

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 March 2020

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested details of an independent review report commissioned by the Permanent Secretary into a specified IT systems failure. The Ministry of Justice (the 'MOJ') refused to provide the requested information, citing section 43(2) of FOIA, the exemption for commercial interests. During the course of the Commissioner's investigation, the MOJ also cited section 40(2), the exemption for personal information, for two individuals named within the withheld report.
2. The Commissioner's decision is that the exemption provided by section 43(2) is not engaged for the reasons set out in this notice. She also finds that section 40(2) is not engaged in relation to one individual named in the report, but has concluded that the MOJ was correct to cite section 40(2) in relation to the other named individual.
3. The Commissioner requires the MOJ to take the following steps to ensure compliance with the legislation.
 - Disclose the requested report.
 - Disclose the name of the senior individual referred to at the end of the report.
4. The MOJ must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The request below relates to an independent review following an IT outage which left courts and probation services without access to technology for a period of several days in January 2019¹.
6. The MOJ advised that the subsequent independent review was conducted to ascertain the cause(s) of that outage and to highlight the lessons learned from this. It has also explained that the resulting report: *"is an internal document with a limited distribution list that was never intended to be published"*.

Request and response

7. On 24 June 2019 the complainant wrote to the MOJ and requested information in the following terms:

"Please can you disclose the independent review commissioned by the Permanent Secretary into the causes of the probation and courts IT systems failure in January 2019.

If you need any further information from me in order to deal with my request, please call me on [telephone number redacted].

If you are encountering practical difficulties with complying with this request, please contact me as soon as possible (in line with your section 16 duty to advise and assist requesters) so that we can discuss the matter and if necessary I can modify the request.

If it is necessary for any reason to redact any information, please redact the minimum necessary and send me the rest of the material, explaining the legal grounds for each redaction."

8. The MOJ responded on 22 July 2019. It refused to provide the requested information citing section 43(2) of FOIA, the exemption for commercial interests. It said that the public interest favoured withholding the requested information.

¹ <https://www.gov.uk/government/news/it-issues-across-ministry-of-justice-latest-update>

9. The complainant requested an internal review on 5 August 2019. The MOJ provided its internal review, late, on 11 September 2019. It maintained its original position.

Scope of the case

10. The complainant contacted the Commissioner on 25 September 2019 to complain about the way his request for information had been handled. He submitted arguments supporting his view that the public interest test associated with section 43(2) favoured disclosure in this case.
11. Towards the latter stages of the Commissioner's investigation, the MOJ advised that it had sent her the "*incorrect report*" by way of the withheld information in this case. It provided her with what it now said was the actual report in scope of the request on 6 February 2020. After the Commissioner made further enquiries about the second report (which also covered the specified IT outage), the MOJ apologised and explained that the original report it had sent was in fact the correct one that had been commissioned by the Permanent Secretary and was therefore the report in scope.
12. In order to satisfy herself that she was in possession of the correct withheld information, the Commissioner asked the MOJ to provide more detail about the two reports. It advised that the second report provided (ie that sent on 6 February 2020) was written by its service provider Atos in response to the IT outage and that the subsequent report (sent originally) was that commissioned by the Permanent Secretary to highlight findings from the service provider report.
13. Having reviewed both reports and, having taken account of the MOJ's explanation, the Commissioner is satisfied that the report sent originally is that in scope of the request.
14. During her investigation, the Commissioner noted that there are two individuals' names mentioned within the actual report in scope. She contacted the complainant to ask him whether he required the names or whether they could be scoped out of her investigation. As the complainant said he would be interested in receiving the names, the Commissioner advised the MOJ accordingly. In response, it cited section 40(2), the exemption for personal information, in relation to those names.
15. The Commissioner has first considered whether the MOJ was entitled to cite section 43(2) in relation to the withheld report. She has also considered whether it was entitled to rely on section 40(2) to withhold the names of two individuals within the report.

Reasons for decision

Section 43 – commercial interests

16. Section 43(2) of FOIA states:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

17. The MOJ applied section 43(2) to withhold information as to the independent review findings following a significant IT outage in January 2019.

