

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

### **Decision notice**

**Date:** 8 March 2022

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

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

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1. The complainant requested information from the Home Office relating to the Home Offices recruitment for a vacant post, specifically the personal statements of the four candidates shortlisted for interview.
2. The Commissioner's decision is that the Home Office was entitled to rely on section 40(2) of FOIA to withhold the requested information.
3. The Commissioner does not require any steps to be taken as a result of this decision notice.

#### **Request and response**

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4. On 14 May 2021, the complainant wrote to the Home Office and requested information in the following terms:

"I would now like to request copies of the 4 personal statements for these candidates so I can see how I compare. I do not wish to see any other part of their applications."
5. The Home Office responded on 25 May 2021 refusing the requested information citing section 40(2) (personal information) of FOIA to do so.

6. On 9 July 2021 the Home Office maintained its stance at internal review to withhold the requested information under section 40(2) of FOIA.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 2 August 2021 to complain about the way their request for information had been handled.
8. The Commissioner considers the scope of this case to be to determine if the Home Office has correctly applied section 40(2) of FOIA to the withheld information.

### **Reasons for decision**

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

9. 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.
10. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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').
11. 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.

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?*

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

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

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

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

14. 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.

15. 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.

16. The information withheld under section 40(2) of FOIA is that of four candidates shortlisted for a specific job vacancy.

17. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subject(s). He is satisfied that this information both relates to and identifies the data subject(s) concerned. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.

18. 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. The most relevant DP principle in this case is principle (a).

*Would disclosure contravene principle (a)?*

19. 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”

20. 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.

21. 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*

22. 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.
23. 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>2</sup>.
24. 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.

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<sup>2</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) of 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”

25. 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*

26. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
27. In this case the requester has a personal interest in disclosure of the withheld information to ensure the Home Office has followed its own guidance and procedures in relation to a particular recruitment exercise.
28. The Home Office acknowledges that the legitimate interest is that of transparency and openness, as well as an understanding of how decisions are made within the Home Office. However, in consideration of disclosure they argued that given the shortlist was small in number by nature, along with the information already disclosed to the requester, there would be a high probability of individuals being identifiable. They also argued that information in a personal statement would identify an individual to the extent that they would be distinguishable from another candidate, otherwise it would be of little use in the shortlisting process.
29. The Home Office cannot identify a legitimate interest in the public or applicant having access to the withheld information. Prospective employee's demand and would expect a level of confidentiality to be upheld within the recruitment process and any subsequent employment.
30. The Commissioner does not consider that disclosure of the withheld information, would further public debate or contribute towards the accountability of the Home Office. Additionally, disclosure under FOIA is disclosure to the world at large and not just to the requester. It is the equivalent to the Home Office publishing the information on its website.
31. As the Commissioner does not consider there is a legitimate interest in disclosure of the withheld information, he has not gone on to consider whether disclosure was necessary or the balancing test.

32. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
33. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to consider whether disclosure would be fair or transparent.

The Commissioner's view

34. The Commissioner has therefore decided that the Home Office was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

## Right of appeal

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35. 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@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)

36. 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.
37. 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 .....**

**Phillip Angell**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**