

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 November 2024

Public Authority: Oxford Direct Services Limited
Address: St Aldates Chambers
109 St Aldates
Oxford
OX1 1DS

Decision (including any steps ordered)

1. The complainant requested information held by Oxford Direct Services Limited (ODSL) about investigations carried out within a certain time period that related to undeclared gratuities accepted by employees.
2. ODSL provided the complainant with information in response to part of their request, but withheld the remaining information under section 40(2) (third party personal information) of FOIA.
3. The Commissioner's decision is that ODSL is entitled to rely on section 40(2) of FOIA as its basis for withholding the remaining information that is relevant to the request.
4. The Commissioner does not require further steps to be taken.

Request and response

5. By way of background, on 4 October 2023, the complainant submitted a request for information about investigations conducted by ODSL that related to undeclared gratuities accepted by any employees. ODSL refused to confirm or deny whether it held the requested information under section 31(3) (law enforcement) of FOIA. On 27 March 2024, the Commissioner issued a [decision notice](#), upholding ODSL's position.

6. On 28 March 2024, the complainant then submitted a further request to ODSL for very similar information. For ease of reference, the Commissioner has separated the complainant's request into two parts as follows:

Part 1. "Between 01 September 2023 and 30 November 2023 how many Oxford Direct Services Ltd employees have been investigated by Oxford Investigation Services for accepting undeclared gratuities. For clarification, I am specifically referring to cases which have been investigated and concluded and for which there are no further or ongoing investigations (including, referral to the police)."

Part 2. "Following the investigation was there any evidence to suggest that employees had acted improperly?"

7. On 29 April 2024, ODSL provided its response to the complainant. With regard to Part 1 of the request, the council confirmed that one employee had been investigated for accepting undeclared gratuities within the relevant time period.
8. ODSL advised the complainant that it was refusing Part 2 of the request under section 40 of FOIA, as it considered that the disclosure of this information would allow for the individual employee to be identified.
9. On the same date, the complainant requested an internal review. They said that any action taken relating to the investigation, such as suspending the person from work, has probably already identified that person. The complainant said that they could not see how revealing information which only confirmed whether an employee had acted improperly, or not, may identify a person. The requester also said that as ODSL had not confirmed that there was no wrongdoing found as a result of the investigation, it would seem that it has already admitted that the person investigated acted improperly.
10. ODSL provided its internal review response on 23 May 2024, upholding its previous position that it was entitled to rely on the exemption at section 40 in response to Part 2 of the request. It said that disclosure of the withheld information would allow for an individual to be identified and that this would breach a data protection principle. ODSL explained that any actions relevant to investigations follow the disciplinary policy and that whilst it believed a copy of this policy document, and the Code of Conduct, had already been provided to the complainant in response to previous requests, it attached further copies with its response.

Scope of the case

11. The complainant contacted the Commissioner to complain about ODSL's response to Part 2 of their request, stating that they believe that the public has a right to know if publicly funded employees have taken undeclared gratuities from a contractor.
12. The Commissioner will therefore decide whether ODSL is entitled to withhold the information relevant to Part 2 of the complainant's request under section 40(2) of FOIA.

Reasons for decision

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). 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').
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. The Commissioner's [guidance](#) says that where it is not obvious that someone may be identifiable, consideration should be given to all the practical steps and all the means reasonably likely to be used by someone who is motivated to identify the people to whom the information relates to. The Commissioner considers that the key question to be asked is whether individuals can be identified from information with a degree of certainty.
22. The Commissioner is satisfied that there will be certain employees at ODSL who, if sufficiently motivated to do so, would be able to piece together the withheld information with other information known to them as an employee of ODSL, and also information which is in the public domain as a result of this, and other information requests, in order to identify the individual who was the subject of the investigation.
23. The Commissioner is also satisfied that the information relevant to Part 2 of the request has biographical significance to the relevant individual; it would reveal the outcome of the investigation and whether or not they were found to "have acted improperly".
24. The Commissioner is therefore satisfied that the information relevant to Part 2 of the request falls within the definition of 'personal data' in section 3(2) of the DPA.
25. 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.
26. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

27. 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".

28. 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.
29. 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

30. 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”.¹

31. 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.
32. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

¹ 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”.

Legitimate interests

33. 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.
34. 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.
35. It is the Commissioner's view that there is a legitimate interest in understanding the processes and procedures that are followed by a public authority, which has a responsibility to protect public money and uphold certain standards. Disclosure of the withheld information, which would confirm the outcome of an investigation into whether an employee of ODSL was found to have accepted gratuities that they did not declare, would promote accountability and transparency. It would also enable members of the public to satisfy themselves that the processes followed by ODSL in relation to investigations into the conduct of staff, are appropriate.
36. The Commissioner therefore considers that the complainant is pursuing a legitimate interest, and that disclosure of the requested information is necessary to meet that legitimate interest.

Is disclosure necessary?

37. '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.
38. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified in paragraphs 33-36 above.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

39. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the

information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

40. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
41. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation that their information will not 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 in their professional role or to them as individuals, and the purpose for which they provided their personal data.
42. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
43. The Commissioner considers that disclosure of the information relevant to Part 2 of the request would reveal details that are not already in the public domain, that is the outcome of an investigation into suspected misconduct by an individual member of staff.
44. The Commissioner acknowledges that there will be certain circumstances where it is considered to be appropriate to inform the public about individuals who have been the subject of a misconduct investigation. However, he considers this is only likely to occur in exceptional circumstances, and where it is recognised that there is a particularly strong interest in the public being made aware of such information. In such instances, the Commissioner considers it likely that the relevant individual would have a reasonable expectation that the outcome of the investigation into their conduct would be made available to the public.
45. In the circumstances of this case, the Commissioner considers that the relevant individual would have a very firm and reasonable expectation that details of the outcome of the investigation (regardless of whether they were found to have acted improperly or not) would not be made

available to “the world at large” in response to an information request, and would remain private between themselves and their employer. This approach was recognised by the Tribunal in the case of [Rob Waugh v Information Commissioner and Doncaster College \(EA/2008/0038, 29 December 2008\)](#), which found:

“...there is a recognised expectation that the internal disciplinary matters of an individual will be private. Even among senior members of staff there would still be a high expectation of privacy between an employee and his employer in respect of disciplinary matters.”

46. Furthermore, the Commissioner considers that the release of details of the investigation to the wider public would cause the individual who was the subject of the investigation harm and distress.
47. The Commissioner considers that the information that has already been made publicly available in response to a number of information requests on the same, or related, matters, goes some way in meeting the legitimate interest in accountability and transparency in how ODSL manages potential misconduct of its employees.
48. The Commissioner considers that the potential harm caused to the relevant individual, in terms of damage and distress as a result of the disclosure of the requested information, to carry significant weight in this case.
49. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
50. 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.
51. The Commissioner has therefore determined that ODSL was correct to apply section 40(2) to Part 2 of the complainant's request.

Right of appeal

52. 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

53. 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.
54. 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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