

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 7 March 2025

**Public Authority:** Department for Work and Pensions  
**Address:** Caxton House  
Tothill Street  
London  
SW1H 9NA

#### **Decision (including any steps ordered)**

---

1. The complainant has requested the number of complaints made about a named health professional. Under section 40(5), the Department for Work and Pensions ("the DWP") refused to confirm or deny if it held information.
2. The Commissioner's decision is that the DWP are entitled to rely on section 40(5) of the FOIA to neither confirm or deny whether it holds information.
3. The Commissioner does not require further steps.

#### **Request and response**

---

4. On 12 September 2024, the complainant wrote to the DWP and requested information in the following terms:

"Hi, thanks for you for your response, however im [sic] confused as to how you don't hold information on the HP in question regarding reports that have gone to reconsideration or tribunal. Is this something capita hold? Clearly you know what reports she's carried out, and you know which reports have been reconsidered or have gone to tribunal?

I ask you to provide the information I requested or point me in the direction of where to obtain it.

How can you assess a HP performance if you don't know how many of her reports are being overturned.

Also could you tell me how many complaints regarding the HP have been made to capita or to DWP

[redacted] could you provide the last audit prior to that please.

...

Also I'm aware of what capital [sic] and the assessors are supposed to do, I'm trying to confirm if that has been done"

5. The DWP responded on 26 September 2024. It provided some of the data requested, but advised it could neither confirm nor deny whether any complaints were held against the named assessor under 40(5) of the FOIA.

## Reasons for decision

---

6. Section 1(1)(a) of FOIA provides that where a public authority receives a request for information, it is obliged to tell the applicant whether it holds that information. This is commonly known as the duty to confirm or deny.
7. There are however exemptions from the duty to confirm or deny. When applying an exemption from the duty to confirm or deny, a public authority is not restricted to only considering the consequences of the actual response that it would be required to provide under s1(1)(a). For example, if it does not hold the information, the public authority is not limited to only considering what would be revealed by denying the information was held, it can also consider the consequences if it had to confirm it did hold the information.
8. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
9. Therefore, for the DWP to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny it holds information falling within the scope of the request the following two criteria must be met:
  - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and

- Providing this confirmation or denial would contravene one of the data protection principles.

**Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?**

10. Section 3(2) of the DPA 2018 defines personal data as:

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

11. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

12. 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.

13. Having reviewed the request and the DWP's submissions the Commissioner is satisfied that if DWP were to either confirm or deny it held the information, it would involve the disclosure of personal data. This is because it would relate to a single named individual. The first criterion is therefore met.

14. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party (or parties) does not automatically prevent the DWP from refusing to confirm whether it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.

15. Under the data protection principles, personal data can only be disclosed if disclosure is lawful, fair, and transparent.

16. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that

“processing shall be lawful only if and to the extent that at least one of the conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

17. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:

“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.”

18. In considering the application of Article 6(1)(f) 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 confirming or denying that the requested information is held 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(s).
19. 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**

20. In considering any legitimate interests in confirming whether the requested information is held in response to an FOI request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sake as well as case specific interests.
21. 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.
22. In this case, the complainant is seeking the requested information due to their own private interests. The Commissioner does not believe there is a wider public interest satisfied by the release of one assessor’s personal data. However, the Commissioner accepts that the personal interests of the requester can be considered a legitimate interest under Article 6(1)(f) of the GDPR.

### **Is confirming whether or not the requested information is held necessary?**

23. ‘Necessary’ means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so

confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less intrusive?

24. Confirmation or denial under FOIA that the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
25. The Commissioner is satisfied in this case, which concerns information about a named assessor, there are no less intrusive means of achieving the legitimate interest identified.

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

26. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if a data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
27. Disclosing whether the requested information was held would reveal whether or not an individual, who could be identified, had been the subject of a complaint or otherwise.
28. The DWP notes the complainant has made numerous requests for information about the health professional and has stated disclosure of the information could lead to reputational damage for the health professional. In addition, confirming or denying would not provide any context, such as whether complaints were upheld or whether any action has been taken against the health professional as a result.
29. The DWP has also advised health professionals fall below the DWP's SCS (Senior Civil Servant Level), meaning the individual would not have a reasonable expectation their personal data would be disclosed.
30. Information released under the FOIA is to the world at large. As the information, if held, would relate to identifiable individuals, it is considered personal data, and an individual would expect their personal data and circumstances would remain confidential.
31. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh a data subjects'

fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.

32. The Commissioner has therefore decided that DWP was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5) of FOIA.

## Right of appeal

---

33. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

34. 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.
35. 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**