

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

### **Decision Notice**

**Date:** 31 July 2012

**Public Authority:** Department of Justice (Northern Ireland)

**Address:** Annex A  
Dundonald House  
Stormont  
Belfast  
BT4 3SU

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

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1. The complainant requested the names and job titles of officials within the Department of Justice (Northern Ireland) and the Compensation Agency. The Department provided some information, but withheld some officials' names under section 40(2) of the FOIA as it considered disclosure would be unfair to those individuals. The Commissioner upholds this decision and does not require any steps to be taken.

#### **Request and response**

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2. The Compensation Agency is an executive agency of the Department. It is responsible for supporting the victims of criminal injury or criminal damage, by ensuring that they are appropriately compensated in accordance with relevant statutory schemes. The complainant in this case had previously made an unsuccessful claim to the Compensation Agency under the Criminal Injuries (Compensation) (Northern Ireland) Order 1988.
3. On 23 December 2010, the complainant submitted an information request to the Department. The request was for information relating to the complainant's contact with the Department and the Compensation Agency. The full text of the request is reproduced at annex 1 at the end of this Notice.
4. The Department responded on 4 January 2011, advising that it was handling the request under the Data Protection Act 1998 (the DPA). This was because the Department considered the request to be for the

complainant's personal data, and therefore exempt from disclosure under the FOIA.

5. On 24 February 2011 the Department provided the complainant with all the personal information it considered he was entitled to receive. The complainant was dissatisfied with this response and complained to the Commissioner.

### **Scope of the case**

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6. It was clear to the Commissioner from the wording of the complainant's request that most of the requested information (to the extent that it might be held) would be the complainant's personal data. Section 7 of the DPA gives an individual the right to request copies of personal data held about them, but it is exempt from disclosure under the FOIA by virtue of section 40(1). Therefore the Commissioner conducted an assessment under section 42 of the DPA into the Department's compliance with the DPA. The assessment does not form part of this Decision Notice because an assessment under section 42 of the DPA is a separate legal process from the consideration under section 50 of FOIA. The complainant received the result of the assessment on 22 November 2011.
7. However, during the course of the section 42 assessment the Department advised the Commissioner that it had withheld the names of some officials on the basis that they were not the complainant's personal data and it would be unfair to disclose them into the public domain.
8. The Department explained to the Commissioner that it holds relevant information because it provided assistance to the Compensation Agency in dealing with a previous subject access request (a request for the complainant's personal information) made by the complainant to the Compensation Agency. The Department provided technical assistance relating to the provisions of the DPA, rather than providing judgement or opinion relating to the complainant. The Department confirmed that it does not hold any information relating to the complainant in connection with any other issue, and this was investigated to the Commissioner's satisfaction under the section 42 assessment.
9. Consequently the Commissioner is satisfied that the names of the officials should be considered under the FOIA rather than the DPA. This is because the information attributed to the individuals relates to matters of compliance with the DPA rather than the complainant in this case. The Commissioner therefore proceeded to investigate this element of the complaint under the FOIA. During the FOIA investigation the

Department agreed to disclose one piece of withheld information to the complainant: the name of the chief executive of the Compensation Agency. The Department also disclosed all the job titles as requested by the complainant.

10. Therefore the Commissioner's decision in this case relates to the remaining withheld information, which comprises the names of officials working in the Department or the Compensation Agency at the time of the complainant's request to the Compensation Agency.
11. Under section 50(2)(a) of the FOIA the Commissioner is not required to make a decision if the complainant has not exhausted the public authority's internal review process. However, the Commissioner is mindful that the Department had originally handled the request under the DPA, and had not advised the complainant of any information which was not his personal information but which was being withheld under the FOIA. The FOIA investigation was commenced in November 2011, following completion of the DPA assessment. As the complainant first made his request in December 2010 the Commissioner considered it appropriate to proceed to an investigation under the FOIA without requiring the complainant to request a further internal review.