Is section 43(2) engaged?

18. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met. First, the actual harm that the public authority alleges would, or would be likely to, occur if the withheld information was disclosed, has to relate to the applicable interests within the relevant exemption.
19. Second, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice that is alleged must be real, actual or of substance.
20. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
21. In relation to the lower threshold of 'would be likely', the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold of 'would', in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

Applicable interests

22. The term 'commercial interests' is not defined in the FOIA. However,

the Commissioner's guidance on the application of section 43² of the FOIA explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity, such as the purchase and sale of goods or services.

23. It is the MOJ's contention is that disclosure of the requested report would be likely to prejudice both its own commercial interests and those of the third party IT service provider. It believes that disclosure of the report would be likely to undermine the associated IT outage negotiations process, which was still underway with its IT service provider at the time the request was submitted. It said that the decision to withhold the requested information: *"was made after many meetings with colleagues in digital, legal and commercial, who found that on balance due to the current negotiations at the time it would prejudice these negotiations if the report were to be released, even redacted at that time"*.

Does the requested information relate to the applicable interest?

24. Having regard to the definition above, the Commissioner has reviewed the withheld ten page report. The Commissioner would describe the content as largely factual, and she has been told by the MOJ that the report was based on a review of a more in-depth technical analysis report of the issues which led to the IT outage in January 2019 (ie the second report sent by the MOJ which was ultimately deemed not in scope; see 'Scope' section above).
25. The Commissioner also notes that the report makes what she would describe as 'non-specific' references to the contract with the MOJ's IT service provider in terms of what it was required to do in relation to the services being provided. She is mindful that parts of the report are critical of both parties, but views this as inevitable given what occurred. The report also contains positive references and recommendations moving forward.
26. Whilst the Commissioner does consider that information about negotiations within the bounds of a particular contract is information which relates to a commercial activity, she has not found any evidence within the report which relates either to the specific negotiations process between the two parties or to any associated contractual clauses. Further, neither has the MOJ highlighted any specific parts of

² <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

the report to her to demonstrate how the applicable interests relate to the requested information.

27. As part of the exchange to identify the correct withheld information in this case, the Commissioner advised the MOJ of her preliminary view that section 43(2) was not engaged and asked it if it wished to provide any further submissions for her consideration. In the absence of any further section 43 arguments, the Commissioner finds that the MOJ has not demonstrated sufficiently how the requested report relates to the applicable interests it has cited.

Conclusion

28. For this reason, the Commissioner finds that the first criterion necessary to engage section 43(2) is not met. This being the case, the Commissioner is not required to consider the remaining two criteria. She concludes that the MOJ has not demonstrated that section 43(2) is engaged and now requires it to disclose the withheld report in its entirety as per the step in paragraph 3 of this notice.
29. As the Commissioner has found that section 43(2) is not engaged in relation to the requested information in this case, there is no need for her to consider the associated public interest test.

Section 40 - personal information

30. There are two individuals named at the end of the report, so the Commissioner has next considered whether the MOJ has properly relied on section 40(2) to withhold this information.
31. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
32. In this case the relevant condition is contained in section 40(3A)(a)³. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
33. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection

³ As amended by Schedule 19 Paragraph 58(3) DPA.

Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.

34. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

35. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

36. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
37. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
38. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
39. In this case, as the information withheld under section 40(2) consists of two named living individuals, the Commissioner is satisfied that the disclosure of this information would identify the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
40. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
41. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

42. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

43. In the case of an FOIA request, the personal data is processed if it is disclosed in response to the request. This means that the information can only be disclosed if doing so would be lawful, fair and transparent.

Lawful processing: Article 6(1)(f) of the GDPR

44. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.

45. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"⁴.

46. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-

- (i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- (ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

⁴ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted"*.

- (iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject(s).

47. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

48. In considering any legitimate interests in disclosure of the requested information under FOIA, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

49. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

50. From the available correspondence the Commissioner can find no specific legitimate interest arguments from either party in support of disclosure or otherwise of the names of the two individuals. However, during a telephone call with the complainant to ascertain whether he wished the Commissioner to investigate the MOJ's reliance on section 40(2) to withhold the two names, the complainant said he required the names as they might be "*pertinent*".

The Commissioner's view

51. A disclosure under FOIA is effectively one to the world at large. Dependant on factors such as the level of seniority of the two named individuals within their employing organisation and their potential roles respective to the IT outage, the Commissioner considers that there *may* be legitimate interest arguments as to why their names should be disclosed.

52. In addition, given the scale and resulting disruptions to parts of the MOJ's operations over a period of several days, together with the ensuing publicity and press coverage, the Commissioner accepts that there is a legitimate interest in the disclosure of information associated with this particular IT outage. Disclosure of the names concerned would also serve to evidence the level of seniority which were considered appropriate to investigate the matter.

53. The Commissioner has therefore next considered whether disclosure of the names is necessary.

Is disclosure necessary?

54. 'Necessary' means more than desirable but less than indispensable or an absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
55. The Commissioner has been guided by the facts in this case, namely that the IT outage which occurred in January 2019 was largescale, lasted several days and had widespread repercussions for parts of the MOJ's operations. She has considered that, according to the withheld report, the two named individuals were involved in the resulting investigation following that IT outage and with the compilation and/or review of the ensuing report specified in the request.
56. In this case, the Commissioner has found by her own internet searches that the name of the more senior individual in the report is already in the public domain. Given this individual's seniority and job role, and involvement in the IT outage issue, the Commissioner considers that disclosure is necessary to evidence the seriousness of the matter and that it was dealt with at an appropriate level.
57. However, given that the other named individual is described by the MOJ as a "*junior member of staff*" whose name is not in the public domain, and whom, by virtue of their position, will not have played a pivotal role in the IT outage, the Commissioner does not find it necessary to disclose the name of this individual.
58. The Commissioner must next consider the balance between the legitimate interests in this case against the senior data subject's interests or fundamental rights and freedoms.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

59. It is necessary to balance the legitimate interests in disclosure against the senior data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
60. In considering this balancing test, the Commissioner takes into account the following factors:

- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individuals expressed concern about disclosure; and
 - the reasonable expectations of the individuals.
61. In the Commissioner's view, a key issue is whether the individual concerned have a reasonable expectation that their information will not be disclosed. 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 individuals, and the purpose for which they provided their personal data.
62. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
63. The MOJ told the Commissioner that the individual has "*an expectation that we keep their name secure from the public*". It is not clear from the limited section 40(2) arguments submitted by the MOJ as to whether the individual had been asked to consent to disclosure of their name.
64. The Commissioner has considered the public nature of the individual's position and role and the reasonable requirements of that role meant that consent to disclosure was implicit when an individual accepted appointment to that role. Moreover, the individual's name is already in the public domain.
65. Based on the above factors, the Commissioner determined that there is sufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and that disclosure of the information requested would be lawful.

Fairness and transparency

66. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful in relation to one of the named individuals in the report, it is still necessary to show that disclosure would be fair and transparent under DP principle (a).
67. In relation to fairness, the Commissioner considers that, since disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
68. The requirement for transparency is met because, as a public authority, the MOJ is subject to FOIA.

Conclusion

69. The Commissioner therefore decided that the MOJ had failed to demonstrate that the exemption at section 40(2) FOIA is engaged and it must disclose the name of the senior individual.

Other matters

Withheld information

70. Whilst acknowledging that errors can occur, the Commissioner considers it fundamental to the integrity of her investigations that the correct withheld information is provided to her from the outset. The errors referred to earlier in this Notice caused further considerable work and delays for the Commissioner, in that it was necessary to make additional enquiries to identify and verify the actual withheld information relevant to this request.

Internal review

71. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA.
72. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
73. The Commissioner is concerned that on this occasion it took over 26 working days for an internal review to be completed.
74. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal

in her draft "Openness by Design strategy"⁵ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"⁶.

⁵ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁶ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

75. 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@justice.gov.uk

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

76. 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.

77. 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

Carolyn Howes
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