

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 December 2024

Public authority: Department of Finance Northern Ireland

Address: 2nd Floor
Craigantlet Buildings
2 Stoney Road
Belfast
BT4 3SX

Decision (including any steps ordered)

1. The complainant has requested information from the Department of Finance Northern Ireland (DoF) in relation to internal audits. DoF refused to disclose some of the requested information ("the withheld information"), citing sections 43(2) and 40(2) of FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that DoF has correctly applied sections 40(2) and 43(2) to the withheld information.
3. The Commissioner does not require any steps to be taken by DoF.

Request and response

4. On 18 December 2024 the complainant requested the following information from DoF:-
 1. A copy of the NICS Internal Audit Manual along with any amendments made since 01/05/2022.

2. The number of assignments allocated to date under contract ID 3794362 - DoF - Provision of Internal Audit Services
 3. The number of assignments offered, in the first instance, to the first and subsequently second named suppliers on the framework.
 4. The total number of days allocated to date under this framework.
 5. Details of any contract management training undertaken by the contract manager
 6. Details of any returns / reports made in respect of this framework.
5. On 26 March 2024 the complainant clarified and reworded their request:-
1. A copy of the NICS Internal Audit Manual along with any amendments made since 01/05/2022.
 2. The number of firms engaged to date under contract ID 3794362 - DoF - Provision of Internal Audit Services.
 3. The number of assignments not offered, in the first instance, to the first named suppliers on the framework and the reasons for this.
 4. Details of any contract management training undertaken by the contract manager.
 5. Details of any summary returns / reports made in respect of the operation of this framework e.g. no. of days used, number of firms used, etc.
 6. Copies of any assurances that the contract was operating as intended.
6. DOF responded on 15 April 2024 providing some information and stating that it was refusing the remainder of the request under sections 40(2) and 43(2) of FOIA.
7. The complainant sought an internal review on 14 June 2024 and DOF responded on 8 July 2024 upholding the exemptions.

Reasons for decision

8. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
9. A public authority must be able to show how and why its disclosure has the potential to prejudice someone's commercial interests. The prejudice can be to the commercial interests of any person (an individual, a company, the public authority itself or any other legal entity). DOF explained to the complainant that disclosing the information they have requested would be likely to prejudice its own commercial interests.
10. In order for section 43(2), to be engaged, three criteria must be met:
 - the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed must relate to someone's commercial interests.
 - 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.
 - the level of likelihood of prejudice being relied upon by the public authority must be met (i.e., it must be shown that disclosure would, or would be likely to, result in prejudice occurring).
11. The Commissioner's guidance on section 43¹ clarifies that a commercial interest relates to a person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.
12. DOF explained to the complainant that disclosing the information they have requested would be likely to prejudice its own commercial interests.

The prejudice to DOF's commercial interests

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmentalinformation-regulations/section-43-commercial-interests>

13. DOF applied the section 43(2) exemption was applied to three areas of the request;
 - Copy of the Northern Ireland Civil Service (NICS) Internal Audit Services Manual (1)
 - Summary Reports in respect of the operation of the NICS contract (5) and
 - confirmation of contract operating as intended (6).
14. DOF states that it applied section 43(2) of FOIA to these parts of the request as the disclosure of this information would be likely to prejudice the commercial interests of the DOF. The NICS Internal Audit Manual details the Internal Audit policies and procedures that apply across the NICS Internal Audit Services (NICS IAS) which provides services to nine central Departments and 30 Arm's Length Bodies (ALBs).
15. DOF has explained to the Commissioner that NICS IAS are a hard charging service provision. Organisations responding to tender competitions are required to detail how they apply their policies and procedures to internal audit assignments. Disclosure of the NICS policies and procedures to the world at large would allow organisations to plagiarise the NICS Internal Audit Manual to ensure that their approach aligns with the NICS. This would be likely to impact DOF's ability to effectively assess tender response and determine value for money. The disclosure of this information is likely to undermine the NICS Internal Audit Service's ability to successfully compete for future tender competitions.
16. In relation to parts 5 and 6 of the complainant's request, the record contains details of future procurement plans. Disclosure of this would be likely to impact DOF's commercial interests for future public sector tender competitions. The record also contains performance information about contractors. There is a risk that tenderers could be discouraged from competing for future competitions if information identified as being commercially sensitive is released, thereby reducing the competitive market for DOF.
17. DOF has provided the Commissioner with more detailed arguments regarding the likelihood of prejudice envisaged by disclosure of the withheld information, which cannot be reproduced in this decision notice, however the Commissioner is satisfied as detailed below.
18. The Commissioner is satisfied first, that the harm DOF envisages relates to its own commercial interests. Second, the Commissioner accepts that a causal link exists between disclosure and commercial prejudice as explained by DOF. Finally, the Commissioner accepts DOF's position

that the envisioned prejudice would be likely to occur. The Commissioner's decision is therefore that DOF was entitled to apply section 43(2) to the withheld information and he will go on to consider the associated public interest test.

Public interest arguments in favour of disclosure

19. DOF accepts that there is a general public interest in the accountability, openness, and transparency of government, and to promote public understanding of how money is spent and decisions are made.

Public interest arguments in favour of maintaining the exemption

20. DOF considers that there is a strong public interest in ensuring that private sector companies can compete on an equitable basis for public sector contracts, and the disclosure of commercially sensitive information could compromise the ability of companies to do so, thereby reducing the competitive market. There is also a public interest in DOF having as wide as possible a competitive market to select from in relation to procurement as this would allow it to achieve value for public money to the best of its ability.

Balance of the public interest arguments

21. The Commissioner accords significant weight to the public interest in transparency and accountability, especially where it would show that best value for public money is being achieved.
22. However, the Commissioner has noted DOF's arguments and considers that, given the likelihood of prejudice caused, e.g. discouraging contractors to compete in future tender processes and the likelihood therefore of compromising DOF's ability to obtain best value for money, the Commissioner considers that the balance of the public interest lies in favour of maintaining the exemption.

Section 40 - personal information

23. 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.
24. 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').

25. The first step for the Commissioner is to determine whether the information withheld by DOF under section 40(2) 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.
26. 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?

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

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

28. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
29. 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.
30. 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.
31. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information consists of the training details of named staff members, which is information that both relates to and identifies those concerned.
32. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
33. The fact that information constitutes the personal data of identifiable living individuals 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.
34. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

35. 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”.

36. 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.
37. 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

38. 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.

39. 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.
40. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

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 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

41. 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.
42. 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.
43. The complainant has a legitimate interest in DOF demonstrating transparency in respect of its internal audit manual, which includes details of training undertaken by a specific individual. The complainant is interested in the competence of certain individuals in carrying out their specific responsibilities. There is also a wider public interest in public authorities demonstrating transparency.

Is disclosure necessary?

44. '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.
45. The Commissioner does not consider that the complainant could ascertain the details in any other way, so the Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

46. 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.
47. 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.
48. In the Commissioner's view, a key issue is whether the individuals concerned have 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.
49. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
50. The Commissioner considers that the individuals, even in their professional roles, would have a reasonable expectation of their details being kept confidential and disclosure of their training records would be likely to result in unwarranted distress.
51. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' 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.
52. 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.

Other matters

53. The complainant raised with the Commissioner the quality of DOF's original and internal review responses. The Commissioner's guidance states that a refusal notice should detail whether the information is held, which exemption is being applied under FOIA, and why. DOF stated that the information was held and the exemptions it was applying, it also provided detailed public interest arguments. However, the Commissioner would remind DOF that it is best to provide a detailed explanation as to the reasons for applying the exemptions cited.
54. In relation to the internal review response, the Commissioner considers that an internal reviewer should make a fresh decision based on all the

available evidence that is relevant to the date of the request, not just a review of the first decision. DOF simply reiterated the first decision and the Commissioner would remind DOF of his guidance on internal reviews.

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.

Signed

Deirdre Collins
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Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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