

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 March 2023

Public Authority: Department for Infrastructure
Address: Clarence Court
10-18 Adelaide Street
Belfast
BT2 8GB

Decision (including any steps ordered)

1. The complainant has requested information from the Department for Infrastructure ("DfI") regarding Driving Examiner pass/fail rates per year for all Driving Examiners in Northern Ireland between 2020 and 2021.
2. The Commissioner's decision is that the DfI is entitled to rely on section 40(2) of FOIA – personal information, to withhold the requested information.
3. The Commissioner does not require the DfI to take any steps as a result of this decision notice.

Request and response

4. On 14 January 2022, the complainant wrote to the DfI and requested information in the following terms:

"My understanding of your email is that it is not possible to provide this information on the [named centre] test centre alone.

Therefore, could I be provided with the said information for all Driving Examiners in Northern Ireland in 2020 and 2021, i.e. all examiner pass/fail driving test curtailment rates per year?"

5. The DfI responded on 10 February 2022. It stated that driving test pass/fail rates are a National Statistic and, as such, must be released in accordance with the UK Official Statistics Code of Practice. It explained that driving test statistics are presented in quarterly or monthly schedules. It provided the complainant with the information in an anonymised format, covering the years stated within the request.
6. Following an internal review the DfI wrote to the complainant on 14 April 2022. It stated that it could not provide the complainant with the requested information as it falls under section 40(2) of FOIA – personal information.

Scope of the case

7. The complainant contacted the Commissioner on 29 April 2022, to complain about the way their request for information had been handled.
8. During the Commissioner's investigation, the DfI advised that it was also applying section 38(1) of FOIA – health and safety, to the withheld information.
9. The Commissioner considers that the scope of the case is to determine if the DfI was correct to withhold the information under section 40(2) of FOIA. He will go on to consider section 38(1) of FOIA if the information cannot be withheld under section 40(2).

Reasons for decision

Section 40(2) – personal information

10. 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.
11. In this case the relevant condition is contained in section 40(3A)(a)6 . 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 UK General Data Protection Regulation ('UK GDPR').
12. 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.

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

Is the information personal data?

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

“any information relating to an identified or identifiable living individual”.

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. 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.
18. In the circumstances of this case, the information relates to individuals and their work. Although the information on its own may not be considered personal data, due to the amount of information that is already within the public domain, the Commissioner is satisfied that the information could lead to all the individuals being identified. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA
19. 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.
20. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

22. In the case of a 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.
23. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.
24. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.

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

25. 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"¹.

26. In considering the application of Article 6(1)(f) of the UK 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.

¹ 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 UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".

27. 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

28. In considering any legitimate interest(s) in the disclosure of the requested information under 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.
29. 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.
30. The Commissioner considers that the complainant has a legitimate interest in this information which they believe to have wider societal benefits.

Is disclosure necessary?

31. '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.
32. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

33. It is necessary to balance the legitimate interests in disclosure against the 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.
34. 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.
35. 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.
36. The Commissioner is satisfied that junior members of staff would not expect information relating to their work published to the world at large.
37. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
38. The Commissioner notes that information has already been provided to the complainant, in the form of providing an anonymised breakdown of individual examiners' performances every quarter.
39. As is explored in his guidance on determining what is personal data², the Commissioner considers that it is necessary to consider whether individuals would be identifiable "by a determined person with a particular reason to want to identify individuals". This is because a disclosure which is ordered under the FOIA is a disclosure to the world at large, and not only to the person making the request.
40. In this case, it is clear that the requested information would relate to a small number of individuals and, due to the amount of information that has already been released, members of the public would potentially be able to identify specific individuals (or believe that they could identify individuals based off other assumptions).
41. The DfI explained that it is aware that there is a strong public interest in transparency around driving tests, specifically the pass/fail rates and, to reflect this, the department strives to be as open as possible by

² <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

publishing quarterly statistics, which include details of pass rates by geographic location, gender and vehicle type.

42. As previously mentioned in paragraph 18, the Commissioner is satisfied in this case, that due to the amount of other information that has been provided, individuals could be identified. Additionally, the Commissioner notes that this could also lead to individuals being incorrectly identified, which could potentially lead to them being targeted.
43. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
44. As the Commissioner has considered that the information can be withheld under section 40(2) of the FOIA, he has not gone on to consider the DfI's application of section 38(1) of FOIA.

Right of appeal

45. 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

46. 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.
47. 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

Michael Lea
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF