

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

### **Decision notice**

**Date:** 4 March 2025

**Public Authority:** Department for Business and Trade ("DBT")  
**Address:** Old Admiralty Building  
London  
SW1A 2DY

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

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1. The complainant has requested information relating to their Employment Tribunal. DBT, the public authority, explained that some points of the request comprised the applicant's personal data, some points were not valid requests, one point exceeded the cost of compliance, one point was not held and the remaining point was withheld under FOIA section 40(2) – third party personal data.
2. The Commissioner's decision is that DBT is entitled to withhold the name requested at point 4 of the request in reliance on FOIA section 40(2). He also finds, on the balance of probabilities, that the information requested in the first part of question 5 is not held by DBT.
3. The Commissioner does not require further steps.

### **Request and response**

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4. On 25 March 2024 the complainant wrote to DBT and requested information in the following terms:

"This FOI all relates to my Employment Tribunal. The case reference number is: [reference redacted]- the jurisdiction is "London Central".

The case name is "[complainant] v The Secretary of State for Business and Trade".

### Financial Questions

I have already requested a review of the GLD's FOI response. I am not convinced by the figures they have produced, for example [named individual] fees appear to be quite low for 7.5 days of hearing, as well as preparation time. I have therefore asked for invoices. I would be grateful if you could assist in supplying the below information:

- 1.Total amount spent by the GLD in preparing the case up to and including 15th February 2024, including an itemisation. Please supply supporting evidence.
- 2.Total amount spent on Barrister representation [named individual] with invoices, including preparation time, Preliminary Hearing and Final Hearing appearances.
- 3.Total amount spent on DBT resources to prepare the case (Witness Time, liaising/instructing with GLD etc)

### Rationale and Accountability

Secondly, as all evidence has now been heard by the Employment Tribunal and we are simply awaiting the Tribunal Decision, I do not accept GLD's arguments relating to legal advice privilege and litigation privilege. I am sure the Information Commissioner will agree that it is simply not possible to prejudice the outcome of this case as it has already been heard, and that there is now greater weight in favor[sic] of the factors for disclosure. I ask you to keep this point in mind when answering the below questions:

- 4.What is the name of the person who is giving senior sign-off for public money to be spent in this way? Who is the most senior person approving the expenditure?
- 5.What are the channels of accountability? The Secretary of State is responsible for the actions taken by the Department – please break this down further in relation to my matter. Assumably Ms [named individual] is not accountable for Legal Proceedings?
- 6.Have any submissions been provided to the Secretary of State, Junior Ministers or Departmental non-Executive Directors regarding myself or this legal matter? As these are about me personally, I would like to see them please.
- 7.If no such submissions have been sent and senior figures within the department remain unaware of the case, please can you explain why?

8. Please can you provide the rationale for defending this case, and rejecting numerous approaches from myself for amicable settlement (including Judicial Mediation)? What weight was given to the unique circumstances of the case?
9. I understand that Rt Hon Kemi Badenoch MP remains unaware of the case, its background and details – please confirm?
10. Please share details of any exchanges between DBT regarding myself with the following parties: the Cabinet Office, Ministry of Defence, Rt Hon Grant Shapps MP and his offices, as well as Rt Hon Kemi Badenoch MP's Parliamentary office."
5. DBT responded substantively on 24 April 2024. It stated that FOIA section 12(1), cost of compliance, applied to point 3 alone, of the request and therefore it was not obliged to comply with the request. It added that points 6 and 10 comprise the personal data of the applicant and are therefore exempt from FOIA under section 40(1) but fall for consideration as subject access requests ("SAR") under the Data Protection Act. DBT advised that it would contact the complainant separately in this regard.
6. The complainant requested an internal review on 25 April 2024. They explained that they no longer required the information sought in points 1 and 2 of their request as invoices provided by Government Legal Department sufficiently answered their questions. They advised:
- "In the interests of getting a response to questions 4 to 10, I am willing to drop question 3 from this request. Answering these questions cannot possibly exceed £600. Please can you proceed with providing a timely response to questions 4 to 10?"
7. Following an internal review DBT wrote to the complainant on 24 May 2024. It stated:
- "On review I can confirm that Question 3 (which DBT confirmed in its FOIA response would alone exceed the cost threshold, and you have now in your request for an internal review, confirmed you wish to withdraw Question 3), Question 4 and Question 5 fall to be treated as valid requests under FOIA. Question 6, and 10 are SAR requests and are being handled by the DBT SAR Team. Question 7, 8 and 9 are not valid FOIA questions, and therefore DBT will not accept these under FOIA.
- ... This now leaves Question 4 and Question 5 of your request to be addressed."
8. With regard to question 4 DBT relied FOIA section 40(2) to refuse the request. With regard to question 5 DBT advised that it does not hold recorded information on what the channels of accountability are in the

