

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 November 2013

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested a breakdown of the results for two directorates in the public authority in response to questions relating to bullying or harassment in staff surveys. The public authority withheld information relevant to a part of the request on the basis of the exemptions at sections 36(2)(c), 40(2) and 41(1) FOIA. It claimed that it did not hold information within the scope of the remaining parts of the request.
2. The Commissioner's decision is that the public authority was entitled to withhold the information referred to as 'the disputed information' in this notice on the basis of the exemption at section 40(2). He also finds that, on the balance of probabilities, the public authority did not hold information within the scope of the remaining parts of the request.
3. The public authority does not need to take any steps.

Request and response

4. On 30 November 2012, the complainant wrote to the public authority and requested information in the following terms:

'I remember that during the years covered [REDACTED] there were a number of staff surveys at COI which explicitly asked about whether staff have experienced, witnessed, or been aware of bullying – both within COI as a whole and by departments like Strategic Consultancy. I believe research interviews and surveys were also conducted as part of

COI preparing or entering the Sunday Times' best employer awards and similar schemes.

Please could I have a copy of the results regarding the numbers reporting bullying for COI and StratCon, which I believe I can ask for under the FOIA...'

5. The public authority responded on 4 February 2013. It confirmed that it held information matching the request above and supplied the complainant with a *'printout of the results of the 2009 and 2010 survey questions about experience of discrimination, harassment and bullying for the COI as a whole.'*

6. On 6 February 2013, the complainant wrote back to the public authority in the following terms:

'I would also ask for a more comprehensive information to the information I requested, which was

a) for both COI and the Strategic Consultancy (StratCon) department at COI

b) for the years covered [REDACTED], which went further than that provided

c) not only 'experienced' (as sent in your email) but also regarding witnessing or being aware of.

d) also regarding interviews in preparation for the Sunday Times surveys.

7. The public authority considered this to be a request for an internal review and responded accordingly on 3 April 2013. It explained that the results for COI and StratCon were not held separately. Data from the survey would have to be manipulated to produce the specific results for StratCon. It was therefore of the view that it did not *hold* (within the meaning envisaged in section 1(1)(a) FOIA) the results for StratCon. It also claimed that results would in any event be exempt from disclosure on the basis of section 40(2) FOIA. In terms of item b, the public authority explained that in 2010, COI became part of the public authority and was wound up and separate surveys ceased to be produced. It therefore did not hold information relevant to item b. The public authority also claimed that it did not hold information relevant to item d. It did not specifically address item c.

Scope of the case

8. The complainant contacted the Commissioner on 31 May 2013 to complain about the way his request for information had been handled. His complaint was phrased as follows:

'Since last November, the Cabinet Office (CO) has ignored, delayed, or failed to respond to FOIA requests from me regarding information about staff reviews, staff surveys, and bullying at the Central Office of Information (COI), an organisation which became part of The Cabinet Office before it was closed down. I am not happy with the supposed 'review' after I complained, and the CO continues to ignore my most recent requests for clarification or information...'

9. During the course of the Commissioner's investigation, the public authority revised its position in relation to item a. It accepted that the results for StratCon (i.e. the Strategic Consultancy Directorate) could be readily extracted from raw data for the survey and it was therefore *held* by the public authority. It however claimed that the relevant information was exempt from disclosure on the basis of the exemptions at sections 36(2)(c), 40(2) and 41(1) FOIA.
10. The scope of the investigation therefore was to consider;
- i. whether the public authority was entitled to withhold the information relevant to item a (the disputed information) on the basis of the exemptions at sections 36(2)(c), 40(2) and 41(1),
 - ii. whether the public authority holds information within the scope of items b, c and d, and
 - iii. the timeliness of the public authority's response to the requests for information and internal review.

Reasons for decision

Item a – the disputed information

11. The disputed information is a breakdown of the survey data showing responses (in figures) to the question about bullying and harassment in 2009 for the Strategic Consultancy Directorate and in 2010 for the Strategy and Planning Directorate (the successor unit to StratCon). The question in both surveys was; *'During the past 12 months, have you personally experienced bullying or harassment at work?'* Respondents had the option of answering *'Yes, No, or prefer not to say'*. The disputed

information is basically the number of respondents for each of the three options; yes, no or prefer not to say. As mentioned, the responses to this question for the COI as a whole had previously been disclosed to the complainant on 4 February.

Section 40(2)

12. Information is exempt from disclosure on the basis of section 40(2) if it constitutes third party *personal data* (i.e. the personal data of anyone other than the individual making the request) and either the first or second condition in section 40(3) is satisfied.

13. Personal data is defined in section 1 of the Data Protection Act 1998 (DPA) as follows:

'.....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 likely to come into possession of, the data controller; and includes any expression of opinion about the individual and indication of the intentions of the data controller or any person in respect of the individual.'

14. Section 2 of the DPA defines *sensitive personal data* as follows:

'....."sensitive personal data" means personal data consisting of information as to-

- (a) the racial or ethnic origin of the data subject,*
- (b) his political opinions,*
- (c) his religious beliefs of a similar nature,*
- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),*
- (e) his physical or mental health or condition,*
- (f) his sexual life,*
- (g) the commission or alleged commission by him of any offence, or*
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.'*

Is the disputed information personal data?

15. The primary consideration in the circumstances of this case is whether the respondents are identifiable from the anonymised data in conjunction with information already known or available to the public, including the complainant.

Complainant's arguments

16. The complainant argued that the numbers of staff employed by StratCon (over 50 in his view) means that it would be difficult to identify individuals from the disputed information. In other words, the numbers are not low enough to make it easier to identify respondents.

Public authority's arguments

17. The public authority is of the view that although the responses were given anonymously, the disputed information refers to a very small number of respondents. The complainant was a member of staff during the relevant period and anyone equipped with his knowledge of the directorate and its staff would be able to make a reasonably accurate guess as to who the respondents were. This would include other members of staff, especially the management team, and more significantly, the alleged perpetrators of bullying and harassment would be able to guess the identity of those respondents who had drawn attention to the problem by reporting the matter. The difference between the 2009 figure and the 2010 figure may also focus allegations of bullying or harassment on a particular respondent or respondents. The public authority estimated that there were 86 staff deployed at the directorate in 2009 and 26 in 2010.
18. The public authority further argued that the disputed information is the *sensitive personal data* of data subjects who could be identified, albeit indirectly, as perpetrators of discrimination, bullying or harassment if the relevant respondents (i.e. those who experienced bullying or harassment) were identified. In that sense, the disputed information is also information as to the commission or alleged commission of an offence (e.g. under the Protection from Harassment Act 1997) by the data subjects.

Commissioner's assessment

19. Given the low number of respondents who answered Yes to the question in both surveys, the Commissioner accepts that someone with knowledge of the directorate and its staff including a previous member of staff would be able to make a reasonably accurate guess as to the identities of some or all of those respondents. He accepts that the

number of staff at the directorate in 2009 and 2010 was low enough to make it easier for respondents to be identified.

20. The Commissioner also believes that even if only the number of respondents who answered *No* was revealed, given the low number of staff, it is still likely that the number of respondents who did not answer *No* to the question could be deduced from those figures. Consequently, given the low number of respondents who did not answer *No*, someone with knowledge of the directorate and its staff would be able to make a reasonably accurate guess as to the identities of some or all of those respondents.
21. The Commissioner accepts that the disputed information could potentially be sensitive personal data within the meaning in section 2(g). He accepts that if relevant respondents are identified, someone with knowledge of the directorate and its staff would be able to identify the alleged perpetrators of harassment, an offence under the Harassment Act 1997. The disputed information does not relate to discrimination. The request was for information related to bullying or harassment.
22. The Commissioner therefore accepts that the disputed information is personal data within the meaning envisaged in section 1 of the DPA.

Would the disclosure of the disputed information contravene any of the data protection principles?

23. As mentioned, for section 40(2) to apply, either the first or second condition in section 40(3) must be satisfied. The first condition in section 40(3) states that disclosure of personal data would contravene any of the data protection principles or section 10 of the DPA.
24. The public authority submitted that disclosure would contravene the first data protection principle. The first data protection principle states:
'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-
 - (a) *at least one of the conditions in Schedule 2 is met, and*
 - (b) *in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.*
25. The public authority submitted that disclosure would neither be fair nor lawful because it would not satisfy any of the conditions in Schedule 2. It considered that the condition in Schedule 2, paragraph 6(1) was the most relevant condition in the circumstances of this case. Paragraph 6(1) in Schedule 2 states:

'The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'

26. The public authority acknowledged that openness and transparency in public affairs and understanding the extent of bullying in government departments and whether departments are able to identify it and take action to prevent it are legitimate interests in favour of disclosure. However, it considered that the disclosure would be unwarranted because of the legitimate interest in protecting information provided by the data subjects in confidence. Disclosure would significantly prejudice the data subjects' (respondents) right to privacy. It would cause significant damage or distress to the data subjects because it could increase the acts of bullying or harassment against the exposed victims. Simply engendering the fear that victims of bullying or harassment could be exposed would cause substantial distress to victims. Disclosure would also cause substantial damage to the alleged perpetrators. In particular, to the extent that other members of staff and managers were able to surmise their identity, it could lead to their being treated as if they had committed these offences, including finding it more difficult to obtain promotion. The fear that they would be deprived of opportunities for professional advancement without having an opportunity to defend themselves, would cause substantial and unwarranted distress.

Commissioner's assessment

27. In considering whether the first data protection principle has been contravened, the Commissioner believes that the correct approach is for the public authority to initially consider whether disclosure would be fair and lawful, separate from whether disclosure would also meet any of the conditions in Schedule 2 and/or Schedule 3. The Commissioner therefore considered whether disclosure would be fair. If he finds that it would be unfair to disclose the disputed information, that alone would contravene the first data protection principle and there would be no need to consider the other elements.
28. In determining whether disclosure would be fair in this case, the Commissioner has principally considered the reasonable expectations of the respondents in light of the circumstances in which they responded to the question in the surveys on bullying and harassment. He has also considered the consequences of disclosing the disputed information.
29. It is clear that the respondents took part in the surveys with the expectation that they would not be identified from their answers to the questions asked in the surveys. In particular, they would expect that

their responses to the serious and sensitive subject of bullying or harassment in the workplace would not be revealed in such a way that would identify them. This more so for those who claim to have been victims of bullying or harassment and their alleged perpetrators. The Commissioner believes that, in the circumstances, their expectation would have been quite reasonable. It would be a significant intrusion of their privacy should their identities be revealed. The Commissioner is therefore also mindful of the damage and distress that revealing the identity of the respondents could cause. He accepts that victims of bullying or harassment could suffer more of the same should their identities be revealed. He also accepts that the alleged perpetrators' careers could be damaged if they are also identified.

30. The Commissioner therefore finds that disclosing the disputed information would be unfair and consequently in contravention of the first data protection principle.
31. The Commissioner has not gone on to separately consider whether disclosing the sensitive personal data would meet any of the conditions in Schedule 3. That is because the alleged perpetrators are more likely to be identified should the victims' identities be revealed. He has already found that revealing the identities of the respondents would contravene the first data protection principle. There is therefore no need to separately consider whether the sensitive personal data should be disclosed.
32. The Commissioner finds that the public authority was entitled to withhold the disputed information on the basis of the exemption at section 40(2). In view of his decision, he has not considered the applicability of the other exemptions relied on by the public authority.

Does the public authority hold information within the scope of items b, c and d?

33. In determining whether information is held, the Commissioner applies the normal standard of proof – i.e. he will decide on the balance of probabilities whether the information is held. Clearly, the explanations offered by both the public authority and complainant in support of their respective positions would be crucial to his decision.

Item b - for the years covered [REDACTED], which went further than that provided

34. The public authority explained that the first Civil Service wide survey was conducted in 2009. A pilot study in February 2009 did not include the COI. Therefore, no results of staff surveys prior to 2009 could be held.

35. The complainant claimed that *'senior management assured staff all HR information including reports and data across a number of years would be held.'*
36. The Commissioner has no reason to doubt the public authority's explanation. He is satisfied that, on the balance of probabilities, the public authority does not hold information relevant to item b.

Item c - not only 'experienced' (as sent in your email) but also regarding witnessing or being aware of. And

Item d - also regarding interviews in preparation for the Sunday Times surveys.

37. The public authority explained that there was no evidence to suggest that the staff surveys in 2009 and 2010 gathered data about *witnessing or being aware* of bullying. There is nothing to suggest that the question has ever been asked because it is not regarded as a reliable metric.
38. The complainant did not provide any specific evidence to support his view that information relevant to items c and d is held by the public authority. He did however make the following comments:

'I also understand that the old COI IT team is still working at Hercules House and they would have access to the COI document management system called Livelink. While this may not be running at present, much data may still be held and accessible if the system was to be turned on again. I am not saying that it would be easy to do so, merely that at the time of my FOIA request last year it could have been done and the CO did not even consider how to access that data as it was obliged to do under the FOIA.'

39. The public authority explained that the 'Livelink' document management system was decommissioned in September 2012. Only a specific and a limited number of business critical documents were exported and preserved. It did not include the information requested.
40. The Commissioner is satisfied that, on the balance of probabilities, the public authority did not hold the information requested.

Procedural matters

41. By virtue of section 10(1), a public authority is required to respond to a request for information within 20 working days.
42. The Commissioner finds the public authority in breach of section 10(1) for not providing a response to the request (which was made on 30 November 2012) within 20 working days.

Other matters

43. The FOIA does not stipulate a time limit for public authorities to issue internal reviews. However, as a matter of good practice, the Commissioner considers that a public authority should take no more than 20 working days to issue an internal review and in exceptional circumstances, 40 working days.
44. The Commissioner therefore wishes to record his concern that it took the public authority over 40 working days to issue the outcome of its internal review to the complainant. He expects the public authority to complete internal reviews of responses to requests for information more promptly in future.

Right of appeal

45. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

46. 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.
47. 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
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