

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 February 2014

Public Authority: Department for Communities and Local Government

Address: Eland House
Bressenden Place
London
SW1E 5DU

Decision (including any steps ordered)

1. The complainant submitted a request to the Department for Communities and Local Government (DCLG) seeking the number of individuals employed on zero-hours contracts, how many hours each person on such contracts worked and the amount each individual was paid. DCLG confirmed that two individuals had been employed on such contracts and for each individual provided the number of days each individual had worked. However, it refused to provide the exact level remuneration each individual received on the basis that it was exempt from disclosure by virtue of section 40(2) of FOIA (the personal data exemption). The Commissioner is satisfied that this information is indeed exempt from disclosure on the basis of section 40(2) of FOIA.

Request and response

2. The complainant submitted the following request to DCLG on 8 July 2013:

'How many people have DCLG employed on zero-hour contracts between July 1 [2012], and July 2, 2013?

Could I have this figure broken down to show:

a) how much each person was paid in the period they were on zero-hours contract

b) how many hours each person worked during the period'

3. DCLG responded on 8 August 2013 and explained that two individuals were employed on zero-hours contracts for the period in question and provided details of the amount of days worked by each individual. However, DCLG explained that it considered the amount of remuneration paid to each individual to be exempt from disclosure on the basis of section 40(2) of FOIA. Nevertheless, DCLG directed him to two Parliamentary Questions (PQs) on the subject of the zero-hours contracts in question.¹ The answers to these PQs confirmed that one of the individuals was Sir Ken Knight, who prior to moving on to a zero-hours contract had been the chief fire and rescue adviser. The purpose of his contract was to enable DCLG to have access to professional advice until a new chief fire adviser had been appointed and to enable Sir Ken Knight to complete the efficiencies review of the fire and rescue service in England. The other individual was retained to take lead responsibility for finalising and signing off the London Thames Gateway Development Corporation accounts following its closure.
4. The complainant contacted DCLG on the same day in order to ask for an internal review of the decision to withhold details of payments on the basis of section 40(2) of FOIA.
5. DCLG informed the complainant of the outcome of the internal review on 4 September 2013; the review upheld the application of section 40(2) of FOIA.

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<http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130702/text/130702w0001.htm#13070280000002> and <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130610/text/130610w0005.htm#13061115000001>

Scope of the case

6. The complainant contacted the Commissioner on 18 September 2013 in order to complain about DCLG's decision to withhold the amount each of the two individuals were paid on the basis of section 40(2) of FOIA. The complainant provided the Commissioner with submissions to support his view that the exemption had been incorrectly cited by DCLG and these submissions are referred to below.

Reasons for decision

Section 40 – personal data

7. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA).

Is the withheld information personal data?

8. Clearly then for section 40(2) to be engaged the information being withheld has to constitute 'personal data' which is defined by the DPA as:

'...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'

9. DCLG noted that although the complainant did not seek the identities of the two individuals in question – rather just the amount each was paid – it would not be difficult to use other information that was already available to identify the names of the two individuals and link this to the levels of remuneration paid to each of them. As one of the individuals, Sir Ken Knight, had been identified in the aforementioned PQs, his identify was in fact already in the public domain. With regard to the other individual – the name of which the Commissioner was provided with – DCLG argued that it would not be at all difficult for individuals

with some knowledge of that person's appointment to be able to link their remuneration data to the individual in question.

10. In these circumstances the Commissioner is satisfied that the disputed information – i.e. the level of remuneration paid to each of the individuals – constitutes their personal data. This is because one of the individuals has already been identified by virtue of the PQs responses and the Commissioner is satisfied that it would be possible, for some members of the public at least, to identify the other individual.

The first data protection principle

11. DCLG argued that disclosure of the withheld information would be unfair and thus breach the first data protection principle which states that:

'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.'*

12. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, e.g. established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
- The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the

information was disclosed? In consideration of this factor the Commissioner may take into account:

- whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
13. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
14. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.
15. Finally, the Commissioner's guidance on requests for personal data about employees explains that exceptional circumstances are needed to justify the disclosure of exact salaries that are not routinely published. In such cases there could be additional public interest factors which outweigh any detriment to the individuals concerned. The guidance envisages that such exceptional circumstances could include situations where:
- there are current controversies or credible allegations;
 - there is a lack of safeguards against corruption;
 - normal procedures have not been followed;
 - the individual in question is paid significantly more than the usual salary for their post; or
 - the individual or individuals concerned have significant control over setting their own or others' salaries.

DCLG's position

16. With regard to the reasonable expectations of the individuals, the DCLG noted that the Commissioner accepts that the remuneration information relating to an identifiable individual is likely to carry a significant, legitimate and reasonable expectation that his or her employer would not disclose it.

