, ODSL reconsidered its decision and disclosed further information to the complainant. Whilst it withdrew its reliance upon section 41, ODSL maintained its position that certain information was exempt from disclosure under sections 43(2) and section 40(2). It also now applied section 36(2)(b) and (c) to withhold other information.
10. The following decision notice therefore analyses whether ODSL was correct to withhold information under sections 40(2), 43(2) and section 36(2)(b) and (c) of FOIA.

Reasons for decision

Is ODSL a public authority for the purposes of FOIA

1. Oxford Direct Services (ODS) is the group trading name for two separate companies, ODSL, and Oxford Direct Trading Services Limited ('ODTSL'), which are both wholly owned by Oxford City Council ('OCC').
2. ODSL has confirmed that both companies are public authorities for the purposes of FOIA as they fall under the definition of public authorities provided by section 6(2)(b)(i) of FOIA¹.
3. ODSL said that both public authorities operate together, but within their respective areas, under the name ODS Group. ODSL provides administrative support to ODSTL and responds to FOI requests on behalf of either, or both companies. Therefore, requests made to either of these authorities are responded to by ODSL on behalf of the relevant authority. Where information is held by both of these authorities, ODSL will provide an FOI response in relation to both.
4. As ODSL is the primary authority for responding to FOI requests, the Commissioner considers that it will generally hold information on both its, and ODSTL'S behalf. The Commissioner will therefore, generally, issue his decision notices to ODSL, unless ODSL specifies to the Commissioner that in respect of any individual complaint, it considers that the information is held only by, or on only on behalf of, ODSTL. In such cases the Commissioner will address decision notices to ODSTL specifically.
5. However, in this case, the relevant request explicitly relates to ODSL, not to ODSTL. The Commissioner is therefore satisfied that only information held by ODSL, and not ODSTL, falls within the scope of the complainant's request in this instance.

¹ <https://www.legislation.gov.uk/ukpga/2000/36/section/6>

Section 40(2)– personal data of third parties

6. This reasoning covers whether ODSL was correct to apply section 40(2) of FOIA to any part of the withheld information.
7. 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.
8. In this case the relevant condition is contained in section 40(3A)(a)². 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').
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 2018'). 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 2018 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. The Commissioner is satisfied that part of the requested information is personal data. It is the identities and contact details of individuals working for ODSL or Oxford City Council.

² As amended by Schedule 19 Paragraph 58(3) DPA

Would a data protection principle apply

14. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed on principle (a), which states:

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

15. 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
16. 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

17. The Commissioner considers that the lawful basis most applicable is article 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"³.

18. 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 these interests override the rights and freedoms of the individuals whose personal information it is.

³ 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".

19. ODSL argues that there is no legitimate interest in the disclosure of the withheld information. It has said that it had disclosed the majority of the information, which includes the names of senior officials, counsellors, and other senior staff, and that it has only redacted the names and contact details of junior staff. ODSL states that it does not consider that the redactions have reduced transparency over its actions and decisions.
20. The Commissioner recognises that the public has a legitimate interest in having access to the full documentation over the issue in order to create transparency and accountability for the decisions made by ODSL regarding the furloughing of its staff. This includes the identities of the decision makers over the issue.
21. The next question is whether the legitimate interests which have been identified override the rights and freedoms of the individuals concerned. The Commissioner must therefore balance this legitimate interest against the rights and freedoms of the individuals whose data has been withheld.
22. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will 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 acting in their public or private capacity, and the initial purpose for which they provided their personal data.
23. The Commissioner has balanced the legitimate interest which have been identified against the fact that the individuals concerned would have a reasonable expectation that their information would not be disclosed to the public. The Commissioner considers the following to be important factors in his consideration of this case:
 - a) The requested information primarily relates to the individuals' public lives, but details of names and contact details whilst at work also impinge upon their private lives.
 - b) The Commissioner considers that it is not necessary to have access all of the requested information in order to meet the legitimate interest in creating transparency and accountability. The majority of the information has been disclosed, and this is sufficient to determine the actions taken by ODSL at the time that furlough was under discussion.
 - c) Senior Officers identities have not been redacted from the disclosed information. Senior Officers have a greater level of accountability to the public for their work, decisions, and management of public money. As such there is a greater expectation that information about

them may be disclosed in response to a request. Less senior officers are accountable to ODSL or to the council, rather than to the public, and their performance and decision making is managed via the personal development and disciplinary processes.

