

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 16 August 2021

**Public Authority:** Parliamentary and Health Service Ombudsman  
**Address:** Citygate  
Mosley Street  
Manchester  
M2 3HQ

#### **Decision (including any steps ordered)**

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1. The complainant has requested the Parliamentary and Health Service Ombudsman (the PHSO) to disclose the names and job titles of all senior staff earning £39,979 or above, excluding clinical advisors. The PHSO refused to disclose the information citing section 40 of the FOIA.
2. The Commissioner's decision is that the PHSO is not entitled to rely on section 40 of the FOIA in this case.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the names and job titles of all senior staff earning £39,979 or above, excluding clinical advisors and the information which is already made publicly available via the PHSO organogram.
4. The public authority 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.

## Request and response

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5. On 11 February 2020, the complainant wrote to the PHSO and requested information in the following terms:

"I see you are seeking a Senior Improvement Officer for your Manchester office (closing date 18 February 2020 and a salary of £39,979):

<https://www.ombudsman.org.uk/about-us/jo...>

A position requiring considerable abilities:

"Reporting to the Improvement manager you will be responsible for the delivery of improvement projects, development of policy, guidance, training, tools and facilitating end to end process mapping workshops. You will be expected to use workforce information, data and KPIs to establish success measures, trends and outcomes in relation to your own projects.

The successful candidate will have an in depth understanding of continuous improvement techniques and processes as well as a Working knowledge of data analysis and statistical methods."

1. Please provide the names and positions of all senior staff earning £39,979 or more (excluding the names of clinical advisers).
  2. Please provide details of all senior positions currently unfilled.
  3. Please provide an organogram of the PHSO. If no such document exists, please provide details of all staffing information that such a document would normally include: the name of each department, the job titles of staff and the number of staff with each job title."
6. The PHSO responded on 9 March 2020. In response to questions 1 and 3 it advised the complainant that it does not disclose the names of members of staff below Assistant Director level, as it considers this information is exempt under section 40(2) of the FOIA. For the names of Assistant Directors and above, it applied section 21 of the FOIA, as this information is reasonably accessible via other means. It provided a link to an organogram on its website. In relation to question 2, the PHSO confirmed that all senior positions are filled.
7. The complainant requested an internal review on 10 March 2020 in relation to questions 1 and 3 of his request. He stated that he considers the PHSO's choice of who falls into the category of 'senior' is far too

restrictive and that the names of all staff earning £39,979 or more who are neither Assistant Directors or Clinical Advisors should be disclosed.

8. As the complainant received no response, he referred the matter to the Commissioner on 21 May 2020.
9. The Commissioner wrote to the PHSO on 6 July 2020 and requested it to complete the internal review process within 20 working days.
10. The complainant wrote to the Commissioner on 29 August 2020 as he had still not received a response.

### **Scope of the case**

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11. The complainant first contacted the Commissioner on 21 May 2020 to complain that the PHSO had not responded to his request for an internal review. The Commissioner issued the PHSO with a reminder on 6 July 2020 and asked it to complete the internal review within 20 working days. The PHSO did not do this, so the complainant approached the Commissioner again on 29 August 2020. The Commissioner decided to exercise her discretion and accepted the complaint for full investigation on 1 September 2020 without the benefit of an internal review.
12. The PHSO's internal review was later issued on 25 September 2020. This upheld its previous application of section 40(2) of the FOIA to the withheld information. The complainant confirmed he wished for the Commissioner to continue with her investigation, for the same objections detailed in paragraph 7 above.
13. During the Commissioner's investigation the PHSO decided to disclose some additional information to the complainant. This was provided to the complainant on 10 August 2021 and contained the names and job titles of several staff who either appear on the PHSO website or have already been considered in a previous appeal to the First-tier Tribunal.
14. The Commissioner considers the scope of her investigation to be to establish whether the PHSO is entitled or not to refuse to disclose the remaining withheld information under section 40(2) of the FOIA.

### **Reasons for decision**

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#### **Section 40 personal information**

15. 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.

16. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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').
17. 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.
18. 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?***

19. Section 3(2) of the DPA defines personal data as:
20. *"any information relating to an identified or identifiable living individual"*.
21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. 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.
23. 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.
24. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to each data subject. She is satisfied that a person's name and job title is information which both relates to and identifies that person. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

25. The fact that information constitutes the 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.
26. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

27. Article 5(1)(a) of the GDPR states that:
28. *"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"*.
29. 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.
30. 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**

31. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:
32. *"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"*<sup>2</sup>.

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<sup>2</sup> 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"*.

33. 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.
34. 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*

35. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. 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.
36. The complainant has not raised any specific legitimate interests in the disclosure of the withheld information in his correspondence to the Commissioner. Just that he considers the bar for the disclosure of personal data relating to PHSO staff is set too high (Assistant Director level and above). Likewise the PHSO has not put any arguments to the Commissioner in respect of the legitimate interests in the disclosure of this information. It has only said that its policy is set at disclosing the names and job titles of those employed at Assistant Director level and above because there is a legitimate interest in members of the public knowing who these employees are, suggesting therefore that there is no legitimate interest in the disclosure of staff details below this threshold.
37. The Commissioner disagrees. There is a legitimate interest in the disclosure of the withheld information to promote overall accountability and transparency within the organisation. Additionally there are roles within the PHSO below the threshold of Assistant Director which are senior positions and positions which are regularly engaging with

members of the public and making decisions on behalf of the PHSO. The Commissioner considers there is a legitimate interest in members of the public knowing who those particular employees are and in them being accountable for the roles they hold and the decisions they make, especially as those decisions often relate to the lives of the complainants who use the PHSO service or those they are representing and the issues which they raise with it.

*Is disclosure necessary?*

38. '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.
39. Again no specific arguments have been presented to the Commissioner on whether disclosure is necessary from either the PHSO or the complainant. The PHSO has only said that it does not consider disclosure of staff information below Assistant Director is necessary.
40. The Commissioner considers that disclosure is necessary to meet the legitimate interests she has identified above. She is not aware of any other, less intrusive, means of achieving this. Disclosure is necessary to promote the accountability and transparency within the organisation and enable members of the public to clearly see which employees are public facing and which employees hold senior positions.

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

41. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the 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.
42. In considering this balancing test, the Commissioner has taken 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 individual expressed concern to the disclosure; and
- the reasonable expectations of the individual. n

43. In the Commissioner's view, a key issue is whether the individuals 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.
44. That being said, the individuals' reasonable expectations are a good starting point but that does not wholly decide whether the withheld information should be withheld or not. The Commissioner must consider whether those expectations are in themselves reasonable expectations to hold given the specific circumstances of the case.
45. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
46. The PHSO confirmed that it has a clear policy in place stating that it will only release the name and job titles of members of staff at Assistant Director level and above. It argued that this is therefore the reasonable expectation of all staff below this level.
47. The Commissioner drew comparison between the PHSO's structure and her own and provided the PHSO will her own policy on the disclosure of staff information, which can be accessed on her website via this link:  
[https://ico.org.uk/media/about-the-ico/policies-and-procedures/1891/policy\\_on\\_disclosure\\_of\\_ico\\_employee\\_information.pdf](https://ico.org.uk/media/about-the-ico/policies-and-procedures/1891/policy_on_disclosure_of_ico_employee_information.pdf)
48. The PHSO agreed that in terms of structure the two organisations are very similar. It stated that if that were the only consideration for comparison it would concede that the threshold for disclosure may be set too high. However, it does not agree that the businesses carried out by both organisations is similar enough to justify the routine disclosure of staff names and positions in the manner described in the Commissioner's own policy.
49. The PHSO confirmed that it is strongly its view that such disclosure presents more risk to the employees of the PHSO than the ICO. It argued that the decision to set the threshold at Assistant Director level was made following careful assessment of the perceived threat of its employees based on actual staff experiences and it argued that this is where the two businesses differ.