context of the complainant's request. It explained that the claim is against DBT and not against any particular individuals and DBT instructed the Government Legal Department ("GLD") to act on its behalf with respect to this claim. It added that the second part of point 5 is not a valid FOIA request.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 16 August 2024 to complain about the way their request for information had been handled.
10. The Commissioner subsequently confirmed to the complainant the scope of his investigation was to determine whether DBT is entitled to rely on section 40(2) as a basis for refusing to answer question 4 and to consider the searches undertaken in response to the first part of question 5. The Commissioner also explained to the complainant that FOIA allows for requesting recorded information held by public authorities, there is no obligation for public authorities to create information in order to answer a question.
11. During the Commissioner's investigation, on 15 January 2025, DBT contacted the complainant and advised that it was now relying on an additional exemption at FOIA section 38(1), health and safety, with regard to question 4.

## **Reasons for decision**

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### **Section 40 - personal information**

12. 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.
13. 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').
14. 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.

15. 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?**

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

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

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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.
19. 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.
20. In the circumstances of this case the Commissioner is satisfied that the information relates to the person to whom question 4 relates. This is because the name of a data subject quite obviously is information that both relates to and identifies the individual concerned.
21. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
22. 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.
23. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

24. 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”.

25. 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.

26. 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.
27. DBT explained that the withheld name is that of a DBT official who is a senior civil servant. It acknowledged the general principle across Whitehall of the disclosure of the names of senior civil servants. Notwithstanding this it considers that in this particular case disclosure would be unfair to the individual and significantly impact on their fundamental rights.

### **Lawful processing: Article 6(1)(f) of the UK GDPR**

28. 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"<sup>1</sup> .
29. 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.
30. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

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<sup>1</sup> 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**

31. 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.
32. 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.
33. DBT's view is that the complainant has a personal interest in the withheld information due to their Employment Tribunal case brought against DBT. DBT acknowledged that disclosure would demonstrate that DBT is open and transparent in its conduct but noted that there is little wider public interest in the withheld information. It considers that disclosure of the name in the circumstances is disproportionate to the rights and freedoms of the individual concerned.
34. The complainant explained that they believe that DBT is manipulating rules to conceal the identity of a senior civil servant in relation to their case. They believe that attempting to conceal the information is a breach of the Civil Service Code. The Commissioner cannot investigate breaches of the Civil Service Code, the more general allegation is addressed in Other Matters at the end of this Notice. The Commissioner notes that the complainant has received a response from the Civil Service Commission in this regard. He notes the Commission's comment:

"...the Code is extremely narrow in its remit and does not cover human resources management issues. The Code is concerned with the outward-facing roles of civil servants rather than their internal relations, which means there is likely to be a public interest dimension to a concern raised under the Code."
35. Having considered the specific circumstances of the complainant's request, the Commissioner accepts that there is a narrow and largely private legitimate interest in disclosure of the name requested. There would be little public interest in the specific disclosure other than the general transparency and accountability of DBT.

## **Is disclosure necessary?**

36. '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.

37. DBT accepts that the complainant has a legitimate interest in transparency. However DBT considers that the complainant's legitimate interests have been met through the litigation process. They received full disclosure of all relevant, as determined by the judicial disclosure process, material as part of the Employment Tribunal process. It does not consider that disclosure of the DBT official's name is necessary to meet the legitimate aim of creating transparency and accountability.
38. The Commissioner is aware of the history and on-going circumstances of the complainant and their employment tribunal and other matters concerning DBT. In this light the Commissioner understands the complainant's interest in matters pertaining to DBT's handling of their litigation. However, in the Commissioner's view it is not sustainable to argue that disclosure of the name under FOIA is necessary. Through their FOIA requests the complainant knows the amount spent by DBT. DBT has approved the expenditure for the employment tribunal; disclosure of the signatory name adds little, if anything, to the public's understanding of the matter. The Commissioner also does not understand the necessity for the complainant to attribute a name to the expenditure.
39. In the circumstances of this case, the Commissioner has identified that whilst there is a legitimate interest in ensuring accountability and transparency on the part of DBT, this has already been appropriately and proportionately met and he is not persuaded of the necessity in the disclosure of the withheld name. Therefore he is satisfied that the general approach to disclosing senior officials' names in the context of their jobs does not apply here.
40. Given this finding the Commissioner has concluded that disclosure of the name would not be lawful and therefore article 6(1)(f) of the UK GDPR is not met. Disclosure would therefore breach the first data protection principle and thus the information is exempt from disclosure on the basis of section 40(2) of the FOIA.
41. As the Commissioner finds the information should be withheld he has not proceeded to consider the additional exemption at section 38 which DBT applied to the same information.

## **Section 1 – General right of access to information**

42. Section 1(1) of FOIA states:

"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 them.”

43. In scenarios where there is some dispute between the amount of information a public authority says is held and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
44. In other words, in order to determine such complaints, the Commissioner must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).
45. With regard to question 5 of the request the Commissioner asked DBT to provide a full explanation of the searches conducted to determine if any recorded information was held on the channels of accountability in relation to the complainant’s “matter”.
46. In order to provide assistance, as part of its internal review considerations DBT explained to the complainant that their action is a claim against DBT and DBT instructed GLD to act on its behalf with respect to this claim. DBT further explained that each claim is treated individually on its own merits where advice and guidance is sought from and is provided by the Ministry of Justice (“MoJ”) HR casework team and GLD lawyers.
47. DBT explained to the Commissioner that when an Employment Tribunal claim is received it is allocated a HR casework adviser and a lawyer from GLD who work with it to prepare for the claim. A Deputy Director from the business area is assigned to oversee the case and work with HR and GLD to respond on behalf of the Department. It advised:

“In line with the standard process, GLD acted on behalf of DBT regarding this claim. Details around individual HR cases related to attendance, conduct or performance and details around any ET claims are not routinely shared with senior civil servants who would only have involvement with ET cases where necessary (e.g. if a witness). HR cases are managed by the policy business area and line managers with support and advice from the MoJ HR casework team.”
48. DBT explained to the Commissioner that in this case the complainant’s line manager fulfilled their duties, in line with DBT’s HR policies, with advice and guidance provided by the MoJ HR casework team. This is a standard process applied consistently by all the line managers who are managing attendance, performance or conduct matters.

49. DBT stated that it had not carried out the searches requested by the Commissioner as it would have been a "fruitless exercise" because it does not hold recorded information on the procedure explained above and has never held it.
50. The Commissioner usually expects public authorities to search for information using particular, relevant search terms across the systems used to store information. However, in this case he understands that DBT was already aware that recorded information detailing "channels of accountability" was not held in the complainant's case or others. The Commissioner accepts that in circumstances of a claim on the Department, DBT follows the process as it has outlined above, without any recorded information setting out accountability. The Commissioner therefore accepts that information on the process outlined is different to information on "channels of accountability".
51. The Commissioner notes the complainant's statement that the Secretary of State is responsible for the actions taken by DBT. The Commissioner accepts this over-arching responsibility for all matters concerning DBT. However, he considers that it would be unlikely for there to be a documented list of accountability from the Secretary of State downwards for the handling of claims such as those litigated at an Employment Tribunal. The Commissioner finds that DBT's reasons as to why it does not hold the information requested at question 5 of the request are reasonable.
52. The Commissioner concludes that, on the balance of probabilities, DBT does not hold recorded information within the scope of the first part of question 5 of the request.

## **Other Matters**

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53. With regard to the complainant's allegations regarding DBT, as referenced in paragraph 34, given that the Commissioner has found the name to be validly withheld under section 40(2) there are no grounds for him to investigate further.

## **Right of appeal**

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54. 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)

55. 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.
56. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Susan Hughes**  
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