

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 December 2021

Public Authority: Information Commissioner
Address: Wycliffe House
Water Lane
Wilmslow
SK9 5AF

Decision (including any steps ordered)

1. The complainant requested information about a bulk order of purchases from Hotel Chocolat. The Information Commissioner ("the ICO") initially relied on section 36 of the FOIA (prejudice to the effective conduct of public affairs) to withhold all the requested information, but subsequently disclosed most of the information it held. However, it relied on section 40(2) of the FOIA (third party personal data) to withhold the name of an employee.
2. The Commissioner's decision is that the ICO is entitled to rely upon section 40(2) of the FOIA in the manner that it has done. However, the ICO failed to obtain the correct objective reading of the request and therefore breached section 16 of the FOIA.
3. The Commissioner does not require further steps to be taken.

Jurisdiction and Nomenclature

4. This decision notice concerns a complaint made against the Information Commissioner. The Information Commissioner is both the regulator of the FOIA and a public authority subject to the FOIA. He is therefore under a duty, as regulator, to make a formal determination of a complaint made against him in his capacity as a public authority – a duty confirmed by the First Tier Tribunal. It should be noted however that the complainant has a right of appeal against the decision, details of which are given at the end of this notice.

5. This notice uses the term “the ICO” to refer to the Information Commissioner dealing with the request, and the term “the Commissioner” when referring to the Information Commissioner dealing with the complaint.

Background

6. In February 2021, the ICO published (as it routinely does) details of spending on corporate charge cards. The data released showed a purchase of £6,248.40 from chocolatier Hotel Chocolat. Following several media reports about this transaction, the ICO announced that it would be conducting an investigation to determine whether this purchase was in line with its finance policies.
7. On 27 September 2021, the ICO announced that an external investigation had been completed. Whilst the ICO noted that the purchase was for “thank you” gifts to over 250 of its staff in recognition of their efforts over a challenging year, the purchase had not been compliant with the appropriate policies. The ICO also noted that a failure of financial controls had meant that this purchase had not been properly challenged.¹

Request and response

8. On 17 July 2021, the complainant wrote to the ICO and requested information in the following terms:

 "[1] *Provide the order or invoice for the following payment you made:*

 21/12/2020 HOTEL CHOCOLAT 6,248.40

 "[2] *Provide the relevant policy relating to this type of purchase.*

 "[3] *Provide the name and job title of the relevant controlling person who made the purchase.*

¹ <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2021/09/statement-in-response-to-use-of-ico-corporate-charge-card/>

"[4] Provide a list of all names of persons who benefited from the purchase -i.e. maybe they got a nice pressie from the IC?

"[5] Provide all data relating to recovery of the sum and disciplinary action.

9. The ICO responded on 10 August 2021. It refused to provide any of the requested information and relied on section 36 of the FOIA to withhold it so as to avoid prejudicing its ongoing investigation.
10. Following an internal review (and the issuing of its public statement) the ICO wrote to the complainant on 27 September 2021. It disclosed the information that it held in relation to elements [1] and [2]. In respect of elements [3], [4] and [5], it now relied on section 40(2) of the FOIA to withhold the requested information.

Scope of the case

11. The complainant contacted the Commissioner on 28 September 2021 to complain about the way this request for information had been handled.
12. As the Commissioner was already investigating a complaint about an identical request that the complainant had submitted back in February – but where the internal review had been completed prior to the ICO's public statement – the Commissioner suggested that it would be more sensible to accelerate the present complaint and withdraw the previous one. The complainant agreed to this and did not object to the Commissioner's suggestion of restricting the scope of the investigation to whether the ICO was entitled to withhold the information within the scope of element [3].
13. During the course of the investigation, the ICO raised, with the Commissioner, what the correct objective reading of the element [3] of the request was – this is discussed in more detail below. The Commissioner advised the ICO that, if it was unsure what the correct objective reading was, it should seek clarification from the complainant. The ICO did not do so. However it did provide submissions explaining why section 40(2) of the FOIA would apply regardless of the interpretation used.
14. In the circumstances, for reasons that will be explained, the Commissioner considered that the best course of action would be to focus the investigation on whether the ICO was entitled to rely on section 40(2) of the FOIA to withhold the requested information.

