

Freedom of Information Act 2000 (FOIA)

Decision notice

29 August 2024

Public Authority: Department for Culture, Media and Sport
Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested names of individuals attending Bullying and Harassment Roundtable meetings between specified dates from the Department for Culture, Media and Sport ('DCMS').
2. In relation to the aspects of DCMS's response which constitute this case, the Commissioner's decision is that, on the balance of probabilities, DCMS does not hold the names of the external attendees. It therefore complied with section 1(1) of FOIA. It was also correct to withhold personal information of its own employee under section 40(2).
3. Consequently the Commissioner does not require further steps to be taken by DCMS in relation to this request.

Request and response

4. On 18 January 2024 the complainant made the following request to DCMS for information under FOIA:

"Please send to me the names of the individuals who attended the DCMS Bullying and Harassment Roundtable meetings. If they represented an organisation, please tell me which. Please search only after the 25th October '22 to before 28th November '23".
5. DCMS responded on 30 January 2024. It confirmed that it did not hold the names of individual attendees at meetings during the period of time specified in the request.

6. DCMS further confirmed that it did hold some information within the scope of the request relating to meetings in April 2023 and July 2023. However, it refused to provide it claiming reliance on section 21(1) of FOIA (information accessible to applicant by other means).
7. It further confirmed that the lists of organisations represented during the meetings in question are already available to the public. DCMS provided a link to this information.
8. The complainant requested an internal review of the response on 31 January 2024. He particularly questioned DCMS's position that it did not hold the names of individuals attending meetings during the period indicated in the original request. The complainant contended that DCMS itself attended the meetings on April 2023 and July 2023 and therefore it should at least know those names. Furthermore, the complainant pointed out that other prior meetings in the same series of meetings, apart from one, which go back to June 2021 contained a full list of attendees.
9. DCMS provided an internal review response on 7 February 2024 in which it maintained its original position regarding the section 21(1) exemption. It further confirmed that it did not record the names of external attendees at the meetings and that the name of one DCMS official was withheld from disclosure under section 40(2). This specifically relates to a junior staff member who is not public-facing.

Scope of the case

10. The complainant contacted the Commissioner on 9 February 2024 to complain about the way his request for information had been handled.
11. The Commissioner considers that the scope of his investigation is to determine whether DCMS was correct to say that it did not hold some of the information requested by the complainant, namely lists of individual names of the attendees at the Bullying and Harassment Roundtable meetings at the time specified by the request, and whether DCMS was entitled to withhold personal details of its employee who attended the meetings on the basis of section 40(2) of FOIA.
12. The complainant did not challenge DCMS's reliance on section 21. Therefore the Commissioner has not considered this issue.

Reasons for decision

Section 1 – Information not held

13. Section 1 of FOI states that:

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

14. The public authority is not obliged to create or acquire information in order to satisfy a request. The Commissioner is not required to consider the accuracy or the adequacy of the recorded information a public authority does (or, in some cases, does not) hold. This is because the terms of FOIA only relate to the provision of information as it is held, regardless of its accuracy or validity.

15. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).

The complainant's position

16. The grounds for the complainant's position have been described in paragraph 8 of this decision notice. This particularly refers to the disclosure of the names of attendees at the meetings in April and July 2023, including representatives from DCMS.

DCMS' position

17. In its response to the complainant of 30 January 2024, DCMS confirmed that it held some of the information within the scope of the request, specifically the names of organisations represented at the Bullying and Harassment Roundtable meetings in April 2023 and July 2023. However, it refused to provide it citing section 21(1) exemption for the reason that the requested information was already reasonably accessible by other

means. DCMS provided a link to the relevant website where the information is available.¹

18. Further, in relation to the part of the request concerning the names of individual attendees, DCMS confirmed that it did not hold the names of the external attendees.
19. In the internal review response to the complainant DCMS said that it did not record the names of the external attendees to the meetings in question. It further explained in its response to the Commissioner's investigation that:

"First and foremost, these are not "DCMS roundtables". DCMS hosted one roundtable in June 2021. As a result of this roundtable a working group was created which is chaired by Creative UK."
20. In response to the Commissioner's investigation, DCMS further explained that electronic searches were conducted by the relevant policy team, which located minutes from the meetings. This was the only recorded information located and no other searches were conducted.
21. DCMS acknowledged that this is inconsistent with the previous and subsequent meetings but it explained that there is no standard practice with regard to meeting minutes, to record individual names of attendees to meetings when DCMS is not a host.²

The Commissioner's view

22. In reaching his decision with respect to whether the requested information about the external names of attendees to the meetings is held or was held at the time of the request, the Commissioner has taken account of the views put forward by the complainant. He has also considered the arguments of DCMS.
23. He understands why the complainant could believe that the information he asked for might be or should be held. DCMS has admitted that the lack of the requested information relating to those two specific meetings is inconsistent with the previous and subsequent meetings.
24. However, although he accepts the complainant's reasoning that this might seem at odds with all other meetings, he considered the

¹ <https://www.wearecreative.uk/bullying-harassment/bullying-harassment-roundtable/>

² In this case DCMS explained that it only hosted one meeting in July 2021 which then resulted in a working group chaired by Creative UK and not DCMS, However, DCMS has taken a pragmatic approach to how it interpreted the request in respect of what information it held.

explanation provided by DCMS and has found no evidence to suggest that the information in question is or was held, including for example in a record in addition to the minutes.

25. Based on the information available to him, it is the Commissioner's understanding that the meetings were chaired by Creative UK and it appears that the two organisations were working together rather than being led by DCMS.
26. Further the Commissioner considered the differences in recording of meetings, especially the fact raised by the complainant that names of attendees were not recorded consistently at every meeting. The Commissioner considered the April and July meetings where minutes were taken by DCMS in the form of a readout, and which do not contain attendee names. He also considered the November 2023 meeting where minutes were taken by Creative UK and which do contain attendee names.
27. Based on this and DCMS' explanation that DCMS is not the host of those meetings and therefore is not required to record the information requested, as a matter of standard practice or policy, it is the Commissioner's view that this would appear to be simply a difference in approach between the two organisations.
28. Consequently, the Commissioner's decision is that, on the balance of probability the information requested by the complainant with regards to the names of attendees (i.e. individuals) of the Bullying and Harassment Roundtable meetings in question is not held nor was it held at the time of the request. Therefore DCMS has complied with the requirements of section 1(1) of FOIA in this respect.

Section 40(2) – Personal information of third parties

29. 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.
30. 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 UK General Data Protection Regulation ('UK GDPR').
31. 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.

32. 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?

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

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

34. 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.
35. 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.
36. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information is personal data. This is because the withheld information is the name of the DCMS member of staff attending the Bullying and Harassment Roundtable meetings. A name and a surname is quite obviously information that both relates to and identifies the individual concerned.
37. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
38. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
39. The most relevant DP principle in this case is principle (a), set out at Article 5(1)(a) of the UK GDPR.

Would disclosure contravene principle (a)?

40. 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”.

41. 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.

42. 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

43. 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.”³

44. 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;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

45. 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

46. 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.

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 UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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”.

47. 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.
48. The complainant in this case explained to the Commissioner that the requested information, including the withheld information, which was the name of a DCMS staff member, relates to an investigation conducted by the complainant into individuals participating in the Bullying and Harassment Roundtable meetings one of whom, according to the complainant's knowledge, has received a caution from the police for harassment.
49. The Commissioner has to take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public. He must therefore consider the wider public interest issues and fairness to the persons involved when deciding whether or not the information is suitable for disclosure.
50. Having considered the specific circumstances of the complainant's request, the Commissioner accepts that there is a legitimate interest in disclosure of the withheld information, i.e. the name of the member of DCMS staff who attended the meetings. He recognises that although it is largely a personal interest of the complainant, there is also a legitimate interest to promote transparency.

Is disclosure necessary?

51. '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.
52. The Commissioner has accepted the legitimate aim identified by the complainant. However, in his opinion the disclosure of the details of the DCMS member of staff is not necessary because disclosure would not serve the specific interests identified by the complainant, although it would serve the general legitimate interests in transparency. This, therefore, including accounting for what is already in the public domain, is insufficient in the circumstances of this case to make disclosure necessary. The complainant has not suggested that this individual is the person who received a police caution. Nor has he provided any specific reason why it is necessary to disclose the name of this individual. Given that the individual is not a senior member of staff and is not in a public

facing role, the Commissioner is not persuaded that it is necessary to disclose their name into the public domain in order to meet the legitimate aim set out above.

53. Consequently the Commissioner finds that the necessity test is not met. DCMS would not be able to rely on Article 6(1)(f) as a lawful basis for disclosure of the withheld information. Accordingly DCMS was entitled to rely on section 40(2) of FOIA in respect of this information.
54. Given the above conclusion, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

Right of appeal

55. 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

56. 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.
57. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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