

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 January 2014

Public Authority: Department for Transport
Address: Great Minster House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant requested from the Department for Transport ("DfT") information about whether any of its staff had been dismissed as a result of the problems with the bidding for the West Coast Main Line ("WCML") rail franchise. The DfT refused to confirm or deny whether it held any information under section 40(5).
2. The Commissioner's decision is that the DfT has correctly applied section 40(5) to the request. He does not therefore require it to take any steps to ensure compliance with the legislation.

Request and response

3. During the latter part of 2012 and early part of 2013, the complainant corresponded with the DfT about the WCML rail franchise, specifically about the flaws in the way that the competition for the franchise was conducted. On 11 February 2013 the DfT received a letter from the complainant in which he expressed his concern that it had not addressed the issue as to which person, or persons, were responsible for the problems that had arisen. He stated that:

"To simple say to a genuine question, that the employees of DfT who may be responsible for this will be disciplined privately behind closed doors does not in my opinion give confidence to the general public, myself included, that a white wash or cover up will undoubtedly follow...I see nothing that should not be

made public, as I do not accept that this is a PRIVATE matter...I need to know who is accountable."

4. The DfT responded on 15 April 2013. It appears that the DfT interpreted this as a request for the names of officials who may have been responsible for the problems that occurred. It withheld information under section 40(2) and (3).
5. On 14 May 2013 the complainant wrote to the DfT to clarify that he was questioning what had happened in general, not in personal or specific terms, to the civil servants responsible for the WCML bid errors. His letter stated that all he wanted to know was:

"1. Have any contracts of employment been terminated as a result of the disciplinary action?"

2. Have there been any demotions as a result of the disciplinary action undertaken following the Laidlaw Review?"

6. The DfT treated the complainant's letter as a request for an internal review. In relation to its response of 15 April 2013, it explained that information on the names of employees who may have been responsible for mistakes that led to the cancellation of the WCML rail franchise was exempt from disclosure under section 40(2). In relation to the specific questions in the letter of 14 May 2013, as to whether any contracts of employment had been terminated or whether any demotions had occurred, the DfT applied the exemptions in sections 31(3), 36(3) and 40(5). It refused to confirm or deny whether any contracts of employment had been terminated or whether any demotions had occurred.

Scope of the case

7. The complainant contacted the Commissioner 23 July 2013 to complain about the way his request for information had been handled, specifically whether the DfT was entitled to refuse to provide him with the information requested in his letter of 14 May 2013.
8. During the course of the Commissioner's investigation, the DfT provided a response to the second part of the complainant's request for information as to whether there had been any demotions as a result of disciplinary action undertaken following the Laidlaw Review. It explained that it had taken the reference to the Laidlaw Review to be a reference to the Stow Investigation that was undertaken to consider employment matters related to departmental staff. It went to confirm that it held no information relating to demotions because demotions as a penalty were

not an option at any stage under the central Department's disciplinary procedures.

9. In addition, the DfT confirmed to the Commissioner during his investigation that it was no longer relying on the exemption in section 31(3).
10. The Commissioner considered whether the DfT had handled the first part of the complainant's request, for information as to whether any contracts of employment had been terminated as a result of disciplinary action, in accordance with FOIA. Specifically, he considered whether the DfT was entitled to rely on the exemptions in section 36(3) and 40(5) as a basis for refusing to confirm or deny whether it held any relevant information.

Reasons for decision

Section 40(5) – Refusal to confirm or deny whether personal data is held

11. Section 40(5) of FOIA states:

"The duty to confirm or deny-

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either-

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

12. Section 40(5)(b)(i) provides that the duty to confirm or deny does not arise in relation to information that falls, or would fall if it were held, within the scope of section 40(2) of the Act. Section 40(2) provides that

information which is not the personal data of the applicant and is data as defined in section 1(1) of the Data Protection Act 1998 ("DPA") is exempt from disclosure if disclosure would contravene any of the data protection principles.

13. The DfT argued that section 40(5)(b)(i) applied because, in its view, it would contravene the first data protection principle of the DPA if it were to provide confirmation or denial as to whether it held the information described in the request as it would not be fair to do so.
14. The Commissioner consequently considered whether:
 - (1) the requested information constituted personal data; and
 - (2) if it did constitute personal data, whether providing confirmation or denial as to whether it was held would contravene the DPA.
15. The Commissioner would emphasise that nothing contained in this notice should be taken as any indication as to whether the DfT has or has not terminated any of its staff's contracts of employment as a result of disciplinary action resulting from the problems associated with the bidding process for the WCML rail franchise.

(1) Would the requested information constitute personal data?

16. The term "personal data" is defined by section 1(1) of the DPA. "Personal data" means data which relate to a living individual who can be identified from those data or from data in the possession, or likely to come into the possession, of the data controller (in this case, the DfT).
17. As the complainant was only seeking to obtain details of whether any civil servants' contracts of employment had been terminated as a result of disciplinary action arising from the errors on the WCML bid franchise, and not the names of individual civil servants, there is clearly an issue as to whether the information he requested is data relating to individuals who could be identified and, consequently, whether it was a request for personal data. If it was not a request for personal data, then section 40 could not apply.
18. The issue of whether individuals are identifiable from particular data is referred to in the Commissioner's guidance "*Determining what is personal data*". The guidance makes reference to Recital 26 of the EU Directive from which the DPA originates. Recital 26 states that, whether or not the individual is identifiable will depend on "*all the means likely reasonably to be used either by the controller or by any other person to identify the said person*". The Commissioner's guidance goes on to state that:

"When considering identifiability it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals. Examples would include investigative journalists..." (page 9)

19. The DfT explained that it could not confirm or deny whether it held information on whether staff had their contracts of employment terminated without in effect disclosing the outcome of disciplinary proceedings against former staff members. It argued that if it confirmed that it did hold information on contracts of employment being terminated, then in effect it would be confirming that at least one person's contract of employment had been terminated. Conversely, if it denied that it held any information, this would imply that no one's contract of employment had been terminated.
20. The DfT went on to explain that if it confirmed that it held information, it believed that would be possible for individuals to be able to use this information, together with information already known or available to them, to reach an educated view as to the identities of staff who had their contracts of employment terminated, if it was the case that any contract had been terminated.
21. In support of its view, the DfT explained that staff working within the Department would be aware of the identity of colleagues who worked on the WCML franchise competition project. They would also be aware of which of those colleagues no longer worked within the Department. The DfT provided the Commissioner with details of the number of people who worked on the WCML project and the number from that group who no longer worked within the Department. The Commissioner accepts that the number of people employed in the project team was small and the number who were no longer employed by the time of the request was correspondingly smaller.
22. In addition, the DfT informed the Commissioner that within the group of staff who worked on the WCML project, there was a smaller group of staff who were suspended from duty while the HR investigation, known as the Stow Investigation, was being carried out. The fact that these individuals were suspended was likely to have been known to other staff working in the Department. This was even more likely to be the case because the WCML staff worked in an open-plan environment in which extended absences during the relevant time period would not have gone unnoticed.
23. The DfT also believed that it was very possible that stakeholders external to the Department would have been aware of the absence of

suspended staff and would have reached conclusions based on that fact, in combination with the information that was available in the public domain. The Commissioner notes that the number of staff within the group who worked on the WCML project and who no longer work in the Department may or may not include staff who were suspended from duty while the Stow investigation was being carried out.

24. The DfT informed the Commissioner that even for individuals outside the Department, the details of relevant staff would be generally known by virtue of their roles within the WCML franchise. Third parties would know particular individuals who used to, but no longer, worked for the Department. This, together with the small number of relevant staff and the extensive media coverage subsequent to the decision to cancel the franchise competition in which members of staff who worked on that project had been identified, would mean it was almost inevitable that staff whose contracts had been terminated could have been identified fairly easily.
25. As a consequence of the above, the DfT believed that if it confirmed that it held information within the scope of the request and that, by implication, contracts of employment had been terminated, then it would be possible for third parties (in particular, but not only, other DfT staff) to deduce that an individual or individuals, who they knew had left the Department, had left because their contracts of employment had been terminated rather than because they had chosen to leave of their own accord.
26. Conversely, the DfT argued that if it denied that it held recorded information, with the implication that no contracts of employment had been terminated, third parties would deduce that the staff who left the Department (whose identities they knew) left for reasons unconnected with the termination of their contract of employment.
27. Based on the information provided to him, the Commissioner is satisfied that the confirmation or denial that information is held by the DfT in relation to the request would potentially allow individuals to be linked to that information. Consequently, he accepts that confirming or denying that information is held would disclose personal data about individual employees.
28. The Commissioner went on to consider whether confirming or denying that the requested information is held would contravene the DPA.

(2) Would confirming or denying that the requested information is held contravene the DPA?

29. The DFT argued that confirming or denying whether information is held would breach the first data protection principle. This requires that:
- (a) any disclosure of information is fair and lawful; and
 - (b) at least one of the conditions in schedule 2 is met, and in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.
30. The Commissioner initially considered whether the confirming or denying that information is held would be fair. In doing this he took into account the following factors:
- (i) the individuals' reasonable expectations of what would happen to their information;
 - (ii) whether confirming or denying would cause any unnecessary or unjustified damage or distress to individuals concerned; and
 - (iii) whether the legitimate interests of the public were sufficient to justify any negative impact to the rights and freedoms of individuals concerned.

(i) Expectations of individuals concerned

31. The information that the DfT refused to confirm or deny that it holds under section 40(5) relates to disciplinary action taken against its employees. The Commissioner notes that disclosure of information under FOIA is disclosure to the public at large and not just to the complainant
32. The Commissioner recognises that people have a reasonable expectation that a public authority, in its role as a responsible data controller, will not disclose certain information and that it will respect confidentiality.
33. The Commissioner considers that employees of public authorities should be open to scrutiny and accountability and should expect to have some personal data about them released because their jobs are funded by the public purse. However, he considers that certain types of information should generally not be disclosed even though such information relates to an employee's professional life and not their personal life. One of those types of information is information that relates to disciplinary/personnel matters. His general view is that this type of information should remain private. He considers that information relating to an internal investigation and subsequent disciplinary action will carry a strong expectation of privacy.

34. The Commissioner is satisfied that the employees in this case would have had a reasonable expectation that information relating to investigations into this matter by their employer and any subsequent disciplinary action that was taken, including dismissal, would not be disclosed where such disclosure would allow them to be identified.

(ii) Consequences of disclosure

35. The DfT argued that disclosure of information which could be identified as relating to specific individuals would be likely to lead to media intrusion into the lives of the individuals concerned, causing them distress. It would also be likely to cause reputational damage and financial damage to individuals. If the Department confirmed that an individual had their contract of employment terminated, it could make it more difficult for the individuals concerned to find new employment suited to their level of experience and skills.
36. In addition, the DfT informed the Commissioner that, at the time of the request, disciplinary proceedings were still ongoing in respect of some staff and the outcome of these would have been likely to have been prejudiced if the nature of disciplinary actions taken against other staff had been made known.
37. In light of the nature of the information and the reasonable expectations of the individuals concerned, as noted above, the Commissioner is satisfied that confirmation or denial that the requested information is held would not only be an intrusion into the privacy of the individuals but could potentially cause an unnecessary and unjustified adverse effect.

(iii) General principles of accountability and transparency

38. Notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by confirmation or denial that information is held, depending on the circumstances of the case, it may still be fair to confirm or deny that information is held if there is a more compelling public interest in doing so.
39. In considering 'legitimate interests', the Commissioner's view is that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
40. The Commissioner considers that there is a legitimate interest in openness and accountability. In the circumstances of this case, he accepts that there is a valid interest in ensuring that the DfT has investigated issues related to the problems with the bidding process for the WCML rail franchise properly and that it has subsequently taken appropriate steps in relation to any employees who may have been

responsible for those problems. The fact that errors were made which led to the loss of a considerable amount of public money adds strength to the legitimate public interest in confirming that information is held and thus effectively disclosing that the DfT has taken action.

41. The DfT argued that it would be unfair to the individuals who could potentially be identified if it confirmed or denied that information is held as to do so would be to divulge the outcome of disciplinary proceedings against them and, specifically, whether their contracts of employment had been terminated. The DfT believed that this is even the more the case given the extensive media interest following the collapse of the WCML franchise (with individual staff members being named in the press) and the likelihood that such media interest would be revived, leading to further media intrusion into the lives of individuals.
42. In addition, the DfT argued that public officials can be held accountable for their actions without it being necessary to disclose the identity of particular officials involved. Staff are held accountable in that they are subject to the Department's own internal disciplinary procedures and the consequences of those procedures.
43. The DfT went on to explain that, in this case, an independent investigation had been carried out to establish which officials made errors and which should be held accountable. The report of that investigation was made to the Permanent Secretary and also provided to the Head of the Civil Service. In the DfT's view, the public could be reassured that a thorough and independent investigation had been carried out, and that staff who made mistakes were subject to disciplinary procedures, without it being necessary to publicly 'name and shame' individuals or to directly or indirectly reveal the outcome of disciplinary proceedings that may have been taken against staff who could be identified.
44. The Commissioner considers that the interests of the public in confirming or denying whether information is held must be weighed against the prejudices to the rights, freedoms and legitimate interests of any employees concerned. He accepts that any relevant individuals would have a strong expectation of privacy and confidentiality concerning the details of disciplinary matters.
45. The Commissioner has concluded that, in this case, the strength of the legitimate public interest in either confirming or denying whether information is held is not sufficient to supersede the rights of any relevant employees of the DfT to privacy. This decision has been informed by his consideration of the reasonable expectations of those employees and the possible consequences of disclosure, as detailed above.

46. The Commissioner has therefore decided that it would be unfair to confirm or deny whether the requested information is held as to do so would breach the first data protection principle. As he has determined that it would be unfair to confirm or deny whether information is held, it has not been necessary for him to go on to consider whether disclosure is lawful or whether one of the conditions in Schedule 2 of the DPA are met. He therefore upholds the DfT's application of section 40(5) to the request in terms of whether any its staff have had their contract of employment terminated as a result of disciplinary action.
47. As the Commissioner determined that section 40(5) applied in relation to the information requested, he did not go on to consider DfT's arguments in relation to the applicability of section 36(3).

Right of appeal

48. 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: GRC@hmcts.gsi.gov.uk

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

49. 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.
50. 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

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