

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 30 March 2017

**Public Authority:** Office of the Industrial Tribunals and Fair Employment Tribunal

**Address:** Killymeal House  
2 Cromac Quay  
Ormeau Road  
Belfast  
BT7 2JD

### Decision (including any steps ordered)

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1. The complainant has requested information regarding tribunal decisions from the Office of the Industrial Tribunals and Fair Employment Tribunal (OITFET). This is a Non-Department Public Body which is overseen by the Department for the Economy in Northern Ireland. The OITFET disclosed some information to the complainant, however it refused to disclose the remainder ("the withheld information") citing section 40(2) of FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the OITFET has correctly applied section 40(2) to the withheld information. Therefore she requires no steps to be taken.

### Request and response

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3. On 19 November 2015, the complainant wrote to the OITFET and requested information in the following terms: -

"For each of the seven written transcripts provided by the OITFET:

1. What is the **name of the tribunal case**, for which the written transcript is sought?

2. What is the **name of the requesting litigant**, who sought the written transcript?
3. What is the **date of the litigant's request**?
4. What is the date on which the OITFET provided the written transcript?
4. The OITFET responded on 15 December 2015. It stated that, in respect of parts 3 and 4 of the complainant's request, it only held relevant information for four out of the seven tribunal cases, the remainder having been destroyed in accordance with the OITFET's file retention policy. That information was disclosed to the complainant. In respect of parts 1 and 2 of the complainant's request, the OITFET stated that it held the requested information, however it considered that section 40(2) of the FOIA was engaged as disclosure would breach data protection principles.
5. Following an internal review the OITFET wrote to the complainant on 8 February 2016. It stated that the reviewer was upholding the original decision, however it did disclose the dates of payments made for transcripts in respect of the other 3 cases, having gone through the financial records for the past 7 years.
6. The complainant then submitted a complaint to the Commissioner. He stated that he was no longer seeking information in respect of part 2 of his request, however he was still seeking information in respect of part 1 of his request, i.e. the names of the Tribunal cases for which transcripts were requested and provided. He also stated that he did not believe that the OITFET did not hold information in respect of the other three out of the seven tribunal cases.
7. Following correspondence between the OITFET and the Commissioner, the OITFET sought the parties' consent to disclose the names of the Tribunal cases for which written transcripts had been requested. Consent was given by two of the parties and the names of the relevant cases were disclosed to the complainant by the OITFET, however the complainant was not satisfied with this and stated that he still required the names of the other Tribunal cases.

## Scope of the case

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8. The complainant contacted the Commissioner on 8 February 2016 to complain about the way his request for information had been handled.
9. The Commissioner has considered the way in which the OITFET has handled the complainant's request. In relation to the details of the three Tribunal cases which the OITFET has stated it does not hold, the Commissioner accepts that these were destroyed in accordance with the OITFET's file retention policy. She also accepts that the OITFET has done its best to provide the complainant with some relevant information in relation to these, by providing the dates on which the transcripts were paid for. Therefore, to be clear, the Commissioner is solely investigating the OITFET's application of section 40(2) of FOIA to the withheld information, i.e. the information requested in part 1 of the complainant's request, insofar as this has not already been disclosed to the complainant (he has received the names of two of the cases).

## Reasons for decision

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10. There are effectively two parts to section 40(2) of FOIA. Firstly, the exemption will only cover information that constitutes the personal data of a third party. Secondly, the engagement of the exception requires that disclosure of the personal data would contravene a data protection principle in the Data Protection Act 1998 (DPA)
11. Personal data is defined by section 1 of the DPA as data which relates to a living individual who can be identified from that data, or from that data and other information. In other words, information will only be classified as personal data where it 'relates to' an 'identifiable' individual. The Commissioner's guidance, 'Determining what is personal data', explains that an individual is 'identified' if it is possible to distinguish that individual from other members of a group. In most cases an individual's name together with some other information will be sufficient to identify them.
12. While a name is the most common means of identifying someone, whether any potential identifier actually identifies an individual depends on the context. By itself, a name may not be sufficient to link information to a particular person – for example, the name 'John Smith' may not pick out the relevant one of the many individuals who have that name.

13. Equally, however, it may still be possible to link information to an individual in the absence of a name by giving specific contextual details that pick out the person. The risk of identification will likely increase where the context in which an individual is referenced relates to an event or incident that is particularly noteworthy or memorable.
14. The Commissioner is satisfied that the information to which section 40(2) has been applied relates to identifiable individuals and therefore falls within the definition of personal data. It is therefore for the Commissioner to decide whether disclosure of the personal data would be in accordance with a data protection principle.
15. For the purposes of a disclosure under FOIA, it is the first data protection principle which is likely to be relevant. In accordance with this principle, personal data can only be disclosed if it would be fair, lawful and meet one of the Schedule 2 conditions (and Schedule 3 conditions if the information represents sensitive personal data). If the disclosure of the information would fail to satisfy any of these criteria, the information will be exempt under section 40(2) of FOIA.
16. The starting point for the Commissioner is to consider whether disclosure would be fair to a data subject. The test of fairness will invariably reflect the tension that exists between, on the one hand, safeguarding the important privacy rights of an individual and, on the other, promoting transparency and accountability. A decision must therefore balance the consequences of any disclosure and the reasonable expectations of a data subject with general principles of accountability and transparency and any legitimate interest there may be in disclosure.
17. Various factors may affect whether an individual should have a reasonable expectation that their personal data would be disclosed upon request. These will typically include whether the information relates to an individual's public or private life, the seniority of the individual and whether his or her role is public-facing. The Commissioner's guidance on section 40 explains that the expectations actually held by the individuals in a particular case do not necessarily determine whether disclosure would be fair. Instead, the public authority has to decide objectively what would be a reasonable expectation, i.e. would it be reasonable for the individuals concerned to expect that their personal data would not be disclosed?
18. The OITFET has informed the Commissioner that the name of each tribunal case is comprised of the names of both the claimant and the respondent involved in the case. Only the claimant, the respondent or

the representative of one of these is entitled to request a transcript of the tribunal proceedings.

19. At the time of making a claim, parties to a claim are advised what information will be made publicly available and in what circumstances. Having perused the information which the parties receive at the time of making a claim, the Commissioner is satisfied that the information which the parties are advised will be made publicly available does not include information as to whether either of the parties request a transcript subsequent to proceedings.
20. The OITFET states that it considers that disclosure of the withheld information would breach the first data protection principle, as disclosure would be unfair to the data subjects. The OITFET refers to paragraph 44 of the ICO Guidance Note on personal information, which advises as follows: -

“Fairness can be a difficult concept to define. In the context of disclosing personal information under FOIA it will usually mean considering:

  - Whether the information is sensitive personal data
  - The possible consequences of disclosure on the individual
  - The reasonable expectations of the individual, taking into account their expectations both at the time the information was collected and at the time of the request; the nature of the information itself; the circumstances in which the information was obtained; whether the information has been or remains in the public domain; and the FOIA principles of transparency and accountability and
  - Any legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the individuals who are the data subjects.”
21. The OITFET considers that any individuals who request transcripts would have a reasonable expectation of their names and other personal data which is held on the public register of claims being in the public domain. However, the OITFET is content that they would not have a reasonable expectation of other personal data, including whether or not they requested a transcript, being disclosed, as they are informed at the time of the claim what information will become publicly available.

22. The OITFET considers that the identity of the person making the request for the transcript would be ascertainable by the name of the case, as this would then allow the recipient of the information to identify the relevant appeal or other proceedings in the background to the request for disclosure. Ordinarily it is the Appellant (or comparable party, such as the Applicant in judicial review proceedings) who makes such a request. The release of the case name would allow a member of the public to search the public register for details of the original hearing and thereby identify whether it was the claimant or respondent who lost the case, and to search for details of the subsequent appeal and therefore identify whether it was the claimant or the respondent who initiated the appeal. As such, the combination of the case name and the other information related to the other proceedings, which would then be publicly obtainable, would be very likely to identify the applicant for the transcript.
23. The OITFET states that the possible consequences of such disclosure are that the individuals who requested a transcript would be likely to be identified in circumstances where they had a reasonable expectation of privacy. Equally, those who did not request a transcript would be likely to be identified in such circumstances. The OITFET considers that this would constitute an unwarranted interference with the privacy of the individuals, which would be likely to cause them distress. An additional concern of the OITFET is that these individuals may be contacted by a member of the public, using this information to search the public register, who may ask them about the circumstances of their case, which they would be likely to find distressing.
24. The OITFET considers that disclosure of the withheld information would be unfair to the parties to the cases, who would not have had a reasonable expectation that such information would be disclosed, and indeed some have actively declined to give their specific consent to such disclosure when asked about it.
25. The OITFET has also considered whether there would be any legitimate interest in disclosure of the withheld information. It has informed the Commissioner that it does not consider that there would be such an interest. It states that the withheld information constitutes only a small part of the overall tribunal process and that there would be no valuable public interest in knowing the identity of an applicant for the transcript of a case. The OITFET is also concerned that such disclosure may deter future applicants from requesting case transcripts, which would be likely to have a negative effect on the tribunal appeal process as a whole.

## **Conclusion**

26. The Commissioner has considered all of the arguments put forward by the OITFET and also those put forward by the complainant. The complainant states that he is not seeking personal information, however the OITFET has demonstrated how disclosure of the withheld information could lead to this being put together with other publicly available information which could lead to the identification of individuals.
27. The Commissioner accepts that, given the nature of claims heard by the Tribunal, disclosure of information which could lead to the identification of individuals who requested case transcripts, would be likely to cause distress to those individuals, who would not have had a reasonable expectation that such details would be disclosed.
28. In relation to legitimate interests, the Commissioner accepts, as does the OITFET, that there is a legitimate interest in transparency in organisations such as the OITFET which are receiving public funding. However, the Commissioner also accepts that disclosure would not serve to inform the public any better regarding overall tribunal process, and indeed could put the tribunal appeal process at risk by discouraging individuals from availing of this service.
29. In conclusion, although the complainant has a private interest in disclosure of the withheld information, there is no legitimate public interest to be served by disclosure which would outweigh the considerations of distress caused to the individuals by unwarranted interference with their privacy. Therefore, the Commissioner is satisfied that disclosure of the withheld information would be unfair and would breach the first data protection principle. The Commissioner is satisfied that the OITFET has applied section 40(2) of FOIA correctly to the withheld information.

## Right of appeal

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30. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

31. 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.
32. 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 .....

**Deirdre Collins**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**