50. It went on to say that PHSO complainants have quite often suffered traumatic experiences and been frustrated at a perceived lack of response from public and health authorities. This frustration often manifests as aggressive or abusive behaviour towards its public facing staff. In addition to refuse further contact it has previously had to report complainants to the police. It currently does not accept telephone calls from withheld numbers because of persistent abusive callers.
51. The PHSO therefore considers its policy of only disclosing the names and job titles of staff from Assistant Director level upwards is necessary to allow its staff to carry out their tasks without fear of abuse or threats and is part of its duty of care to provide a safe working environment.
52. The PHSO provided a couple of examples to highlight its position. The first was their Senior Caseworker role. It explained how such staff will work on the most complex investigations that PHSO handles, some of which will be of national significance for example HS2 Ltd complaints with the DfT and Windrush complaints with the Home Office. But they will also investigate complex health cases which have implications for the NHS in England. It stated that while their names are made available to complainants and other people involved in a complaint, their names would not be given to anyone that contacts the PHSO. It commented further that there are too many Senior Caseworkers to be able to determine with any confidence who was involved in a significant case and any such case would be likely to be signed off by one of the Assistant Directors of Casework or the Ombudsman, so the decision would not be likely to be the sole responsibility of a particular Caseworker.
53. The PHSO disputes that their Senior Caseworkers are publicly facing in the way it believes the Commissioner defines such public sector employees and quotes the following from her own guidance:

“It may also be fair to release more information about employees who are not senior managers but who represent your organisation to the outside world, as a spokesperson or at meeting with other bodies. This implies that the employee has some responsibility for explaining the policies or actions of your organisation.”
54. It stated that Senior Caseworkers does not match this description but instead engage privately with complainants in order to investigate their complaints. The PHSO said that they are not engaged in activities where they are expected to explain the PHSO’s actions to a wider audience, and their work looking into complaint happens in private as requires by the Parliamentary Commissioner’s Act 1967 and Health Service Commissioner’s Act 1993.

55. The PHSO confirmed that it is noted that the ICO releases the names of its Senior Case Officers, but the majority of these had already consented to their names being publicly available when they agreed to sign off decision notices. It argued that this reduced the reasonable expectation that names at that grade would be withheld from the public domain. It commented further that while its Senior Caseworkers have the word 'senior' in their job title, it stated that this is to reflect the fact that they are subject matter experts not that they are responsible for high level decisions that would require the accountability through disclosure under the FOIA.
56. The PHSO's second example was its Operation Manager. It confirmed that they are junior managers who look after a casework team within the PHSO, which covers everything from complex investigations to the intake team on the helpline. Their responsibility is to ensure the effective operation of the Caseworkers on their team. Examples of this are overseeing work carried out by staff, reporting on the team's work queue, and general managerial duties for the staff on their team.
57. It explained further that Operation Managers are often involved in complaints, largely in checking draft work of Caseworkers and carrying out reviews of a decision following a challenge from a complainant. It stated that their names can be made available to complainants who wish to speak to someone more senior if they have concerns about the way in which their complaint has been handled, but they are not made available to members of the public otherwise.
58. The PHSO argued that similar to the Senior Caseworker role they are not publicly facing in the sense that they are expected to explain the PHSO's actions to a wider audience, and their involvement is limited only to those who engage the PHSO as part of its official function. It confirmed that unlike the ICO, the PHSO does not make Operation Managers involvement in casework public, and they have a reasonable expectation that their names would be withheld from disclosure in response to an information request made under the FOIA.
59. Dealing with the PHSO's policy on the disclosure of staff information. As stated above this is a very useful starting point when considering the disclosure of staff details under the FOIA. It highlights the expectations of the PHSO staff. However, having a policy in place does not automatically mean that the expectations this sets are reasonable when considering the seniority and public facing nature of given roles. It does not automatically mean that the requested information should not be disclosed. The relevant consideration is whether those expectations are reasonable in the circumstances.

