

Freedom of Information Act 2000 (the Act)

Decision notice

Date: 24 October 2018

Public Authority: The Department for Work and Pensions

Address: 4th Floor
Caxton House
Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested information about a named Jobcentre manager. The Department for Work and Pensions (DWP) refused to confirm or deny whether the information is held under section 40(5) of the Act.
2. The Commissioner's decision is that DWP is entitled to rely on section 40(5) to refuse to confirm or deny whether information is held falling within the scope of the request.
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 27 December 2016, the complainant wrote to DWP and requested information in the following terms:

"[named individual] the manager of [named Jobcentre] has been rewarded for his obedience with at least one visit to 10 Downing Street.

Please provide the minutes of the meeting(s), Emails arranging and discussing the meeting(s), state the purpose of the visit(s), list who was present at the meeting(s), and explain the reasons for a lowly Jobcentre manager to be visiting to 10 Downing Street when legitimate DWP business can be carried out at Caxton House.

Please also provide details of any contact [named individual] has had with senior government officials from any government department or agency other than the DWP in relation to his position as a Jobcentre manager."

5. On 11 January 2017, DWP responded to the request and stated that it was refusing to provide the requested information. DWP cited section 40(2)¹ of the Act but stated:

"Under the FoI Act, DWP is not obliged to confirm or deny that it holds personal information about third parties, but in any event, even if was held [sic], the Department would not disclose personal information to you about [named individual]".

6. The complainant requested an internal review on 25 February 2017 and explained that he believed it was in the public interest to disclose information regarding the named individual's contact with ministers and senior officials.

7. DWP provided the outcome of its internal review on 24 March 2017. DWP upheld its original response and stated:

"The reasoning behind this decision is that there is no further information to add to our response to FoI4886 dated 11 January 2017. We provided you with the recorded information that best answered your request.

The FOIA does not oblige a public authority to create new information to answer questions; nor does it require a public authority to give advice, opinion or explanations in relation to issues/policies under question. The information you request cannot be provided under the FOIA."

Scope of the case

8. The complainant contacted the Commissioner on 17 May 2017 to complain about DWP's request handling in general. The Commissioner confirmed that under section 50, she could only consider individual requests and asked the complainant to set out which requests he wished to proceed to investigation. On 28 September 2017, the complainant confirmed that he wished to complain about the handling of the request dated 27 December 2016.
-

9. During the Commissioner's investigation, DWP clarified that it was relying on section 40(5) and that section 40(2) had been cited in error.
10. The Commissioner will, therefore, consider whether DWP is entitled to rely on section 40(5) to refuse to confirm or deny whether it holds the requested information.
11. As DWP dealt with this request prior to the implementation of the General Data Protection Regulation 2018, the Commissioner must consider section 40 in the context of the Data Protection Act 1998 (the DPA).

Reasons for decision

12. Section 40(5) of the Act allows a public authority to refuse to confirm or deny whether information is held, if doing so would;
 - constitute a disclosure of personal data, and
 - this disclosure would breach any of the data protection principles or section 10 of the DPA.

Is the requested information personal data?

13. Section 1(1) of the DPA defines personal data as:

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

(a) from those data, or

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

14. The two main elements of personal data are that the information must 'relate' to a living person and that person must be identifiable.
15. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
16. Having considered the wording of the request, the Commissioner is satisfied that any information falling within the scope of the request would be the named individual's personal data as the named individual is clearly the focus of the request. Complying with section 1(1)(a) of the Act (the duty to confirm or deny) would constitute a confirmation or denial of whether a visit to 10 Downing Street was undertaken as part of

the named individual's duties as a Jobcentre manager. It would also reveal whether the named individual has been in contact with non-DWP senior officials.

17. The Commissioner is therefore satisfied that confirmation or denial of whether the information is held would constitute a disclosure of the named individual's personal data.

Would confirmation or denial breach one of the data protection principles?

18. Having accepted that the request is for the personal data of a living individual other than the complainant, the Commissioner must go on to consider whether confirmation or denial that information is held would contravene any of the data protection principles.
19. The data protection principles are set out in Schedule 1 to the DPA. The Commissioner considers that the first data protection principle is the most relevant in the specific circumstances of this case.

The first data protection principle

20. 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."*

21. In the case of a request for information under the Act, personal data can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions (and one of the Schedule 3 conditions if relevant). If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure. This applies equally to confirming or denying that personal data is held.
22. In considering whether confirmation or denial is fair, the Commissioner takes into account the following factors:
- the individual's reasonable expectations of what would happen to their information;
 - the consequences of confirmation or denial (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and

- the balance between the rights and freedoms of the individual and the legitimate interests of the public.

Reasonable expectations

23. In the Commissioner's view, a key issue to consider in assessing fairness is whether the individual concerned has a reasonable expectation that their information will not be disclosed (including confirming or denying that the information is held). These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as an individual and the purpose for which they provided their personal data.
24. DWP explained that if it held such information relating to the named individual's personal life, rather than their employment, then it would have been shared with the reasonable expectation that it would not be disclosed externally. The Commissioner would stress that she cannot comment on whether information of this nature is physically held by DWP.
25. DWP further explained that if it held such information in relation to the named individual's professional life, the individual would still have a reasonable expectation of privacy as DWP does not routinely disclose the personal information of junior members of staff. DWP confirmed that it did not have a written policy regarding at what grade staff members could expect personal data to be disclosed, but confirmed that this was DWP's position regarding requests made under the Act. DWP explained that the named individual would have the reasonable expectation that DWP would maintain its position, as to treat the named individual differently to other Jobcentre managers would be unfair. Again, this should not be taken as confirmation or denial that such information is held by DWP.
26. DWP confirmed that most Jobcentre managers are graded at Higher Executive Officer (HEO), with some graded at Senior Executive Officer (SEO), for example those managers with oversight of more than one Jobcentre. DWP considered HEO and SEO to be junior grades in the context of disclosure under the Act.
27. In this case, the Commissioner is satisfied that the named individual would have the reasonable expectation that their personal data would not be disclosed (including confirmation or denial).

Consequences of disclosure

28. As to the consequences of disclosure upon a data subject, the question – in respect of fairness – is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
29. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the requested information. She will also take into account the fact that disclosure under the Act is effectively an unlimited disclosure to the public at large, without conditions.
30. The Commissioner accepts that there is the potential for the individual to feel distressed if DWP confirmed whether or not information of the type requested was held, particularly as she has found that it would not be within their reasonable expectation.

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

31. Notwithstanding a data subject's reasonable expectations or any damage or distress caused, it may still be fair to disclose information, or in this case, confirm or deny information is held, if there is a more compelling public interest in doing so.
32. The Commissioner appreciates that there is a general public interest in accountability and transparency. On the other hand, the Commissioner recognises that this legitimate interest must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of any individual who would be affected by confirming or denying that the requested information is held.
33. The complainant has told the Commissioner that he was made aware of the visit via a conversation with the named individual. He said that he had witnessed the named individual showing others photographs of themselves with the then Secretary of State for Work and Pensions, Iain Duncan Smith.
34. The complainant explained to the Commissioner that he believes it is in the public interest to disclose the activities of the named individual. The complainant explained that he has received a number of sanctions which had been approved by the named individual and he believes that he has been targeted specifically.

Conclusion

35. The Commissioner acknowledges the complainant's concerns, however she has not seen evidence of any misconduct by the named individual.

The Commissioner is not aware of the circumstances leading up to the applied sanctions and it is outside of her remit to comment on whether they were correctly applied.

36. The Commissioner considers that the appropriate route for the complainant to address his concerns is to follow the internal complaints procedure of DWP and, if not satisfied with the outcome, to refer his complaint to the relevant regulatory body.
37. In relation to the first request, confirming or denying whether information is held would reveal one or both of the following:
 - Whether the named individual visited 10 Downing Street;
 - Whether the visit was made in a personal or professional capacity
38. The Commissioner acknowledges the complainant's reasons for believing the information is held by DWP. However, the Commissioner has not been provided with evidence that this information is held by DWP for the purposes of the Act. If the complainant's anecdotal evidence of a conversation is accurate, it could suggest that information may have been disclosed, by the individual, to a limited audience of that individual's choosing. In the Commissioner's view it does not follow that such information would be held by DWP as a public authority under the Act.
39. With regards to the request for emails sent to non-DWP senior officials, the Commissioner accepts that the named individual is not of sufficient seniority that his personal data would be routinely disclosed. The Commissioner is mindful that had the emails been the focus of the request, the named individual would have the reasonable expectation that their personal data would be redacted from any disclosed information. The Commissioner has issued several decision notices regarding disclosure of junior and senior officials' personal data.²
40. However, as the named individual is the focus of the request, it is not possible confirm or deny that emails are held without identifying the named individual. The Commissioner agrees that do so would be against the individual's reasonable expectations and, therefore, unfair.

² For example, <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014762/fs50640285.pdf>

41. The Commissioner has therefore concluded that confirmation or denial as to whether the requested personal data is held would breach the first data protection principle. She considers that the exemption provided by section 40(5)(b)(i) is engaged and that, in the specific circumstances of this case, DWP is not obliged to confirm or deny whether it holds the information requested by the complainant.

Section 17: Refusal notice

42. As set out in the scoping section of this notice, DWP failed to cite the correct exemption, ie section 40(5) rather than section 40(2). DWP has therefore breached section 17(1)(b) of the Act.

Other matters

43. The Commissioner wishes to register her concern at the quality of the internal review. An internal review should comprise a genuine reassessment of the request and response and is an opportunity for the public authority to ensure that it is satisfied with its position.
44. In this case, DWP provided what appears to be a standard response which states *"We provided you with the recorded information that best answered your request"*. However DWP had not in fact provided any recorded information in response to the request. Therefore it appears to the Commissioner that the internal review was poorly conducted, or poorly communicated, or both.
45. The Commissioner has issued guidance on conducting internal reviews³ which states that when undertaking an internal review a public authority should:
- "make a fresh decision based on all the available evidence that is relevant to the date of the request, not just a review of the first decision"*
46. In this case it is evident that DWP did not address the points made by the complainant or undertake a genuine review of the handling of this request.

³ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/>

47. The Commissioner considers that had DWP undertaken a thorough internal review, the issue regarding the correct exemption ought to have been identified and addressed at the time.
48. The Commissioner expects DWP to take appropriate steps to improve the quality of its internal reviews in future.
49. Finally, the Commissioner observes that the complainant has, in this request and others, used an unhelpful tone and made unsubstantiated accusations against DWP and its staff. Whilst the Commissioner appreciates that the complainant is clearly frustrated at how DWP conducts itself, she asks the complainant to moderate his language and refrain from making accusations in his requests for information. The Commissioner recommends the complainant focus any future requests to ensure that they clearly describe the information sought.

Right of appeal

50. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

51. 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.
52. 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

Sarah O’Cathain
Senior Case Officer
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF