

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 May 2023

Public Authority: Forestry Commission England
Address: 620 Bristol Business Park
Coldharbour Lane
Bristol
BS16 1EJ

Decision (including any steps ordered)

1. The complainant has requested information regarding the different statuses of employees.
2. The Commissioner's decision is that Forestry Commissioner England (the FC) was entitled to rely on section 40(2) of FOIA to withhold the requested information, as disclosure would be unlawful.
3. The Commissioner does not require the public authority to take any further action.

Request and response

4. On 23 June 2022, the complainant wrote to the FC and requested information in the following terms:
 - "1. How many employees are registered as suffering from Long Covid?
 2. How many employees registered as suffering from Long Covid have registered this as a disability?
 3. Since 1st January 2020 how many employees have been suspended for over 6 months?
 4. Since 1st January 2020 how many employees have been suspended for over 6 months in the East Forest District?

5. Since 1st January 2020 how many employees have been suspended whilst completing a phased return to work?
 6. Since 1st January 2020 how many employees have been suspended whilst completing a phased return to work in the East Forest District?
 7. Since 1st January 2020 how many employees have been suspended within 3 months of commencing a phased return to work after a period of long term sickness?
 8. Since 1st January 2020 how many employees have been suspended within 3 months of commencing a phased return to work after a period of long term sickness, in the East Forest District?
 9. Since 1st January 2020 how many employees have been suspended within 1 month of registering a disability with their line manager?
 10. Since 1st January 2020 how many employees have been suspended within 1 month of registering a disability with their line manager within the East Forest District?
 11. Since 1st January 2020 how many employees have been suspended within 1 month of making PIDA disclosures?
 12. Since 1st January 2020 how many employees have been suspended within 1 month of making PIDA disclosures within the East Forest District?
 13. Since 1st January 2020 how many employees have been suspended within 1 month of informing their line manager that they are suffering work related stress?
 14. Since 1st January 2020 how many employees have been suspended within 1 month of informing their line manager that they are suffering work related stress in the East Forest District?
 15. Since 1st January 2020 how many employees have been suspended after raising bullying grievances?"
5. The FC responded on 18 July 2022. It stated that the requested information was exempt under Section 40(2) due to the small numbers involved with the information.
 6. Following an internal review the FC wrote to the complainant on 24 August 2022. It stated that it was upholding its original response.

Scope of the case

7. The complainant contacted the Commissioner 26 August 2022 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of his investigation to be to establish whether the public authority is entitled to withhold the requested information under section 40(2) of the FOIA

Reasons for decision

Section 40 personal information

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, he 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.

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

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 Commissioner asked the Trust to explain how a specific person/persons could be identified if the actual numbers were disclosed.
18. The FC advised the Commissioner that any member of the public who is familiar with the structure or governance of the FC, can relatively easily identify the individuals(s) if the requested information was disclosed.
19. The FC explained that Forestry England is a public facing organisation with many of its staff engaging with members of the public on a daily basis, meaning that it is relatively easy for a wide audience to understand how the East Forest District operates.
20. It went further and stated that the East Forest District has about 135 staff and suspension is an extremely irregular occurrence. The requested information could allow a small localised team to identify the individual(s) if disclosed.
21. Also, given the nature of the questions asked, despite the answer just being a number, it would reveal several different aspects about an individual that a motivated intruder may not have known previously.
22. Therefore, in the circumstances of this case and having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
23. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA.

Is the data special category data?

24. Information relating to special category data is given special status in the UK General Data Protection Regulation (GDPR).
25. Article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the

purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

26. Having considered the request, the Commissioner finds that, most of the requested information is special category data. He has reached this conclusion on the basis that it concerns the health of the individuals concerned.
27. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
28. The Commissioner considers that the only conditions that could be relevant to a disclosure under FOIA are conditions (a) (explicit consent from the data subjects) or (e) (data made manifestly public by the data subjects) in Article 9.
29. 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 a FOIA request or that they have deliberately made this data public.
30. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of FOIA
31. The Commissioner will now consider whether disclosing the remaining information, which is not special category data, would be fair and transparent.

Would disclosure contravene principle (a)?

32. 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".

33. 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.
34. 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

35. 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.

36. 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.

37. 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

38. 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.

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:-

"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".

39. 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.
40. The complainant explained that the Covid pandemic has had a devastating effect on significant part of the public population. The complainant advised that it would be in the public interest to know how public authorities, such as the FC have treated those who have been affected by Covid and Long Covid.
41. The Commissioner is also satisfied that there would be an public interest in knowing that the FC is operating in an open and transparent manner.
42. The Commissioner is therefore satisfied that there is a legitimate interest in the requested information and will now to go onto consider whether disclosure is necessary.

Is disclosure necessary?

43. '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.
44. In the circumstances of this case the Commissioner is not satisfied that the disclosing the requested information would satisfy the interests of the complainant. This is due to the fact the complainant has only identified interests in the information which relates to Covid or Long Covid, which the Commissioner has agreed is special category data and therefore exempt from disclosure.
45. The remaining requested information, does not relate to Covid nor Long Covid. For this reason the Commissioner is satisfied that disclosure of the remaining information would not satisfy the legitimate interest of the complainant.
46. In regards to the public interest in ensuring the FC is operating in an open and transparent manner, the Commissioner is of the view that disclosing this information would not be the least intrusive means of achieving this aim.
47. The Commissioner has therefore concluded that the FC was entitled to rely on section 40(2) when withholding the remaining information for this request and does not require any further action.

Right of appeal

48. 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

49. 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.
50. 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

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