

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 27 April 2021

Public Authority: Department for Education
Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Decision (including any steps ordered)

1. The complainant has requested various costs and fees paid associated with an apprenticeship campaign overseen by the Department for Education (DfE). The DfE provided some of the information but refused to provide the specific fees paid to a number of individuals as it considered they were third party personal data and therefore exempt from disclosure under section 40(2) and 41 of the FOIA.
2. The Commissioner's decision is that the DfE was entitled to withhold the information under section 40(2), by way of section 40(3A)(a) of the FOIA. She has therefore not gone on to consider the application of section 41 of the FOIA and she requires no steps.

Request and response

3. On 10 February 2020 the complainant made a request to the DfE in the following terms:

"I am writing to you under the Freedom of Information Act 2000 to request the following information in regards to the Department for Education's Fire It Up apprenticeship campaign with SBTV:

- *What was the total cost of the SBTV X FIRE IT UP campaign?*
- *How much was paid to SBTV for its partnership in the campaign?*

- *How much was paid to Jamal Edwards for his participation?*
- *How much was paid to P Money for his participation?*
- *How much was paid to Teddy Music (aka Silencer) for this participation?*
- *How much was paid to Matthew Walker for this participation?*
- *How much was paid (each) to the seven apprentices for their participation?*
- *What was the total cost of the launch party?*
- *What was the total cost of the production and editing of the music video for "The Calling"?*
- *How much was paid to The Guardian for its partnership in the campaign?*
- *How much was paid to Spotify for its partnership in the campaign?"*

4. The DfE responded on 16 March 2020. It provided some of the requested information but withheld some information under sections 40 and 41 of the FOIA.
5. The complainant requested an internal review on 16 March 2020, specifically in relation to the decision to refuse to release the fees for Jamal Edwards, P Money, Teddy Music and Matthew Walker.
6. Following an internal review the DfE wrote to the complainant on 17 April 2020 upholding its decision to withhold this information but did not add any further detail.

Scope of the case

7. The complainant contacted the Commissioner on 7 May 2020 to complain about the way her request for information had been handled.
8. The Commissioner considers the scope of her investigation to be to determine if the DfE has correctly withheld the fees paid to the named individuals on the basis of either section 40 or 41 of the FOIA.

Reasons for decision

9. Section 40(2) of the 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.

10. In this case the relevant condition is contained in section 40(3A)(a)¹. 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').
11. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
12. 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?

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

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

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. 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.
16. 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.
17. The withheld information in this case is the fees paid to a number of named individuals for their work on a campaign.
18. The Commissioner is satisfied that information about an individual's pay is undoubtedly information which relates to them.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

19. The second part of the test is whether an individual can be identified from the withheld information. Clearly, as the individuals are named in the request they can be identified from the information.
20. The Commissioner is therefore satisfied that the withheld information both relates to and identifies individuals. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
21. The fact that information constitutes personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
22. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

23. 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".

24. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
25. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

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

26. 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"².

² 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:-

27. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
28. 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

29. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
30. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
31. The complainant has argued that the information is needed to assist in transparency of the spending of taxpayer spending.
32. There is an inherent interest in bodies which are funded by taxpayers being held accountable for the way they spend their money. Effective scrutiny helps secure the efficient delivery of public services and drives improvements within the authority itself. The Commissioner therefore

"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".

accepts that there is a legitimate interest in transparency regarding the spending by the DfE on the campaign.

Is disclosure necessary?

33. 'Necessary' means more than desirable but less than indispensable or 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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
34. In this particular case, the Commissioner does not consider that disclosure of the withheld information under the FOIA is necessary to achieve the legitimate interests identified by the complainant.
35. When considering the question of necessity, the Commissioner must consider whether there is a pressing societal need for the disclosure of the information to serve the legitimate interests identified as disclosure under the FOIA is disclosure to the world at large rather than to a particular individual.
36. The DfE argues that even though the withheld information relates to the work undertaken and the fees paid to these individuals, it considers that such individuals would expect that such personal information should be withheld, given that it relates specifically to them, and the fees paid to them as named individuals.
37. The DfE has pointed to the fact that the amount of funding spent on this specific campaign was published on the GOV.UK website and was part of the DfE's annual report. The figures relating to the cost of the campaign were also shared as part of the DfE's response to the information request. The DfE therefore argues that public interest and transparency has been met with the release of the total cost of the campaign, without the need to release details of fees paid to individuals for their input.
38. The DfE has also made it clear to the Commissioner that the agency's of some of the performers have been contacted regarding the information request and they explicitly requested the information not be shared or released into the public domain due to it being personal information.
39. The Commissioner considers that disclosure of such information without the consent of the individuals would be intrusive; it would allow people to draw conclusions about how much money these individuals earn and charge. It would also reveal whether some individuals were paid more than others. Although some of the individuals concerned are well known there is no evidence to suggest that their financial information is in the

public domain or that they would have any expectation of this being disclosed.

40. The Commissioner is satisfied that the disclosures, both in response to this request and in the DfE's annual report, provide transparency about the spending by the DfE on this campaign. This has provided a route to allow for proper scrutiny and oversight of the DfE's spending without disclosing information about the named individuals to the world at large, under the FOIA.
41. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
42. The Commissioner has therefore decided that the DfE was entitled to withhold the information under section 40(2), by way of section 40(3A)(a) of the FOIA. She has therefore not gone on to consider the application of section 41 of the FOIA.

Right of appeal

43. 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

44. 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.
45. 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

Jill Hulley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF