

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 March 2023

Public Authority: Ministry of Defence
Address: Main Building
Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant has requested information relating to an individual's employment to the Ministry of Defence ("the MoD").
2. The Commissioner's decision is that the MoD has correctly relied on section 40(2) and section 40(5B) when refusing this request.
3. The MoD did, however, breached section 10 by failing to respond within 20 working days.

Request and response

4. On 8 August 2022, the complainant wrote to the MoD and requested information in the following terms:
 - Details with regards to the employment of [name redacted] in the role of Engineering QA manager
 - Details of any concerns raised with regards of [their] role within the MOD DE&S."
5. The MoD responded on 13 September 2022. It stated that it did not hold the information within the request, if it was held it would be exempt under section 40(2).

6. Following an internal review, the MoD wrote to the complainant on 13 January 2023. It stated that the requested information for part one of the request was held but was exempt under section 40(2). The MoD advised for the second part of the request, it could neither confirm nor deny whether the requested information was held.

Scope of the case

7. The complainant contacted the Commissioner on 5 December 2022, to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation, is to determine if the MoD was entitled to rely on section 40(2) and section 40(5B) when refusing the request.

Reasons for decision

9. As the MoD has relied on section 40(2) for the first part of the request and Section 40(5B) for the second part of the request, the Commissioner will consider both exemptions individually.

Section 40 - 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)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').
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.

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

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, 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.
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 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 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.
23. 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

24. 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.

25. 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.

26. 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

27. 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".

28. 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.
29. The complainant advised that there is a public interest in the requested information, as [name redacted]'s role involves flight safety. The complainant advised that if the requested information was disclosed, it would show the MoD is acting in an open and honest manner.
30. The MoD also acknowledged that there may be legitimate interests in the requested information, some of which include showing openness, transparency and accountability.

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 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.
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. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
 37. The MoD advised that it is not policy to release personal data relating to individuals who hold a rank lower than SCS1 or their military equivalent, unless they are in a public-facing role.
 38. The MoD explained that disclosure of the full details of the individual's employment would not be fair or lawful, which is why the information has not been published.
 39. The Commissioner recognises that there may be a public interest in the MoD employ, especially in regard to higher ranking roles. Disclosing this information would demonstrate the MoD is acting in an honest and transparent manner.
 40. 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.
 41. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
 42. The Commissioner will now go on to consider the second part of the request for information.

Section 40(5B) – Duty to neither confirm nor deny

43. This reasoning covers whether the public authority should have confirmed or denied, holding the requested information for the second part of the request under section 40(5B) of FOIA.³
44. Section 40(5B) of FOIA allows a public authority to refuse to confirm or deny that it holds particular information if the mere act of confirming (or denying) that information is held would, in itself, reveal personal data about an identifiable individual and would contravene one of the data protection principles.
45. In this case, the Commissioner is satisfied that confirming or denying whether information is held, would identify third party personal data. This is because to do so would reveal whether there were any past concerns relating to the individual's role, which would likely be unlawful and unfair to the individual involved.
46. 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 – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so would be:
 - a. lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) UK GDPR);
 - b. fair; and
 - c. transparent.
47. The Commissioner recognises that individuals have a clear and strong expectation that their personal data will be held in accordance with data protection laws. In this case, he is satisfied that the individuals concerned would not reasonably expect the public authority to confirm to the world at large whether or not it held the requested information relating to their employment history in response to a FOIA request.
48. He has also determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.
49. As there is no lawful basis for doing so, confirming or denying would be unlawful and therefore the public authority has correctly relied on

³ [Freedom of Information Act 2000 \(legislation.gov.uk\)](https://legislation.gov.uk)

section 40(5B) of FOIA to neither confirm nor deny that the requested information is held.

Procedural matters

50. MoD breached section 10 by failing to respond within 20 working days.

Other matters

51. The Commissioner would also like to remind the MoD that whilst it is not a requirement to conduct an Internal Review under FOIA, it is still considered to be good practice for one to be completed within 20 working days, but no more than 40 days.

Right of appeal

52. 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

53. 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.
54. 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

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