## **Reasons for decision**

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### **Section 40(1)**

12. As noted above, all the information that constitutes the complainant's personal data has been considered separately by the Commissioner under section 42 of the DPA. Under section 40(1) of the FOIA, such personal data is absolutely exempt from disclosure into the public domain. The Commissioner is satisfied that section 40(1) was correctly applied to the complainant's personal data in this case.

### **Section 40(2)**

13. Section 40(2) of the FOIA states that the personal data of a third party is exempt from disclosure if to do so would contravene any of the data protection principles or section 10 of the DPA. "Personal data" is defined at section 1(1) of the DPA as data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
14. The Commissioner is satisfied that the withheld names in this case constitute personal data relating to the individual officials. This is because the individuals can be identified by their names. In addition the

names in the context of the requested information also disclose that the individuals worked for particular organisations, and either sent or received correspondence concerning the complainant's subject access request to the Compensation Agency.

15. In this case the Department argued that the withheld names fell under section 40(2) as it was not obliged to provide them to the complainant under the DPA. The Department explained to the Commissioner that none of the individuals in question played an active role in making decisions affecting the complainant. As explained at paragraph 7 above, the Department's involvement was limited to providing general advice on how to respond to the subject access request. In some cases individuals had been copied into correspondence in case they had relevant experience in compliance with subject access requests. Therefore the Department was of the view that the withheld names fell outside the scope of the DPA and should be considered under the FOIA.

Would disclosure of the withheld information breach any of the data protection principles?

16. The Department argued that disclosure of the withheld names would contravene the first data protection principle, which requires that personal data be processed fairly and lawfully.

The first data protection principle

17. The first data protection principle has two main components. They are:
  - the requirement to process all personal data fairly and lawfully; and
  - the requirement to satisfy at least one DPA Schedule 2 condition for the processing of all personal data.
18. Both requirements must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data protection principle. The Commissioner's general approach to cases involving personal data is to consider the fairness element first. If the Commissioner finds that disclosure would be fair he will then move on to consider the other elements of the first data protection principle.

*Would disclosure of the information be fair?*

19. In considering whether disclosure of personal data would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner took account of the following factors:

- The individuals' reasonable expectations of what would happen to their personal data;
- The consequences of disclosure; and
- The balance between the rights and freedoms of the data subjects and the legitimate interests of the public.

*Expectations of the individuals concerned*

20. The Department advised the Commissioner that it does not routinely disclose officials' names unless they are in public facing roles or are at a senior grade (such as Senior Civil Servants, who are at grade 5 and above). This is in line with guidance issued by the Ministry of Justice (the MOJ) although the Commissioner notes that the guidance also makes it clear that less senior staff should often expect their names to be disclosed in certain circumstances:

*"...some senior managerial/ executive staff work in a context of direct personal public accountability. The names of such individuals will very likely fall to be disclosed, as will those of junior staff who deal with the public directly."*

21. The Commissioner has also produced guidance to assist public authorities when considering requests for personal information of their employees<sup>1</sup>. The Commissioner's guidance states that the seniority of the individual acting in a public or official capacity should be taken into account when personal data about that person is being considered for disclosure under the FOIA. This is because the more senior a member of staff is, the more likely it is that they will be responsible for making influential policy decisions and/or decisions relating to the expenditure of public funds. The Commissioner is generally of the view that senior staff are more likely to be exposed to greater levels of scrutiny and accountability and there should therefore be a greater expectation that some personal data may need to be disclosed in order to meet that need.

22. The Commissioner notes that all of the withheld names are for relatively junior staff, with the exception of the (then) senior legal adviser to the Compensation Agency. The Commissioner has therefore considered the names of the more junior staff separately from that of the senior legal adviser.

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[http://www.ico.gov.uk/for\\_organisations/freedom\\_of\\_information/guide/~/\\_media/documents/library/Freedom\\_of\\_Information/Practical\\_application/INTERPRETING\\_A\\_REQUEST.ashx](http://www.ico.gov.uk/for_organisations/freedom_of_information/guide/~/_media/documents/library/Freedom_of_Information/Practical_application/INTERPRETING_A_REQUEST.ashx)

### Names of more junior staff

23. The Department withheld the names of these officials in this case on the grounds that they had no expectation that their names would be disclosed, and they were not responsible for making decisions in relation to the complainant. Having inspected the withheld names the Commissioner is satisfied that the individuals are neither senior nor do they occupy public facing roles. The individuals' names fall within the scope of the complaint simply because the individuals were, according to the wording of the request, "party to" the handling of a subject access request made by the complainant to the Compensation Agency. The individuals did not make any decisions regarding the complainant, nor did they have any influence over decisions which may affect him.
24. In light of the above the Commissioner is satisfied that the individuals would have no expectation that their names would be disclosed into the public domain. The Commissioner is mindful that this alone is not a compelling argument against disclosure, but it is useful in the context of considering disclosure of personal information.

### *Consequences of disclosure to the individuals*

25. The Department confirmed that it had not sought consent from any of the individuals to disclose their names and contact details, nor had it asked the individuals for their views on disclosure. The Department relied on the MOJ guidance referred to at paragraph 19 above, and concluded that the names should not be disclosed, therefore there was no need to seek consent.
26. The Commissioner accepts that, if the withheld names were to be disclosed into the public domain, the individuals concerned may wrongly be identified as accountable or responsible for decisions made in which they had no influence.

### *General principles of accountability, transparency and legitimate public interest in disclosure*

27. The Commissioner appreciates that the complainant has a legitimate interest in knowing how his subject access request was handled. However, in this case the Commissioner considers that disclosure of the job titles of the individuals, rather than their names, to be more helpful – and indeed sufficient – in meeting this legitimate interest. Disclosure of the withheld names under the FOIA would be into the public domain, but would only inform the public that the individual in question was copied into correspondence involving the complainant.

28. The Commissioner also notes that the Department has disclosed the substantive content of the requested information to the complainant under the DPA. The Commissioner accepts that disclosure of the withheld names is not required in order to inform the public as to the Department's decision making process, particularly as the information provided to the complainant under the DPA is exempt from disclosure under the FOIA.
29. The Commissioner recognises that the legitimate interests of the public (as opposed to the private interests of the complainant) must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject in considering how the factors balance. Having done so the Commissioner finds that the disclosure of the requested information would be unfair to the data subjects. The fact that the individuals in question were copied into correspondence, rather than playing an active role in decision making, is an important factor in the Commissioner reaching his decision.
30. As the Commissioner has decided that disclosure would be unfair, section 40(2) is engaged in relation to the withheld names.

The senior legal adviser

31. The Department disclosed the names of most of the senior individuals within the Department and the Compensation Agency. The only exception was the name of the (then) senior legal adviser in the Compensation Agency. The Department argued that disclosure of this individual's name would breach the first data protection principle and section 10 of the DPA. Section 10 provides that an individual may formally request that a data controller (in this case the Department) stop processing, or not process, personal data of the individual on the grounds that it would cause substantial, unwarranted damage or distress.
32. As with the other individuals' names, disclosure of this name would inform the public that the individual was the senior legal adviser at the Compensation Agency at the time the complainant made his subject access request to that authority. The individual in question has since moved to another government department, but did provide a submission as to why her name should not be disclosed into the public domain.
33. The individual in question advised that she had concerns about her personal security should her name be disclosed into the public domain. The individual explained that during her employment by the Compensation Agency, staff were advised to be vigilant with personal security, given the political situation in Northern Ireland. The individual added that she had no expectation that her name would be released into

the public domain, and had she considered this a possibility she would have asked to be transferred out of the Compensation Agency. Finally, the individual suggested that a number of other exemptions under the FOIA could be applied to withhold her name, including section 38 (health and safety), section 35 (formulation / development of government policy) and section 36 (prejudice to the effective conduct of public affairs).

34. The Department confirmed to the Commissioner that this individual's name only appeared in email lists (i.e. that individual was copied into emails rather than the sender or recipient), except on one occasion where the individual was referenced within the context of an email. The Department maintained that the individual did not provide opinions or advice in relation to the complainant; rather that individual has merely been copied into the correspondence for information purposes. In conclusion, other than the individual's name, no information is attributed to this legal adviser.
35. As indicated above the next step is to balance the legitimate interests of the public (as opposed to the private interests of the complainant) against any unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject.
36. The Commissioner is of the view that, generally, individuals who occupy senior posts which are paid for out of the public purse, should expect that information relating to their employment will be made publicly available. The individual in question here, as a senior legal adviser, would generally have been responsible for providing legal advice which would inform decisions, and as such it is arguable that the post holder should be accountable for her advice. However, in the context of this case the Commissioner considers that disclosure of the name of the senior legal adviser is not required in order to inform the public's understanding of the work of the Compensation Agency.
37. The Commissioner is mindful that the former senior legal adviser is of the strong view that her name should not be released on the grounds of personal safety, given the unique history and circumstances in Northern Ireland. This individual clearly believes that disclosure of her name would constitute unwarranted prejudice to her own legitimate interests.
38. The Commissioner considers that the general public interest in disclosing the name of the former senior legal adviser is insufficiently compelling to outweigh genuine concerns of that individual that disclosure would cause her harm. Therefore the Commissioner finds that the disclosure of this individual's name would not be fair and would breach the first data protection principle.



39. As the Commissioner is satisfied that disclosure of the former senior legal adviser's name would breach the first data protection principle he is not required to consider the Department's argument that disclosure would also contravene section 10 of the DPA.

## Conclusion

40. For the reasons set out above the Commissioner finds that the Department was entitled to withhold the names of all the individuals, including the senior legal adviser, under section 40(2) of the FOIA.

## Procedural requirements

### Section 17: refusal notice

41. Section 17(1) of the Act states that:

*"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –*

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies".*

42. The Department's response of 4 January 2011 advised the complainant that it was handling his request under the DPA because his personal information was exempt under section 40(2) of the FOIA. However section 40(1) is the correct exemption for the applicant's personal information, although the Commissioner assumes that this was a typographical error.
43. In any event the Department did not advise the complainant that it was withholding information which was not his personal data. The complainant was only informed of this when the Commissioner advised him of the outcome of his DPA assessment in November 2011. During the Commissioner's investigation the Department clarified that it considered this information exempt under section 40(2) of the FOIA. As the Department failed to advise the complainant of this within the statutory timescale, the Commissioner finds that the Department failed to comply with section 17(1) of the FOIA.

## Right of appeal

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44. 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: 0116 249 4253  
Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

45. 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.
46. 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 .....**

**Alexander Ganotis**  
**Group Manager – Complaints Resolution**  
**Information Commissioner’s Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## Annex 1

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### Full text of request dated 23 December 2010

"I would like to request in electronic format, sent via e-mail to what-do-they-know, the following:

1. All memos/internal messages, emails including telephone notes/records and or other correspondence between Northern Ireland Compensation Agency, it's officers, (including [name of official])and the Department of Justice (Northern Ireland) and it's officers concerning me, [name of complainant].
2. Full details of all advice requested and given to the Northern Ireland Compensation Agency, it's officers, (including Ms Marcella McKnight) by Department of Justice (Northern Ireland), it's officers between March 2010 and the date this request is answered concerning me, [name of complainant].
3. All memos/internal messages, emails including telephone notes/records and or other correspondence between PSNI, it's officers and the Department of Justice (Northern Ireland) and it's officers, (between Jan 2008 and the date this request is answered), concerning me, [name of complainant].
4. All memos/internal messages, emails including telephone notes/records and or other correspondence between PPS, it's officers and the Department of Justice (Northern Ireland) and it's officers, (between Nov 2007 and the date this request is answered), concerning me, [name of complainant].
5. Please supply name(s) of all Department of Justice (Northern Ireland) officers, including their position(s) within DOJ, who have been involved and/or party to any of above matters concerning me, [name of complainant]."