- d) Junior officers would not expect that their details, such as names, job roles and contact details would be disclosed in response to an FOI request. Whilst they would expect that some of these details may be disclosed as part of their normal day-to-day business activities, they would not expect the entirety of the requested information to be disclosed in response to an FOI request. Such a disclosure would be far more intrusive as FOI disclosures are considered to be to the whole world.
 - e) Junior officers would also find it distressing that their information has been disclosed to the complainant in response to an FOI request. The Commissioner notes that providing details such as specific contact details to the whole world via a response to an FOI request raises the risk of unwanted contacts from organisations and individuals, and unwanted marketing calls and phishing emails etc.
 - f) The Commissioner considers that the legitimate interests identified would not warrant the disclosure of personal details of lower grade staff as this would not be required in order to meet the legitimate interests which have been identified, bearing in mind the information which has already been disclosed or published by ODS.
24. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms in the circumstances of this case. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful, and would be in breach of principle (a).
25. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
26. ODSL was therefore correct to withhold the information under Regulation 13 of the EIR.

Section 43(2) – Prejudice to commercial interests

27. ODSL has highlighted to the Commissioner the information which it has withheld under section 43(2) of FOIA.
28. Section 43(2) provides that "*Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).*"
29. In order for a prejudice-based exemption, such as section 43, to be engaged the Commissioner believes that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e., disclosure 'would be likely' to result in prejudice, or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

Does the information relate to a person's commercial interests?

30. ODSL argues that its own commercial interests would be prejudiced if the requested information were to be disclosed.
31. It also argued that third party's interests would be likely to be prejudiced if the information were to be disclosed; most notably Oxford City Council, Bristol City Council and Crystal Electronics Ltd and Siemens. However, ODSL did not explain why it considers that this information would be commercially sensitive to these organisations. It also has not provided any correspondence from these organisations confirming that they consider that a disclosure would be prejudicial to their commercial interests. As the Commissioner cannot consider

speculative arguments on behalf of other organisations, the Commissioner has concentrated on the section 43 arguments relating to ODSL itself.

32. ODSL argues that a disclosure of the withheld information could prejudice its commercial interests by disclosing sensitive information to its competitors about its business model and by prejudicing its ability to negotiate best value arrangements with existing and future partners, and suppliers. The Commissioner is therefore satisfied that the information relates to ODSL's commercial interests.

The causal relationship

33. ODSL argued that prejudice would be likely to occur by disclosing commercially sensitive information to competitors about its business model, and by prejudicing its ability to negotiate best value arrangements with existing and future partners and suppliers.
34. It said that the following information would be likely to cause prejudice to its commercial interests if it was disclosed:
- Dividends paid by ODSL to Oxford City Council.
 - The Commercial Strategy of ODSL.
 - ODSL's existing and potential partnerships with third parties and suppliers.
 - Disclosure of commercially sensitive data to ODSL's competitors.
35. The Commissioner notes that a disclosure of information such as its commercial strategy and its business model might provide competitors with useful information which they could use to gain a competitive advantage against ODSL. However, ODSL did not explain to the Commissioner how such issues might be caused as a result of the disclosure of the information, nor did it explain how its competitors could use the withheld information to its detriment.
36. The Commissioner cannot speculate why the information would cause commercial prejudice to ODSL. It is for ODSL to explain why the information would cause the prejudice it considers will occur, with direct reference to the information in question.
37. The Commissioner also notes that the requested information relates to May-June 2020 and the introduction of furlough at that time. It is therefore older information which will not relate to ODSL's commercial situation at the time of the request in May 2023. The Commissioner accepts that the information may still be relevant, however he considers that the commercial sensitivity of that information from that period is

likely to have waned significantly in the intervening period to the date of the request in May 2023.