17. The caveat to this expectation is that an individual who is a senior public sector public employee may expect a degree of information relating to his or her salary to be disclosed. DCLG confirmed that Sir Ken Knight, prior to moving on a zero hours contract, was a member of the senior civil service (SCS). In contrast, DCLG explained that the other individual ('individual B') was not, prior to moving onto a zero-hours contract, a member of the SCS. Therefore, DCLG acknowledged that although this would mean that Sir Ken Knight might reasonably expect some information about his remuneration to potentially be disclosed conversely, individual B would expect less information to be disclosed.
18. Furthermore, DCLG argued that such general expectations needed to be assessed in light of any policy followed by a public authority as to the extent of disclosure and the individual's awareness and acceptance of such a policy.
19. In the context of this case, DCLG highlighted the following policies:
 - The government's transparency policy on disclosure of remuneration information meant that DCLG employees who are members of the SCS (level 2 and above) at director level should expect their names, salaries and job titles to be published. As part of the transparency agenda, DCLG also publishes the names of staff earning over £58,200 where the member of staff has agreed to disclosure. Although staff are encouraged to disclose, staff can refuse and department respects that decision. Any such salary information is published in bands of £5,000.
 - There is now a statutory requirement that actual salaries over £50,000 will be disclosed in the annual accounts for local authorities, fire and police authorities and certain other bodies. Names are only published where the individual has earned more than £150,000.
 - Additionally, there is a code of practice for local authorities in England on data transparency which makes it a good practice expectation that names, job descriptions and current salaries of all individuals earning over £58,200 (equivalent to SCS band 1) should be published, albeit individuals can refuse consent to their name being published. (This is the same practice as the DCLG referred to above.)
20. DCLG argued that the above meant that Sir Ken Knight as a senior employee on a zero-hour contract of a central government department had no expectation under any statutory requirement, transparency policy, or practice that his actual remuneration would be disclosed.
21. DCLG emphasised that there are no equivalent expectations at all attached to more junior employees – such as individual B – beyond the

publication of pay band information which would have made it at all reasonable to disclose the actual remuneration of individual B.

22. With regard to the consequences of disclosure, DCLG acknowledged that given the increased expectation for senior public employees it is not necessarily sufficient for employees to regard disclosure of information about them, particularly in connection with their public role, as an unacceptable intrusion into their privacy. However, disclosure of exact remuneration information, except where there is specific requirement or policy, is going to be more intrusive than salary banding or pay scale information being published.
23. Although the consequences for the individuals may not be clearly very significant in this case, there could be other consequences that it would be difficult to predict. For example, negotiating salary as part of the future employment or for personal or private affairs. With regard to the legitimate interests in disclosure, DCLG argued that disclosure of remuneration information, allowing for specific exceptional circumstances, is met through the aforementioned transparency policies. It therefore argued that the level of information that it would be appropriate to disclose relating to the remuneration of the two individuals is made available through information that is published. There are no reasons to think that disclosure of the exact level of remuneration in this case is necessary to serve a specific and legitimate interest. In other words, exceptional circumstances are needed to justify the disclosure of exact salaries where they are not routinely published and there are no such circumstances in this case.

The complainant's position

24. The complainant noted that DCLG had argued that there was a reasonable expectation from individuals that information regarding payments they had received would not be disclosed. However, the complainant emphasised that his request had not in fact asked for the names of the individuals concerned; he had not, for want of a better phrase, sought to 'name and shame' specific individuals.
25. The complainant emphasised that it was via a response to a PQ that resulted in public confirmation that Sir Ken Knight was one of the individuals on a zero-hour contract. The complainant argued that it was perverse for DCLG to withhold details of the amount paid to Sir Ken Knight under data protection when the same department disclosed the name of a person on such a contract. As a result, the public had been informed that Sir Ken Knight was on zero-hours contract, how long he worked, what he did, see the report he produced but not know how much it cost the government for his services.

26. The complainant argued that there was a public interest in disclosure of information about how much Sir Ken Knight was paid given that he was a man in a public role, on public money, on public time examining the future of a public service in a report which will shape government policy. In the complainant's view it was important to note that until January 2013 Sir Ken Knight was a senior civil servant.
27. The complainant explained that in his experience local authorities had released details of payments to consultants without such obstruction. In the present circumstances of this case the complainant argued that the individuals in question were not senior civil servants but private individuals providing a service.
28. Furthermore, the complainant drew the Commissioner's attention to another recent example of information being disclosed about fees paid to outside staff. In response to another PQ, the exact amount Sir Michael Lyons was paid for his work between 2004 and 2007 on the Lyons Inquiry into Local Government was disclosed.² The complainant acknowledged that whilst arrangements for how Sir Michael had worked may be different to the arrangements in relation to Sir Ken Knight, he argued that Sir Ken Knight was leading a similarly prominent government review and as a result his level of remuneration should also be disclosed.

The Commissioner's position

29. With regard to the reasonable expectations of the two individuals, in the Commissioner's view it is vital to recognise the nature of their relationship with DCLG for the period covered by the request. That is to say they were employees of the department, albeit on a zero-hours contracts. They were not, as the Commissioner understands it, individuals engaged by the department on a consultancy basis.
30. As a result, the Commissioner accepts DCLG's reasoning that it is appropriate to consider the various policies regarding disclosure of remuneration information in considering the reasonable expectations of both Sir Ken Knight and individual B. In light of these policies and the resulting established practice, the Commissioner accepts that neither of the two individuals would have had any expectation that details of their exact level of remuneration would be disclosed. Rather, Sir Ken Knight

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http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131211/text/131211w0001.htm#131211w0001.htm_wqn37

would have merely expected information about his salary within a £5,000 band to be disclosed and individual B may have expected information to be disclosed which would indicate the equivalent salary band within which the remuneration he received fell within.

31. In terms of the consequences of disclosure, the Commissioner accepts that revealing the actual amount of remuneration paid to each individual would arguably result in a notable infringement into their privacy given that it would reveal the exact amount of money they earned for a specific piece of work time. This would, as DCLG suggests, provide some insight into their private financial affairs.
32. Nevertheless, in terms of the legitimate interests in disclosure of the withheld information, the Commissioner believes that the complainant's line of argument to support the disclosure of Sir Ken Knight's level of remuneration should not be dismissed lightly. In the Commissioner's view given the nature of the work he undertook - ie a review which will shape the future of the fire service in England - there is a considerable legitimate interest in the public knowing how much Sir Ken Knight was paid for this work. Furthermore, in the Commissioner's view the legitimate interest in disclosure of information concerning Sir Ken Knight's level of remuneration - and for that matter the level of remuneration paid to individual B - is arguably increased given that, to date, DCLG has not given any clear indication as to the level of remuneration either individual received under the terms of their zero-hours contracts.
33. That is to say, when Sir Ken Knight was employed as Chief Fire Officer, DCLG published his salary within a £5,000 band.³ However, no indication had been given as to level of remuneration he has received under his zero-hours contract. In the Commissioner's view the absence of such information adds considerable weight to the legitimate interests in disclosing the withheld information, certainly in respect of Sir Ken Knight given the comparative seniority of his previous role compared to individual B.
34. However, having considered the circumstances of this case carefully the Commissioner is not persuaded that these legitimate interests are sufficiently compelling to outweigh the legitimate interests of the two individuals given their strong - and reasonable - expectations that

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/28618/DCLG-Organogram-and-Staff-Data-senior-data.csv - see row 120.

details of their exact level of remuneration would not be disclosed and because of the infringement into their privacy that disclosure would have. In relation to individual B the Commissioner believes that this decision is relatively clear cut given the comparably junior position held by this individual, and to a lesser extent, the nature of work they had been employed to undertake (ie signing off the accounts of a particular organisation rather than undertaking a review into a public service which was likely to have significant impact on further government policy).

35. In relation to Sir Ken Knight, the Commissioner believes that this decision is far more finely balanced given the seniority of his previous position that he held and the nature of the work he undertook under the contract in question. However, the Commissioner is not persuaded that the circumstances of the case are sufficiently exceptional so as to justify the disclosure of the exact level of remuneration paid to Sir Ken Knight.
36. In terms of the complainant's example of Sir Michael Lyons, the Commissioner believes that it is vital to remember that each particular case has to be considered on its own merits. As the complainant acknowledges, the arrangement for how Sir Michael had worked were different to the arrangements in relation to Sir Ken Knight. The same is also true of disclosures local authorities may have made under FOIA about payments to consultants; such disclosures do not set a precedent which means that the withheld information in this case must be disclosed.
37. The Commissioner has therefore concluded that the withheld information is exempt from disclosure on the basis of section 40(2) of FOIA.

Other matters

38. Although the Commissioner has concluded that the exact level of remuneration paid to each individual is exempt from disclosure under FOIA he would encourage DCLG to consider disclosing information which provides at least some indication as to the level of remuneration paid to each individual.
39. In line with the transparency policies and practices discussed in the notice itself, the Commissioner would suggest that DCLG considers disclosing information which indicates the level of remuneration Sir Ken Knight received under his zero-hours contract within a £5,000 band and also considers disclosing the comparable salary band for the level of remuneration received by individual B. The Commissioner wishes to stress that this suggestion does not form a formal part of this notice and is given purely as guidance to DCLG.

Right of appeal

40. 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

41. 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.
42. 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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