

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 April 2023

Public Authority: Department for Transport
Address: Great Minister House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant has requested DfT to disclose the legal advice it obtained when considering their request for an investigation. DfT withheld the information citing section 42 of FOIA.
2. The Commissioner's decision is that the withheld information is exempt under FOIA by virtue of section 40(1), as it constitutes the personal data of the complainant. To the extent that the withheld information contains other information, the Commissioner is satisfied that section 42 of FOIA applies. He has however recorded a breach of section 10 of FOIA, as DfT failed to respond to the complainant's request within 20 working days of receipt.
3. The Commissioner does not require any further action to be taken.

Request and response

4. On 24 July 2022, the complainant wrote to the DfT and requested information in the following terms:

"Please take this as a formal request for data specifically between myself and the DfT between 21st of December 2020 and the date of this letter.

What I request is:

Data about what concerns they investigated, what specific procedures/processes, and what evidence they reviewed as part of all investigations prompted by myself contacting them."

5. DfT responded on 20 September 2022. It confirmed that all information requested or supplied in relation to providing a conclusion to the complainant's investigation that DfT is able to disclose has already been provided. This is either through previous requests or exchanges which have included the complainant as the recipient. It therefore applied section 21 of FOIA, which concerns information already accessible to the applicant. DfT advised that it holds legal advice that falls within the scope of the request but considered this is exempt from disclosure under section 42 of FOIA.
6. The complainant requested an internal review on 23 September 2022.
7. DfT carried out an internal review and notified the complainant of its findings on 15 November 2022. It upheld its application of section 42 of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 27 November 2022 to complain about the way their request for information had been handled. They believe DfT is incorrect to withhold the outstanding information under section 42 of FOIA and that the public interest rests in disclosing this information.
9. The Commissioner has obtained a copy of the withheld information and further submissions from DfT. He is satisfied that the withheld information is exempt from disclosure under FOIA by virtue of section 40(1) (personal data) and also section 42. Being the regulator of the Data Protection Act 2018 (DPA), the Commissioner considers it is appropriate to proactively apply this exemption in cases where it clearly applies but the public authority has failed to cite it.

Reasons for decision

Section 40 – personal data

10. Section 40(1) of the FOIA provides that any information to which a request for information relates is exempt information if it constitutes personal data of which the requester is the data subject.
11. Section 3(2) of the DPA defines personal data as:
“any information relating to an identified or identifiable living individual.”
12. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
13. The withheld information is the legal advice DfT obtained in conjunction with the complainant’s investigation. This information both relates to and would identify the complainant. He therefore considers the withheld information to be the complainant’s personal data.
14. The Commissioner’s decision is that the withheld information appropriately engaged section 40(1) of FOIA and DfT is correct not to disclose it under FOIA. This is because the appropriate information access regime to consider the potential disclosure of an applicant’s own personal data is the DPA. It will always be exempt under FOIA as any request for access should be considered under the DPA.
15. There is no requirement to consider section 42 of FOIA, as the Commissioner is satisfied that the withheld information is exempt under section 40(1). But to the extent that the withheld information can be regarded as information other than the complainant’s personal data, the Commissioner agrees that section 42 of FOIA would apply.
16. The withheld information is a communication between client and legal adviser. It therefore falls within the definition of advice privilege and is therefore subject to legal professional privilege (LPP).
17. In terms of the public interest arguments presented by both DfT and the complainant, the Commissioner has considered these in detail. He acknowledges the complainant’s assertion that there are overwhelming public interest arguments in favour of disclosure. However, he agrees with DfT that these are not sufficient to outweigh the public interest in maintaining the long-standing principle of LPP and the ability of DfT to seek and obtain candid and frank legal advice and explore its options. He is therefore satisfied that the public interest rests in maintaining the exemption.

Procedural matters

18. Section 10 of FOIA requires a public authority to respond to an information request promptly and in any event no later than 20 working days of receipt. As DfT did not meet this deadline in this case, the Commissioner has recorded a breach of section 10 of FOIA.

Other matters

19. The Commissioner does not know if the withheld information has already been considered under the DPA, as part of any subject access consideration, and DfT's decision communicated to the complainant. If it has not the Commissioner would recommend that DfT consider the potential access to this information under the DPA and provide a response to the complainant accordingly. If it already has, it would be good practice to contact the complainant and point to the response it has already issued where access to the withheld information is discussed.

Right of appeal

20. 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

21. 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.
22. 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
Wilmslow
Cheshire
SK9 5AF