60. The Commissioner does not agree that just because the example job roles described above do not explain the PHSO's actions to a wider audience, are not spokespeople to the outside world at external meetings or engagements, they do not hold a public facing role. Representing the PHSO at external engagements or explaining the PHSO's actions to a wider audience is one example of a role that is public facing. But the consideration of what roles are public facing is not limited to this. Senior Caseworkers and Operations Managers regularly engage with members of the public and other organisations through the casework they process. They will have frequent and regular contact with the outside world as a result of the roles they perform, albeit in respect of a specific matter or complaint. The Commissioner would say they do hold public facing roles just like the Case Officers, Senior Case Officers, Team Managers and Group Managers she employs to deal with the casework brought to the ICO.
61. They are also making decisions on a regular basis on behalf of the PHSO. Given their seniority, public facing roles and the level of remuneration they are paid the Commissioner considers they should expect to be accountable and transparent about the roles they perform. The Commissioner notes that employees in these roles routinely give out their names, job titles and contact details during the handling of a particular complaint and they will deal with numerous complaints and members of the public in a given year. Their expectations that their name and job title will be withheld in response a request under the FOIA appears unreasonable given the roles they perform, their seniority and level of pay and especially as they do give the requested information out every day via their casework.
62. In terms of harassment and abuse from particular complainants, the Commissioner agrees this is unpleasant, unacceptable and would cause those in receipt of it distress and upset. However, the Commissioner considers this is usually targeted at the caseworkers and managers dealing with that case and as a result of those people already being in contact with each other. Random selection of any member of staff as a result of the disclosure of the requested information seems unlikely. It is noted too that the complainant has not requested specific contact details.
63. The Commissioner also considers the PHSO should already have mechanisms and procedures in place for dealing with such behaviour and means of controlling this as best it can.
64. The PHSO has referred to the experiences of some staff who have been subjected to such abuse and harrassment but has provided no specific examples for the Commissioner to consider. She is aware that clinical advisors have been targeted in the past but in this case the

complainant's request states that he is happy for this information to be excluded. The Commissioner has also considered cases in the past where clinical advisors' personal details have been requested and she has upheld the application of section 40 of the FOIA. As the necessary detail has not been provided, the Commissioner does not know if the PHSO is referring to clinical advisors here or other members of staff.

65. The Commissioner also asked the PHSO to provide a description of around 10 to 15 job titles and why it considered section 40 applies. It has only provided this information for two; the two which have already been discussed above.
66. The PHSO has provided an excel spreadsheet of all the names and job titles of people that have been withheld under this request. There are other job titles here which the Commissioner believes will either hold sufficient seniority or public facing functions, or both, which would warrant more public scrutiny and accountability than the PHSO's current policy provides. Examples are (but not exhaustive):

Public Affairs and Insight Manager

Senior Information Rights Officer

Assistant Private Secretary

Internal and External Communications Manager

Procurement and Contracts Manager

Payroll and Pensions Manager

67. Many of the roles contained in the spreadsheet are comparable to the job roles contained in the ICO's own policy and for which the information would be disclosed if a similar request was made to the ICO.
68. The Commissioner cannot see what damage or distress disclosure of the requested information would cause the data subjects. The requested information for many will already be known to numerous people as a result of the work and tasks they perform. The Commissioner does not accept that complainants will start targeting random members of staff as a result of the disclosure of this information. When abuse or harassment starts, this is usually as a result of previous contact between a particular complainant and a Caseworker and/or Operations Manager and when a decision has been made which is not in their favour. It is targeted and directed at those already involved and those that are responsible for the decision reached and once the name, job title and contact details of those involved has already been shared via the normal course of casework (exception being clinical advisors). If a

particular complainant wished to try and escalate their concerns, they are more than likely to go straight to Assistant Director, Director or Chief Executive thinking they will have the autonomy to give them what they want rather than randomly pick other Caseworkers not involved or other areas of the business.

69. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of the information would be lawful.

### **Fairness and transparency**

70. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
71. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
72. The requirement for transparency is met because as a public authority, the PHSO is subject to the FOIA.

### **The Commissioner's view**

73. In this instance, the Commissioner has decided that the PHSO has failed to demonstrate that the exemption at section 40(2) is engaged.
74. Since the end of the transition period following the UK's departure from the EU, the GDPR were replaced by the UK GDPR. As this request was received before the end of that transition period, the application of section 40(2) has been decided by reference to the GDPR. However the Commissioner is also satisfied that the disclosure of the personal data to which that exception was applied would not contravene the UK GDPR for exactly the same reasons.

## Right of appeal

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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](mailto:grc@justice.gov.uk)

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

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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