

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 January 2024

Public Authority: Oxford Direct Services Limited

Address: St Aldates Chambers

109 St Aldates

Oxford

OX1 1DS

Decision (including any steps ordered)

1. The complainant has requested, from Oxford Direct Services Limited ('ODSL'), information relating to decisions to furlough a number of its staff during the covid pandemic. ODSL provided some information but redacted sections under section 40(2)(personal data) and section 43(2) (commercial interests).
2. The Commissioner's decision is that ODSL was correct to apply section 40(2) to some, but not all of the withheld information. He has also decided that it was correct to apply section 43(2) to withhold the relevant information.
3. The Commissioner requires ODSL to take the following steps.
 - To disclose the information which it said it is willing to disclose to the complainant.
 - To disclose the names of ODSL directors and assistant directors in an unredacted form within that information.
4. ODSL must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 30 April 2023, the complainant wrote to ODSL and requested information in the following terms:

"Please provide copies of all communications sent and received (including CCéd received communications) by the Managing Director of Oxford Direct Services (ODS) relating to the furloughing of staff during the recent covid-19 pandemic. Please do not restrict information provided to generic communications and public statements."
6. ODSL responded on 25 May 2023 and provided 10 emails and a data sheet falling within the scope of the request. The complainant responded on the same day and requested that ODSL carry out a review. They said that they were aware that more than 11 emails were sent or received by the managing director.
7. Following its internal review, ODSL responded on 22 June 2023. It said that no further information is held by it.
8. On 25 June 2023, the complainant wrote back to ODSL and provided evidence that further information was held. They listed specific examples of further correspondence falling within the scope of the request, and therefore asked it to review its decision again.
9. On 1 August 2023 ODSL responded stating that, since it had already responded to the previous request, it would consider the request for review to be a new request for information. This was not the correct approach as the prior request had not been fully responded to. The complainant wrote to ODSL on 2 August 2023 and pointed this out.
10. On 23 August 2023 ODSL responded. It said that after further searches, it had located a further 52 emails. However, it withheld these under section 12 of FOIA (appropriate limit).
11. The complainant subsequently made a complaint to the Commissioner that it would not exceed the appropriate limit for ODSL to respond to the request.

Scope of the case

12. The complainant contacted the Commissioner on 24 August 2023 to complain about the way their request for information had been handled.
13. During the course of the Commissioner's investigation ODSL withdrew its reliance upon section 12. It said that having reviewed the information, there were not 52 emails, and some were not relevant to the scope of the request. It therefore said that it would disclose a

further 29 emails to the complainant. It said however that it intended to redact personal data under section 40(2) of FOIA and a small amount of information under section 43(2).

14. The Commissioner therefore considers that the scope of his investigation is to decide whether ODSL was correct to withhold information under the exemptions in section 40(2) and 43(2) of FOIA.

Reasons for decision

Section 40(2) - personal information

15. The following analysis considers whether ODSL is entitled to apply section 40(2) of FOIA to redact the names, identities and contact details of some individuals from the information falling within the scope of the complainant's request.
16. Section 40(2) of FOIA allows a public authority to withhold information if it is personal data, i.e., information from which individual(s) could be identified, and if one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
17. In this case the relevant section is section 40(3A); that a disclosure of personal data would contravene one of the data protection principles.
18. The Commissioner is satisfied that the requested information is personal data. It relates to the names and contact details of individuals, such as various ODSL officers, Oxford City Council officers and third parties. The individuals would be identifiable if the information were to be disclosed.
19. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”
20. Personal data is processed when it is disclosed in response to an FOI request. Therefore, the information can only be disclosed if to do so would be lawful, fair, and transparent
21. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in the information being disclosed, and whether that legitimate interest overrides the rights and freedoms of the individuals whose personal information it is. The Commissioner must also decide whether

the disclosure is necessary, or whether the legitimate interests identified could be met in another way.

22. The public has a legitimate interest in knowing how public money is spent. As ODSL is wholly owned by the council, public money was spent through ODSL's actions and decisions in regard to introducing furlough into the company. Additionally, the introduction of the policy would have reduced the level of service it could provide to the public.
23. In considering the necessity test, the Commissioner is satisfied that a disclosure of some of the information is necessary in order to meet the legitimate interests identified. Senior management at ODSL would have been responsible for decisions as to whether to, and how to introduce furlough into the company. There is a legitimate interest in disclosure in order for ODSL to be transparent and accountable for its use of public money and the levels of service which occurred as a result of their decisions.
24. The Commissioner considers that it is not necessary for email addresses or telephone details of any party to be disclosed, however.
25. The Commissioner has therefore balanced the legitimate interest identified against the rights and freedoms of the individuals whose data has been withheld.
26. 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.
27. 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. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
28. The fact that there is a legitimate interest in the disclosure of the information does not mean that all of the identities of those involved needs to be disclosed. If the information which is disclosed provides transparency and accountability as regards ODSL's decisions and actions

in relation to furlough then the balance towards disclosure will be significantly weakened as compared to the rights of the individuals.

29. ODSL has already agreed to disclose the majority of the information, including the identity of some senior officials. However, the Commissioner considers that the public also has a legitimate interest in knowing the senior officers within the organisation, at director and assistant director level, who made relevant decisions in order for it to be transparent about its actions and decisions.
30. In regard to the rights and freedoms of these individuals, the Commissioner considers that senior ODSL staff would reasonably expect that they would need to be accountable for their decisions in directing the authority, particularly as this has an effect on the public purse and the level of service it could provide in this instance. They would therefore reasonably expect that their names may need to be disclosed to the public in order to meet the need for accountability and transparency for their decisions in this respect.
31. Less senior officers would have a reasonable expectation that their information would not be disclosed to the public. It is common practice for a public authority to argue that the names of junior officials are exempt from disclosure under FOIA on the basis of section 40(2) as disclosure would contravene the principles set out in Article 5 of the GDPR. Unless there are very case specific circumstances, the Commissioner accepts that the names of junior officials are exempt from disclosure on the basis of section 40(2) of FOIA. This is in line with the approach taken in the Commissioner's section 40 guidance¹. Therefore, in this case, the Commissioner adopts the reasoning set out in previous decision notices which found that the names of junior officials were exempt from disclosure on the basis of section 40(2) of FOIA.²
32. The Commissioner considers that third parties would also reasonably expect their contact details would be kept confidential, other than for senior council staff. It would also not be necessary to disclose this

¹ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

² IC-114449-B7P7 - <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022310/ic-114449-b7p7.pdf>,
IC-110922-T9R1 - <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022447/ic-110922-t9r1.pdf>

information in order for ODSL to be transparent about its actions and decision making.

33. The Commissioner has therefore decided that the rights and freedoms of senior ODSL officers, at director and assistant director level, are outweighed by the legitimate interests identified. A disclosure of their names within the information would therefore be lawful under Article 6(1)(f) of the UK GDPR.
34. As noted, senior officers within ODSL would have an expectation that their details may need to be disclosed in order that ODSL can be accountable and transparent about its actions. As they would reasonably hold this expectation, the Commissioner considers that it would also be fair and transparent for their names to be disclosed within the context of the requested information.
35. The Commissioner has therefore decided that the names of directors and assistant directors at ODSL should be disclosed in order to meet the legitimate interests identified.
36. However, as regards other individuals, the balance lies in favour of the redacted information being withheld as a disclosure of the information would not be lawful.
37. For these individuals, therefore, as the Commissioner has concluded that disclosure would not be lawful under Article 6(1)(f) of the UK GDPR, he has not gone on to separately consider whether disclosure would be fair or transparent.

Section 43(2) – Prejudice to commercial interests

38. ODSL informed the Commissioner that it intends to redact a small amount of information under section 43(2) of FOIA. Primarily this is the identity of one of its subcontractors. The redactions are made in the context of feedback looking at lessons learned from its collaboration with the contractor. It intends to disclose the majority of the feedback, but the name of the contractor has been withheld.
39. Section 43(2) provides that "*Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).*"
40. In order for a prejudice-based exemption, such as section 43, to be engaged the Commissioner believes that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e., disclosure 'would be likely' to result in prejudice, or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

Does the information relate to a person's commercial interests?

41. ODSL argues that both its own commercial interests, and another third party's interest would be prejudiced if the requested information were to be disclosed. Primarily, it considers that a disclosure would affect the commercial interests of its subcontractor, but it also argues that a disclosure would affect the reputations of both parties.
42. The Commissioner is therefore satisfied that the information relates to the commercial interests of the organisations involved.

The causal relationship

43. ODSL argued that prejudice would be likely to occur by disclosing commercially sensitive information relating its relationship with one of its subcontractors. The redacted information identifies a particular subcontractor in the context of providing feedback on its dealings with ODSL. The feedback itself would primarily be disclosed, but it cannot be attributed to any specific subcontractor in its redacted state.
44. The views would not have been expressed with public disclosure in mind. They were made to pass on useful information between decision makers at ODSL regarding its relationship with the subcontractor, and the parties' respective positions under the circumstances.

45. The Commissioner notes that a disclosure of information such as full and frank details about its commercial relationships with its subcontractors could damage both the relationship between the parties and damage the reputations of either or both parties.
46. Clearly in providing open and frank feedback, views are expressed which might not be fully reflective of the situation, or which might not reflect well on the organisation under discussion. The organisation will also not have had the opportunity to respond to the points made. Under these circumstances, the Commissioner is satisfied that ODSL was not required to ask the subcontractor for its view on the disclosure of the information in this instance.
47. The Commissioner is therefore satisfied that ODSL has correctly identified that if the information were to be disclosed and prejudice resulted, that prejudice would relate to the commercial interests of the subcontractor.
48. ODSL also said that a disclosure of the information would not prejudice its own commercial interests directly, but the information could lead to further questions being asked, and this might result in prejudice occurring to its own commercial interests. The Commissioner does not consider that this latter argument is a valid ground for withholding information under section 43(2). The question which needs to be considered is whether a disclosure of the actual requested information would prejudice commercial interests, not whether the disclosure might lead to further requests, and potentially further disclosures, which might then prejudice commercial interests in the future.

The likelihood of prejudice being caused by a disclosure of the information.

49. The Commissioner notes that the requested information relates to 2020 and the introduction of furlough at that time. It is therefore older information which does not relate to ODSL's commercial situation at the time of the request in May 2023. Nevertheless, the Commissioner accepts that the prejudice it has foreseen would still be relevant at the time that the request was submitted.
50. The Commissioner is therefore satisfied that ODSL was correct to state that a disclosure of the information would be likely to lead to the prejudice it has foreseen.

The Commissioner's conclusions

51. The Commissioner notes that section 43(2) has only been applied to a minimal amount of information. the remainder has been disclosed, providing a reasonable overview of its actions.
52. Having taken into account ODSL's arguments and the withheld information, the Commissioner has decided that section 43(2) is engaged. This is because disclosure would be likely to damage ODSL's relationship with its subcontractor and also its subcontractor's commercial reputation.
53. The Commissioner has therefore gone on to consider the public interest in the case. The test, under section 2 of FOIA, is whether the public interest in the exemption being maintained outweighs that in the information being disclosed.

Public interest test

54. There is a general public interest in public authorities being transparent and accountable for the decisions they take and how they spend public money and public resources.
55. ODSL provides waste collection and other services which were disrupted due to the covid pandemic. There is a public interest in ODSL being clear about its decisions when furloughing staff as this involves the use of public money and ties into the service which it provided to the public during the period.
56. However, the Commissioner notes that ODSL has agreed to disclose the majority of the information in question. The redactions it has made under section 43 are minimal, and do not severely impact upon the transparency of its actions. Additionally, the redacted information relates primarily to its subcontractor, not to ODSL itself.
57. A disclosure of the withheld information would be detrimental to the commercial interests of the subcontractor. There is a strong public interest in protecting these interests where no strong reason for the information to be disclosed has been identified. A disclosure of feedback relating to the subcontractor would not, in this instance, aid the public by creating transparency over ODSL's actions and decisions.
58. The Commissioner has therefore decided that the public interest in the exemption in section 43(2) of FOIA outweighs that in the information being disclosed in this case. ODSL was therefore correct to withhold the information under section 43(2) of FOIA.

Right of appeal

59. 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

60. 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.
61. 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

Ian Walley
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