

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 August 2022

Public Authority: Financial Ombudsman Service
Address: Exchange Tower
London
E14 9SR

Decision (including any steps ordered)

1. The complainant has requested statistics on the number of employees identifying as gay. The Financial Ombudsman Service ("the FOS") provided some information, but withheld the remainder and relied upon section 40(2) of FOIA (third party personal data) in order to do so.
2. The Commissioner's decision is that the FOS has correctly relied upon section 40(2) of FOIA to withhold the information.
3. The Commissioner does not require further steps.

Request and response

4. On Thursday 26 August 2021, the complainant wrote to a particular individual at the FOS and requested information in the following terms:
"how many people in your team identified on application as gay."
5. On 9 September 2021, the complainant added to his request as follows:
"How many people employed in the Financial Ombudsman service identify as gay"
6. The FOS responded to both requests on 21 September 2021. In respect of the second request, it provided the information. In respect of the first request it refused to provide the information and relied on section 40(2) of FOIA in order to do so.

7. Following an internal review the FOS wrote to the complainant on 29 December 2021. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 2 January 2022 to complain about the way his request for information had been handled.
9. As the FOS' position has been set out clearly in both its response and its internal review, the Commissioner considers that he has sufficient information on which to make a decision. He therefore did not seek a submission from the FOS – although he did ask it whether it wished to add to its previous response. The FOS was happy to rely on its previous responses.
10. The Commissioner considers that the scope of his investigation is to determine whether the FOS was entitled to rely on section 40(2) of FOIA to withhold the information.

Reasons for decision

11. Section 40(2) of FOIA states that information will be exempt from disclosure if it is the personal data of someone other than the person requesting it and if its disclosure would otherwise breach any of the data protection principles.
12. Information will be personal data if it relates to an identifiable living individual.
13. Clearly, the manner in which a person describes their sexuality is something that relates to that person as it is of biographical significance to them.
14. The FOS explained in its original refusal notice that the team to which the complainant referred in his first request was made up of only six people – therefore any disclosure it made carried a significant risk of identifying one or more individuals within that team.
15. The Commissioner notes that the mere fact that a number is small does not necessarily mean that it will identify one or more individuals. However, the smaller the size of the group from which that number is drawn, the easier it will be to identify one or more individuals within that group.

16. If the number of individuals within the group who identify as gay is zero or six, the FOS cannot disclose that information without revealing that all six of the people in the team identify as gay (or do not identify as gay).
17. If the FOS discloses that either one or five individuals on the team are gay, there is a very high chance that a person familiar with the team will be able to establish the identity of the sixth person. For example, if a person knows that five out of the six people are in heterosexual relationships, but do not know the relationship status of the sixth team member, they can reasonably infer that the sixth person is the one who identifies as gay (or vice versa).
18. If the number is between two and four it will be more difficult, though still far from impossible to deduce which of the six team members have or have not identified as gay. Furthermore, because the team size is small, there is a much higher risk of the information being accidentally revealed via a mosaic effect. For example, if a person is familiar with that particular team, they can make a further request after one of the members has left to see how the overall figure has changed and use that figure to deduce information about either the individual who has left, the remaining group members, or both.
19. In the circumstances of this case, the Commissioner is satisfied that it would be possible for a motivated intruder to use both information in the public domain and insider knowledge to identify one or more individuals within the team. Having done so, they would then be able to learn how those team members describe their sexuality. The information thus identifies individuals and relates to those individuals – therefore it is their personal data.
20. Furthermore, the Commissioner notes that information about a person's sex life or sexual orientation is their special category personal data. Special category data is deemed to be particularly sensitive and therefore deserving, under data protection law, of even greater protection.
21. A data controller may not process special category personal data unless one of a small number of conditions applies. In the context of FOIA, the Commissioner considers that the only possible conditions that would justify disclosing special category data to the world at large (which is what disclosure under FOIA requires) would be if the data subjects had given their consent or if they had manifestly made the information public themselves.
22. The Commissioner is not aware that any of the team members have given their consent for this special category personal data to be

disclosed to the world at large. The FOS is not obliged to seek the team members' consent, nor are they obliged to give it.

23. Nor, in the Commissioner's view can the personal data manifestly be said to have been made public. The personal data here is the description of their sexuality that each team member provided on their application form – not the description that an outside observer considers best fits the team member's lifestyle.
24. For example, a person can be in a long term homosexual or heterosexual relationship, but still consider themselves to be bisexual or pansexual. Even if a person knows that one of the team members is in a relationship with an individual of the same gender, it does not follow that that team member must be gay. More importantly, it does not mean that they must have identified as gay when completing their application.
25. The Commissioner therefore considers that the special category personal data has not manifestly been made public by the data subjects themselves and therefore there is no lawful basis on which the FOS can disclose the information under FOIA.
26. As there is no lawful basis for the information to be disclosed, disclosure will therefore be unlawful. As the first data protection principle requires all personal data to be processed lawfully, disclosure under FOIA would thus breach one of the data protection principles. As its disclosure would breach one of the data protection principles, it follows that the information is exempt under section 40(2) of FOIA.

Other matters

27. Although there is no statutory time limit for completing an internal review, the Code of Practice, issued under section 45 of FOIA, states that internal reviews should not normally take more than 40 working days to complete.
28. The Commissioner notes that, in this case, the FOS took three months to complete its internal review. The Commissioner considers this to be poor practice.

Right of appeal

29. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

30. 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.
31. 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

Roger Cawthorne
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