The Commissioner's conclusions

38. Having taken into account ODSL's arguments and the withheld information it has submitted, the Commissioner has not been persuaded that information dating back 3 years will retain the commercial sensitivity which it may have once had.
39. Although the Commissioner accepts that details within the information may be commercially sensitive, ODSL has not explained to the Commissioner why a disclosure of the withheld information would be commercially prejudicial to it in 2023. It is not for the Commissioner to speculate on how or why prejudice might occur. In the absence of such information the Commissioner's decision is that ODSL was not correct to apply section 43(2) to withhold the information.
40. As the Commissioner's decision is that section 43 is not engaged, he is not required to carry out a public interest test.

Section 36 – prejudice to the effective conduct of public affairs.

41. ODSL applied section 36(2)(b) and 36(2)(c) to withhold some information from disclosure.
42. These sections provide that information to which this section applies is exempt information if, *in the reasonable opinion of a qualified person*, disclosure of the information under Act—

"(b) would, or would be likely to, inhibit—

*(i) the free and frank provision of advice, or
(ii) the free and frank exchange of views for the purposes of deliberation, or*

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

The qualified person

43. The Commissioner has firstly considered who, within ODSL is the 'qualified person' for the purposes of section 36. The relevant qualified person for the purposes of this exemption is defined by section 36(5).

44. The relevant subsection for a publicly owned company is section 36(5)(o). This provides that, the qualified person will be:

"in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means—

- (i) a Minister of the Crown,*
- (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or*
- (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."*

45. ODSL separated from Oxford City Council for the purposes of responding to FOI requests in April 2023. As such, it asked the Commissioner who is the authorised person who could apply section 36. The Commissioner informed it that this is an issue which needs to be determined by ODSL itself as the Commissioner does not hold this information. He further advised it that it may need to seek advice from Oxford City Council or the Cabinet Office, and provided a link to his guidance on determining who the qualified person in an authority is. The guidance states that:

"If you are a public authority falling within section 36(5)(o) and are uncertain who is your authorised qualified person, you can get advice from the FOI team in your central government parent department..."

and

"The qualified person is required to give a reasonable opinion about the likelihood of prejudice or inhibition under section 36(2). The qualified person's opinion is crucial to engage the exemption. If the opinion is not given by the appropriate person, the exemption cannot apply."⁴

46. ODSL subsequently argued that as the Act does not specify who in a limited company may act as the "qualified person", it chose to mirror as closely as possible the "qualified person" specification for Local Authorities as set out by the Department of Levelling Up. This indicates that an Authority's Monitoring Officer may be so nominated. It said that,

⁴ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/#whoisthe>

as such, the Executive of ODSL nominated the Company Secretary as its "qualified person".

47. From the description provided by ODSL, the Commissioner notes that the person who it has designated as the qualified person has not, insofar as ODSL has informed him, been authorised as such by a Minister of the Crown. ODSL itself also does not appear to have been authorised as a qualified person by a relevant Minister.
48. In the absence of either of these two options, the qualified person for ODSL is a Minister of the Crown. It was not, however, a Minister of the Crown who applied section 36 to withhold the information in respect of this request for information.
49. As the person who gave the opinion is not the qualified person, section 36 cannot therefore be applied to withhold the relevant information.
50. The Commissioner's decision is therefore that ODSL was not correct to apply section 36(2)(b) or (c) to withhold the information from disclosure.

The Commissioner's Conclusions

51. The Commissioner has decided that, whilst ODSL was correct to apply section 40(2) to withhold the redacted personal data falling within the scope of the request, it was not correct to apply section 43(2) or section 36(2).
52. The Commissioner therefore requires ODSL to disclose the information it withheld under section 43(2) and 36(2) to the complainant in response to their request for information, subject to the redactions made under section 40(2).

Right of appeal

53. 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

54. 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.

55. 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

Ian Walley
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