Reasons for decision

Section 16 – Advice and assistance

15. Section 16 of the FOIA requires a public authority to provide reasonable advice and assistance to those making, or attempting to make, requests for information.
16. Exactly what advice and assistance will be “reasonable” will depend on the particular circumstances of each request. However, as a general rule, the Commissioner considers that, where a request is unclear or where a request is capable of more than one objective reading, section 16 of the FOIA obliges the public authority to ensure that it has obtained the correct objective reading of the request.
17. In this case, the Commissioner accepts that element [3] was capable of more than one objective reading. Is the person who “authorises” a purchase the person who literally hands over the money (ie. they “authorise” the supplier to provide the product for the agreed price) or is it the person who ultimately signs off the transaction (ie. they “authorise” another (more junior) person to pay the money on behalf of the organisation?)
18. The Commissioner agrees with the ICO that it is more likely that the complainant intended the latter interpretation. But the Commissioner also considers that either interpretation could be considered to be an objective reading of the request.
19. The ICO was therefore obliged to clarify with the complainant exactly what information he intended to seek with this element of the request. As it failed to do so, it failed to comply with its duty under section 16 of the FOIA.
20. Having established that a breach of the FOIA has occurred and remains outstanding, the Commissioner has to consider whether a remedial step should be ordered. In this case, he has decided it should not.
21. The ICO has provided a submission explaining why section 40(2) would apply, regardless of the interpretation used – the arguments being broadly the same. The Commissioner therefore considers that he has sufficient information in order to make a decision. Were he to order a remedial step, it would be for the ICO to seek clarification, which would necessitate the complainant making a further request for information – meaning that the process of request and complaint would need to be re-started from scratch. The Commissioner does not consider that it would be in the interests of any of the parties involved (but particularly the complainant) to require the request to be clarified and re-submitted.

22. However, the ICO should ensure that, when dealing with future requests which might potentially have more than one objective reading, it confirms, with the requestor, what the correct interpretation of the request should be before it begins processing the request.

Section 40 personal information

23. 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.
24. In this case the relevant condition is contained in section 40(3A)(a)². 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 withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the 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.

² As amended by Schedule 19 Paragraph 58(3) DPA.

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. The withheld information in this case (regardless of the interpretation of the request) will be the name of a member of ICO staff. Disclosing the information indisputably allows the staff member to be identified and consequently linked to the purchase in question.
32. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the staff member concerned. He is satisfied that this information both relates to and identifies the staff member. 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 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.
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. Article 6(1) of the UK 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" lawful bases for processing listed in the Article applies.
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”³.

39. In considering the application of Article 6(1)(f) of the UK 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.
40. 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

41. A variety of interests may be legitimate interests. The interests may be wide or narrow, compelling or trivial, commercial or societal. The interests may be case-specific or a more general interest in transparency and accountability. However, the narrower or more trivial the interest, the less likely it is that disclosure to the world at large will be a proportionate means of addressing that interest.

³ 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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) 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”.

42. The ICO has explained that, whilst the purchase was signed off by a relatively senior member of staff, the actual order had been placed by a junior employee.
43. In this case the ICO identified a general interest in disclosure of transparency and accountability – especially as it had already admitted a departure from its policy.
44. The Commissioner also considers that, if (and only if) the request is seeking details of the person who signed off the transaction, there is a legitimate interest in understanding the level of seniority at which this decision was taken and the extent to which senior staff were aware.

Necessity

45. '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.
46. The ICO pointed out that, alongside its internal review, it had also disclosed a copy of the invoice for the purchase, copies of its relevant policies and a summary of the investigation report's main findings. Which, it argued, was sufficient to satisfy any legitimate interest in disclosure.
47. The ICO argued that it had also disclosed a redacted copy of the investigation report, which the Commissioner notes is true but, given that this did not occur until after the completion of the internal review, he has disregarded this point.
48. The Commissioner accepts that disclosing the name of the individual who signed off the purchase would add little to public understanding of how any breach of financial controls took place – and that the information the ICO has placed into the public domain has gone much further in addressing the legitimate interest that the processing of this personal data would. However, disclosure of the name (because it would be easily linked to that individual's job title) would give an indication of the level of seniority within the ICO at which such matters were discussed. None of the material the ICO has disclosed indicates this level of seniority and therefore the Commissioner considers that disclosure is necessary to meet that legitimate interest.
49. In the case of the employee who physically placed the purchase order, the Commissioner does not consider that disclosure of that employee's name would aid public understanding of the decision-making process in

any way. If the complainant intended his request to seek that information (as opposed to the name of the more senior individual), the Commissioner does not consider that disclosure of that information would be necessary to advance the legitimate interest.

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

50. 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 the 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.
51. 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.
52. 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.
53. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
54. The ICO considered that the rights of the individual concerned should outweigh any legitimate interest in transparency. It noted that its staff members had a reasonable expectation that the ICO would not, in most circumstances, disclose the fact that the particular actions of a named member of staff were or were not the subject of an investigation. Given that the ICO had (in order to be transparent) already confirmed that an investigation had been carried out, it would be unfair to link that investigation subsequently to a named individual.

55. The ICO also pointed out that it would be particularly unfair to the individual to be singled out – given that the investigation had concluded that it was a failure of financial oversight, rather than any malfeasance on the part of the employee, that had caused the breach of the ICO's policies. Disclosure would not only be likely to subject the member of staff in question to a torrent of abuse, but might also affect their future employability too.
56. The Commissioner agrees that, in the circumstances of this case, the rights of the member of staff outweigh any legitimate interest in transparency.
57. The Commissioner recognises that the individual in question is a senior member of staff who should have a reasonable expectation that their conduct will be the subject of greater scrutiny than that of their subordinates. In ordering a full external investigation, the ICO has raised the profile of that purchase and has publicly confirmed that the purchase was in breach of its policies.
58. Notwithstanding that, the Commissioner also notes that there has been no suggestion that this purchase was made for personal gain (if the individual benefitted at all from this purchase, the benefit would have been a £24.60 box of chocolates – the same as 253 other ICO employees). The ICO has made clear that this was a "thank you" gift to staff for their hard work and, whilst this was a breach of policies, no suggestion of fraud or malfeasance has been made.
59. The Commissioner also recognises (as he has done in similar cases involving other public authorities) that even the most senior of staff have a reasonable expectation that any disciplinary or quasi-disciplinary investigations they are the subject of will not be revealed by their employer – unless there are exceptional circumstances.
60. What appears to have happened in this case is that the member of staff in question sanctioned a purchase which, whilst well-intentioned, did not conform with the policies of their organisation. According to the statements published by the ICO, this purchase should have been subjected to proper challenge, but this did not occur because of a failure of financial controls. If that is the case then the Commissioner considers that it would be unfair to the member of staff in question to be seen as having been responsible for making a "bad" decision and suffering reputational damage when the system that should have prevented such a decision did not work correctly.
61. Whilst the staff member's level of seniority indicates the level of seniority at which the decision was formally taken, it does not indicate whether the decision was also discussed at a more senior level –

meaning that even disclosure of the name would not ultimately satisfy this legitimate interest.

62. In the circumstances of this case, the Commissioner is satisfied that disclosure would be contrary to the reasonable expectations of the data subject and would therefore cause them unwarranted damage and distress.
63. As such the rights of the data subject outweigh any legitimate interest in disclosure and there is thus no lawful basis on which the personal data could be processed.
64. As no lawful basis for the processing exists, disclosure would be unlawful and would therefore breach principle (a) of the UK GDPR. The ICO is thus entitled to rely on section 40(2) of the FOIA to withhold the requested information.
65. For the avoidance of doubt, although the Commissioner does not consider that disclosure of the name of the junior employee who placed the purchase would be necessary to satisfy any legitimate interest in disclosure, even if it were necessary, the same arguments on balancing would apply. In fact, they would weigh even more heavily in favour of the rights of a junior member of staff.

Right of appeal

66. 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

67. 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.
68. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF