

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 April 2024

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information associated with a voluntary redundancy/exit initiative within the Ministry of Justice (the 'MOJ'). Specifically, he asked for the job description titles and the associated job evaluation scheme ('JES') reference numbers, for those whose applications were accepted for voluntary redundancy. The MOJ refused to provide any of the requested information, citing section 40(2) of FOIA (the exemption for personal information).
2. The Commissioner's decision is that where a job description title and JES number is unique to an individual accepted for voluntary redundancy, that would constitute personal data and would be exempt under section 40(2) for the reasons set out in this notice. The remaining job description titles and JES numbers are not personal data and are required to be disclosed.
3. The Commissioner requires the MOJ to take the following steps to ensure compliance with the legislation:
 - Disclose the JES numbers and job description titles for those accepted for voluntary redundancy where a unique job title does not apply.
4. The MOJ must take this step within 30 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 10 October 2023, the complainant wrote to the MOJ and requested information in the following terms:

“Under [sic] Freedom of Information Act, I would like to request the following information:

The job description title and JES reference number recorded on SoP [Single Operating Platform] for each HQ [Headquarters] VES [Voluntary Exit Scheme] applicant whose application has been accepted and progressed by the panels. No request for any personal information, only the JD [job description] recorded on SoP for any HQ staff whose VES application has been supported by the panel I would like you to provide this information in the following format:

I would prefer the response via email to [email address redacted].

Please do not hesitate to contact me on the number below should any aspect of my request require clarification.”

6. The MOJ responded on 7 November 2023 and refused to provide any of the requested information, citing section 40(2) of FOIA (the exemption for personal information). It told the complainant that:

“Personal data is not only information clearly relating to an individual such as their name, date of birth, and address but can also be considered as personal data if identification is possible through a jig-saw approach: in this instance, individual’s specific roles. A jig-saw approach is when apparently unconnected information, some of which might already be in the public domain, can be related to each other by a motivated individual with access to information in order to identify any individual parties involved.”

7. The complainant requested an internal review on 8 November 2023. He argued that he was not seeking any personal information, only the job description titles and JES reference numbers for those applicants whose applications had been supported by the panel.
8. Following its internal review the MOJ wrote to the complainant on 7 December 2023. It maintained that section 40(2) of FOIA applied.

Scope of the case

9. The complainant contacted the Commissioner on 15 December 2023 to complain about the way his request for information had been handled. He maintained that he was not seeking any personal information.
10. The Commissioner considers that the scope of his investigation is to consider whether the MOJ was entitled to rely on section 40(2) of FOIA to refuse the request in its entirety. The Commissioner has not deemed it necessary to view the withheld information in this case in order to reach his decision.

Reasons for decision

Section 40 - personal information

11. Section 40(2) of 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.
12. 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 UK General Data Protection Regulation (UK 'GDPR').
13. 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 FOIA cannot apply.
14. 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?

15. Section 3(2) of the DPA defines personal data as:
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¹ As amended by Schedule 19 Paragraph 58(3) DPA.

“any information relating to an identified or identifiable living individual”.

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.
18. 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.
19. The MOJ told the Commissioner that:

“We believe that the release of the job description title(s) and reference number(s) could lead to an individual being identified. Of the 392 people who progressed after panel, there are 273 job titles used on the system. Therefore, most of the job titles (205) there is only for 1 person (1 job title = 1 person), with the most people aligned to a single job title is 9 (1 job title = 5 people) but this is only for 1 job title. This would have resulted in people becoming identifiable by their job title. Furthermore, each job title would have a different JES Reference. Therefore if there are 273 job titles, there would be 273 JES References. The disclosure of the information could lead to individual's being identified using the motivated intruder model. If the requester had inside knowledge, or had the time and resources to try to identify an individual, they could do so.”

20. The Commissioner made further enquiries to check his understanding of the above. The MOJ confirmed the following:
 - Each job description has its own unique JES number. This means that where more than one person is employed in that role, they will all share the same JES number.
 - Of the 392 individuals eligible to exit following a moderation panel, 205 held positions within the MOJ that had unique job titles and unique JES numbers.
 - The remaining 187 people had job titles which were held against more than 1 person. The numbers are:
 - There were 41 job titles which were held by 2 people (2 people having the same job title).

- There were 15 job titles which were held by 3 people (3 people having the same job title).
- There were 5 job titles which were held by 4 people (4 people having the same job title).
- There were 5 job titles which were held by 5 people (5 people having the same job title).
- There was 1 job title which was held by 6 people (6 people having the same job title).
- There was 1 job title which was held by 9 people (9 people having the same job title).

Motivated intruder

21. A test used by both the Commissioner and the First-tier tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.
22. The ICO's Code of Practice on Anonymisation² notes that:

"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA."
23. In summary, the motivated intruder test is that if the risk of identification is "reasonably likely" the information should be regarded as personal data.

Non-unique posts

24. Based on the explanation provided by the MOJ, where the job title is not unique to that individual, the Commissioner does not accept that it is likely that a motivated intruder could identify an individual using the job title and JES number. In other words, where the job title applies to more than one individual who successfully applied for voluntary redundancy, the Commissioner does not consider that disclosure of the job titles and JES numbers would render those individuals identifiable.

² <https://ico.org.uk/media/fororganisations/documents/1061/anonymisation-code.pdf>

25. The MOJ has not made its case for any low numbers (ie two or three) employed in a particular job role and accepted for voluntary redundancy, where it potentially could be feasible for a motivated intruder with insider knowledge of the particular job roles to reidentify those people. However, this would also be contingent on how many other people continued to be employed in that particular job role; for example if two Information Rights Assistants were accepted for voluntary redundancy, but five remain in employment with the MOJ, it would be harder for anyone without specific insider knowledge to identify which two of the seven had left the MOJ and why they had done so. (The Commissioner has utilised a job role to illustrate a point; he is not aware whether such a job title exists in the MOJ).
26. In the absence of any detailed arguments from the MOJ, the Commissioner does not accept that disclosure of the job titles and associated JES numbers for those individuals accepted for voluntary redundancy without a unique job title, constitutes personal data. He has, therefore, ordered their disclosure at paragraph 3 of this notice.

Unique posts

27. In the circumstances of this case, having considered the withheld information and that the complainant is an employee, the Commissioner accepts that where there is only one person working in a uniquely titled job role, then providing the title of that role and the associated JES number, could render that individual identifiable via the 'motivated intruder' approach referenced above. Although a job title and JES number in itself may not constitute personal data, in the circumstances of this case, being able to use that job description title and associated JES number, ie one that is unique to a particular individual within the MOJ, could allow a motivated intruder to positively identify that individual. It would then also reveal the job title of that individual and, additionally, that that individual applied for, and was successful in securing voluntary redundancy. The complainant has argued that not everyone offered voluntary redundancy accepted it, however, his request specifies those applications that have been accepted and progressed. In any event, this point does not detract from the information about these individuals that would be revealed should the requested information be disclosed, ie even if they had not accepted voluntary redundancy it would still reveal their individual job title and role and that they had at least applied for it.
28. The Commissioner is therefore satisfied that, where job titles and JES numbers are unique to one individual, the information relates directly to those individuals. He is satisfied that this information both relates to and potentially identifies those particular individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

29. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
30. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

31. 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”.

32. 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.

Lawful processing: Article 6(1)(f) of the UK GDPR

33. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one of the” lawful bases for processing listed in the Article applies.
34. 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”³.

³ 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 UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second

35. 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.
36. 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

37. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
38. The MOJ recognised the following:
- "I accept that there may be legitimate interests in seeking information under Freedom of Information laws as a member of staff who may have a personal interest, for instance if an application has been refused."
39. The complainant referenced that the MOJ had recognised the legitimate interest set out above but did not submit any of his own.

sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

40. The Commissioner is satisfied that there is a legitimate interest argument in this case, albeit mostly limited to those directly affected.

Is disclosure necessary?

41. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

42. The MOJ has told the complainant:

"In this case, however, I conclude that disclosing the job descriptions and JES reference of those who have applied for voluntary redundancy is not necessary to meet the legitimate interest, as there would be other means of appealing any decision that may or may not relate to your request. HMPPS [His Majesty's Prison and Probation Service] Headquarters circulated and published guidance for applicants on how to appeal a refusal, with a dedicated team to discuss applications with."

43. Although the complainant disputes that he received the guidance referred to above, he has informed the Commissioner that he has contacted the officer who carried out the internal review to query this matter.

44. The Commissioner accepts that inadvertent errors can occur when dealing with large scale redundancy administration. He has no reason to doubt that the MOJ has an appeals process in place and a dedicated team to discuss applications. He considers that individuals seeking further information about why their application has been refused or anyone objecting to the decision reached has an outlet to do so.

45. However, even accessibility to such a regime, were it available to the complainant, would not result in full disclosure of the information he seeks. Disclosure is therefore the only option available to him and therefore necessary to fulfil his legitimate interests.

46. The MOJ concluded that it was not necessary for it to go on to conduct the balancing test. The Commissioner disagrees with the MOJ on this point and he has therefore considered this test below.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

47. It is necessary to balance the legitimate interests in disclosure against the data subjects' 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 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.

48. 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.
49. 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.
50. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
51. The Commissioner considers that matters relating to an individual's employment status are private matters.
52. The Commissioner has seen no evidence that the individuals concerned have consented to disclosure of their personal data. He also accepts that the individuals in question would have no realistic expectation that their personal data would be disclosed in response to an FOI request.
53. While the legitimate interest identified is not trivial, nor is it compelling. Further, there is no suggestion that the withheld information will add to the overall transparency and accountability of the MOJ.
54. 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.
55. 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.

The Commissioner's view

56. The Commissioner has therefore decided that the MOJ was entitled to withhold the information classed as 'personal data' as set out in this notice under section 40(2) of FOIA, by way of section 40(3A)(a).
57. He has also determined that the information not classed as 'personal data' should be released by the MOJ in accordance with the step at paragraph 3 of this notice.

Right of appeal

58. 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

59. 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.

60. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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