

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 March 2019

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested from the Home Office information about expenses claims made by the Surveillance Camera Commissioner. The Home Office disclosed most of the requested information, including information about individual amounts claimed, but it withheld copies of receipts submitted in support of subsistence claims. It said this information was exempt under section 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that the Home Office was entitled to rely on section 40(2) of the FOIA to withhold the receipts. However, she found that it breached section 1 and section 10 of the FOIA by failing to respond to the request within the statutory time for compliance.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 13 September 2018, the complainant wrote to the Home Office and requested information in the following terms:

"Please disclose the current salary of the Surveillance Camera Commissioner;

Please disclose all benefits and allowances for the commissioner.

Please disclose the total amount claimed in expenses by the commissioner in 2017 and 2018.

For 2018, please provide a breakdown showing the amounts claimed for travel, accommodation, subsistence and hospitality.

For subsistence and hospitality claims, please provide copies of all receipts."

5. The Home Office responded on 8 November 2018. It disclosed the information it held in response to the first four parts of the request (clarifying that no claim was submitted in respect of hospitality) but refused to provide copies of receipts for subsistence claims, in respect of the fifth part of the request, citing section 40(2) of the FOIA. Instead, it disclosed a breakdown of the individual claims, listing them by merchant and the amount claimed.
6. The complainant requested a review of the decision to withhold copies of the individual receipts on 8 November 2018. The Home Office provided the outcome of the review on 5 December 2018, upholding its decision to withhold the information.

Scope of the case

7. The complainant contacted the Commissioner on 5 December 2018 to complain about the way the fifth part of his request for information had been handled. He disagreed with the decision to withhold copies of receipts, citing the public interest in public authorities being transparent regarding their spending of public money.
8. While the complainant requested information on "*travel, accommodation, subsistence and hospitality*" elsewhere in the request, the fifth part of the request asked only for subsistence and hospitality receipts. The Home Office said that the Surveillance Camera Commissioner ('the SCC') did not submit any expenses claims in respect of hospitality and the complainant has not challenged this.
9. "Subsistence" is the tax definition of food, drink and other necessary living expenses where the expense is incurred as a direct result of being required to travel for work.
10. The Commissioner has therefore considered in this decision notice whether the Home Office was entitled to rely on section 40(2) of the FOIA to withhold copies of the receipts submitted by the SCC in support of his subsistence expenses claims.
11. The Commissioner has also considered the timeliness of the Home Office's response to the complainant.

12. The Commissioner has had sight of the withheld information when reaching her decision on this matter.

Reasons for decision

Section 1 – general right of access

Section 10 - time for compliance

13. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
14. Section 10(1) of the FOIA states that on receipt of a request for information a public authority should respond to the applicant within 20 working days.
15. In this case, the complainant submitted the request on 13 September 2018 and the Home Office provided its response on 8 November 2018, 40 working days later. By failing to reply within the statutory time for compliance, the Home Office breached sections 1(1) and 10(1) of the FOIA.
16. The Commissioner has made a note of this breach for compliance monitoring purposes.

Section 40 – personal information

17. Section 40(2) of the 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.
18. In this case the relevant condition is contained in section 40(3A)(a)¹. 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 General Data Protection Regulation ('the GDPR').
19. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

Act 2018 ('the DPA'). If it is not personal data then section 40 of the FOIA cannot apply.

20. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

"any information relating to an identified or identifiable living individual".

22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
23. 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. On that point, the Commissioner notes that the request is expressly for information about the SCC, a living individual whose identity can easily be ascertained by information in the public domain.
24. 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.
25. The withheld information in this case comprises copies of receipts submitted by the SCC in support of subsistence claims he has submitted. The receipts contain:
- merchant's name and address;
 - date and time visited;
 - the bill amount;
 - details of payment method; and
 - (in some cases) the items purchased.
26. In essence the receipts contain information about how and where the SCC has carried out his public duties. It has 'biographical significance' for him because it describes his whereabouts at particular times and it is used to make decisions as to whether he will be reimbursed for the expenditure.

27. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that this information both relates to and identifies the SCC. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
28. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
29. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

30. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

31. 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.
32. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

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

33. 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.

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:-

34. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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.
35. 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

36. In considering any legitimate interests in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
37. 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.
38. The complainant did not give any reason for requesting copies of receipts. However, in his request for an internal review and in his complaint to the Commissioner, he cited the public interest in public authorities being open and transparent regarding their spending of public money.
39. The Home Office's comments on legitimate interests were as follows:

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the 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".

"We acknowledge a legitimate interest in the expenses claimed by senior officials. That is why we publish information about the expenses claimed by senior officials as part of the transparency data [sic] and why, in this case, we have provided to [the complainant] information about [the SCC]'s expenses in response to his request."

40. The Commissioner accepts that there is a legitimate interest in the public being able to scrutinise the spending of public money and in public authorities being open and transparent about expenses claims made by their senior staff.

Is disclosure necessary?

41. '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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

42. On that point, the Home Office said:

"We do not necessarily see a legitimate interest in disclosure of copies of actual invoices. There is very little information in the receipts which is not in the summary information provided to [the complainant] and we note that the FOIA is about information rather than documents. We do not publish receipts as part of transparency data [sic].

...

We note ... that the test is one of reasonable necessity, which involves the consideration of alternative measures, and that disclosure would not be necessary if the legitimate aim could be achieved by something less. It would in our view be difficult to argue that the publication of summary (albeit quite detailed) information about senior officials' expenses on GOV.UK fails to meet the legitimate interest in such information, because it does not involve the publication of actual receipts".

43. The Commissioner has viewed the receipts and notes that the amounts shown on them match the breakdown that has already been provided to the complainant. The additional information that would be revealed by their disclosure is time, date and location of purchase, payment method details and (in some cases) details of what was purchased (eg the precise refreshments ordered).
44. While the Commissioner considers that disclosure of the individual amounts claimed is necessary to meet the legitimate interests in transparency and accountability, she does not find there to be a

similarly pressing need for the receipts themselves to be disclosed. This is because she considers that they add little of value to the information that has already been disclosed. Information about, for example, the time or location an expense was incurred will add little further to the public's appreciation of whether or not the claim was a reasonable one.

45. Furthermore, the Commissioner considers that revealing information about the precise time and location of purchases would provide information about the SCC's movements and whereabouts, which would be both intrusive and potentially threaten his personal security. The Home Office told the Commissioner that, as a former senior policeman, the SCC is expected to exercise caution with regard to his personal security, and this extends to avoiding giving away detailed information about his movements or about (what might be) regularly visited locations.
46. The Commissioner also considers that revealing the exact details of the meals or refreshments purchased would go beyond what the SCC would be entitled to expect with regard to public scrutiny of how he performs his duties, and would be unnecessarily intrusive into his private life, particularly given that the amounts claimed are small and that the level of expenditure is within the range to be expected for someone being required to travel for work.
47. Individual expenses claims are of course subject to formal scrutiny prior to being reimbursed and so there is already oversight in place to ensure that unreasonable or ineligible claims are identified and dealt with appropriately. The Home Office accepts that the individual amounts claimed should be disclosed, and it has done so in this case. Referring to its wider practice of proactively publishing expenses details for senior civil servants, it has also highlighted that disclosure of receipts has not hitherto been deemed necessary to meet the public interest in transparency surrounding expenses payments.
48. Taking account of the intrusion into the SCC's personal life that disclosure of the receipts would entail, and that it would add nothing discernible to the public's understanding of the information already disclosed, the Commissioner finds that disclosure of the receipts is not necessary to meet the legitimate interest in transparency and accountability identified in paragraph 40, above.
49. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest identified, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's view

50. The Commissioner has therefore decided that the Home Office was entitled to withhold copies of the receipts submitted by the SCC in support of his subsistence expenses claims, under section 40(2), by way of section 40(3A)(a) of the FOIA.

Right of appeal

51. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

52. 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.
53. 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

Samantha Bracegirdle
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