

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 7 March 2023

**Public Authority:** Education Authority Northern Ireland

**Address:** 40 Academy Street  
Belfast  
BT1 2NQ

#### **Decision (including any steps ordered)**

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1. The complainant requested information in the form of a series of questions about a recruitment competition held by the Education Authority Northern Ireland ("the EA") relating to assistant information governance officer roles.
2. The EA provided some information in scope of the request and cited section 40 (personal information) of FOIA for withholding part of the requested information.
3. The Commissioner's decision is that the EA is entitled to rely on section 40 of FOIA to withhold the requested information and has complied with section 1(1) of FOIA.
4. The Commissioner does not require any steps to be taken as a result of this decision notice.

## Request and response

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5. On 17 November 2022, the complainant wrote to the EA and requested information in the following terms:

"Please accept this as a FOI request under Section 8 of FOIA.

1. For the most recent assistant information governance recruitment competition how many applications were received?
2. How many applicants were Male how many were female?
3. How many applicants identified as catholic how many identified as protestant?
4. How many applicants were internal candidates?
5. What was the age range of all applicants?
6. How many applicants were shortlisted?
7. How many of these are internal candidates?
8. Please break down the sex and community background of the shortlisted applicants?
9. Please provide the age range of the shortlisted applicants?
10. How many applicants who in their application form stated that they were currently working in a foi and data protection role were rejected at shortlisting? This should be contained in their current employment details on their application
11. Of these rejected at shortlisting how many applicants gave their current employer as the Police Service of Northern Ireland?
12. Recruitment panels at this level are managed by the hiring manager. Was a hiring manager involved in this recruitment process?
13. Did any member of the recruitment panel declare a conflict of interest?

14. If any conflict of interests were declared how many of those were made by each panel member and how many by the hiring manager?"
6. The EA responded on 15 December 2022 answering each question in turn and citing section 40 of FOIA to withhold the information for points 6, 7, 8, 9, 10 and 11.
7. On 15 January 2023 at internal review, the EA upheld its reliance on section 40(2) of FOIA to withhold information in scope of the request and explained that the numbers involved were low (fewer than 5) and therefore identification of these individuals would be likely given the particular circumstances of the request.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 18 January 2023, to complain about the way their request for information had been handled.
9. The Commissioner considers the scope of his investigation is to determine if the EA has correctly cited section 40(2) of FOIA for the withheld information.

### **Reasons for decision**

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#### **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)<sup>1</sup>. 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').

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

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 this case the withheld information is the number of candidates shortlisted in a recruitment competition which may not appear to constitute personal data. However in this case, given the relatively small number (fewer than 5), and information to which the complainant has access to, the Commissioner is satisfied that data subjects could be directly identified by the complainant if this information were to be disclosed.
19. In the circumstances of this case, having considered the information available to him, the Commissioner is satisfied that this information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
20. 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.

21. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

22. 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.”

23. 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.

24. 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.

**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.<sup>2</sup>”

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<sup>2</sup> 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

26. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under 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.
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. In this case, the EA recognises that there is a legitimate interest in openness and transparency, as well as their accountability for the recruitment exercise.

### **Is disclosure necessary?**

31. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity
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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"

and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

32. In this case, the information being withheld is information about candidates (fewer than 5) who had been shortlisted during a recruitment competition. The EA says that it is not necessary to disclose the small numbers involved, in order to fulfil the legitimate interest being pursued. The complainant has argued: "There are no section 40 implications for the EA to provide the number of shortlisted candidates. There are no section 40 implications for the EA to provide the number of internal candidates shortlisted. Providing the number of candidates shortlisted and the number of internal candidates shortlisted for these 3 posts provides transparency and does not identify any individual."
33. The Commissioner accepts that the requester considers the withheld information is necessary for him to understand the detail of the recruitment data. However, having considered both the EA's explanations around the likelihood of identification due to the small numbers involved and the requester's knowledge of the process and those involved, the Commissioner has determined that there is insufficient legitimate interest to outweigh the fundamental rights and freedoms of the individuals in this specific case and considers that there is no legal basis for the EA to disclose the withheld information and to do so would be in breach of principle (a). The EA is therefore entitled to rely on section 40(2) of the FOIA to refuse to provide the information

## Right of appeal

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34. 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: 0300 1234504

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

35. 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.
36. 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 .....**

**Joanna Marshall**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**