

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 January 2012

Public Authority: Serious Fraud Office
Address: Elm House
10-16 Elm Street
London WC1X 0BJ

Decision (including any steps ordered)

1. The complainant has requested information relating to a staff survey which was carried out in 2009. The public authority disclosed some information upon request and further information during the Commissioner's investigation. The public authority refused to provide the remainder (two presentations to management) arguing that it was information obtained in confidence and therefore exempt under section 41 of the FOIA.
2. The Commissioner's decision is that the requested information is not exempt under section 41 of the Act.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation: It must disclose the two presentations to the complainant.
4. The public authority 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 30 June 2010, the complainant wrote to the public authority and requested information in the following terms:

" ... recently staff at the Serious Fraud Office completed a civil service wide engagement survey.

Could you please provide me with a copy of the complete People Survey Report as compiled by the external survey supplier detailing the responses of the members of the Serious Fraud Office as provided to the Serious Fraud Office Management along with any copies of any correspondence and copies of any presentations made of the findings by the survey supplier to Senior Management."

6. The public authority responded on 17 August 2010. It stated that the information was provided in confidence and therefore exempt under section 41 of the Act. It explained that it was a relatively small organisation and that the response rate to the survey had been low. It was concerned that individuals could be identified from the withheld information.
7. Following an internal review the public authority wrote to the complainant on 25 November 2010. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He said that the public authority was not entitled to withhold the information he had requested.
9. During the course of the investigation, the public authority disclosed further information voluntarily. The Commissioner would

note that other public authorities had done so with the same type of information.¹

10. The Commissioner asked the complainant whether he would be willing to withdraw his complaint now that the public authority had made a further substantive disclosure. The complainant said that he was not prepared to do so.
11. This decision notice will address whether or not the public authority is entitled to apply the confidentiality exemption to that information within the scope of the complainant's request which remains withheld. This is two presentations to the public authority's management about the survey responses.

Reasons for decision

12. The public authority has sought to rely on the confidentiality exemption as its basis for withholding the remainder of the withheld information. It has argued that the complainant would be able to work out how his colleagues responded based on his knowledge and experience of working at the public authority. With this in mind and as noted above, the Commissioner asked the public authority to consider the application of the personal data exemption instead of, or in addition to the confidentiality exemption. Unfortunately, its responses in this regard were not particularly thorough.
13. In some circumstances the Commissioner will consider whether disclosure under the Act would involve the unfair disclosure of personal data even if the public authority fails to provide sufficiently detailed arguments on this point. This is because he is also the UK regulator for the Data Protection Act 1998. He has therefore considered first whether any of the withheld information is covered by the personal data exemption.

Personal data exemption

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<http://media.education.gov.uk/assets/files/pdf/2/2009%20dcsf%20staff%20survey%20results.pdf>

<http://www.rail-reg.gov.uk/upload/pdf/csps-orr.pdf>

<http://www.ipso.gov.uk/peoplesurvey.pdf/>

14. The personal data exemption of the Act (section 40) says that if disclosure of the requested information would breach any of the data protection principles, that information is exempt². The Commissioner has therefore considered whether any of the withheld information is personal data. If it is, the Commissioner would consider whether disclosing it would breach any of the data protection principles.

Is any of the withheld information personal data?

15. Information is personal data where it relates to a living, identifiable individual and is biographically significant about them. Personal data can be in both electronic form or held in a manual record (in certain circumstances). The information in this case is all held in electronic form.
16. The Commissioner believes that a person's views about their experience of work is biographically significant to them. Recorded information of this nature is therefore personal data where it can be linked to a living, identifiable individual. The Commissioner also thinks that information about a person's gender, age, ethnicity, disability, length of service or grade at a place of employment is personal data where it can be linked to a living, identifiable individual.
17. As noted above, the withheld information is two presentations to management setting out an analysis of responses to a staff survey carried out in 2009.
18. Some of the withheld information includes analysis of responses from particular groups of individuals. For example, the withheld information sets out information about groups who are described by gender, department where they work, age range, ethnicity, disability, length of service or service grade. This information will now be called "group detail" in this notice. The group detail includes a description of the group and the views expressed by a percentage of that group.
19. The public authority provided the Commissioner with information about how many people would be included in such groups. The public authority also provided information about how many

² <http://www.legislation.gov.uk/ukpga/2000/36/contents>

employees it had and how many employees had responded to the survey. Some of the groups are larger than others.

20. The question arises in this case as to whether the group detail in the withheld information can be linked to one or more living, identifiable individuals once the information is disclosed under the Act. If it can be linked (and can therefore be considered personal data), the Commissioner must then consider whether it would be unfair to the identifiable individuals in question to make this information about them public knowledge under the Act.
21. The Commissioner recognises that an informed insider such as the complainant may be able to use the group detail to make an educated guess as to how a colleague might have responded to the survey, particularly where the size of the group is small. The guess may or may not be correct. However, the Commissioner does not think that this means the group detail is personal data. This is because it is not possible to determine accurately the views of any specific living individuals from the group detail.
22. The remainder of the withheld information includes two types of information. The first type appears to the Commissioner to be generic explanations of the survey process and methodology used for statistical analysis. This information will now be called "methodology information" in this notice.
23. The second type is analysis of responses by groups that are described using specialist opinion research terminology which rates the level of employee engagement at the public authority. It is not terminology that the survey participants would naturally use to describe themselves nor were they asked to describe themselves using this terminology. This information will now be called "engagement information" in this notice.
24. The Commissioner is satisfied that living individuals could not be identified from either the methodology information or the engagement information. The methodology information is an overview of the survey process without reference to specific individuals. The engagement information uses specialist terminology to describe the groups it covers. This means that, compared to the group detail which uses non-specialist self-descriptors, it is even more difficult to determine accurately the response of a living, identifiable individual from it.

25. In reaching his view as to whether and to what extent any of the withheld information includes personal data, the Commissioner also has had regard for his own published guidance³. He has focused on the question of whether any individual could be explicitly identified from the information in question.
26. He has also considered the House of Lords' judgment in the case of the Common Services Agency v Scottish Information Commissioner [2008] UKHL 47⁴ and Department of Health v Information Commissioner [2011] EWHC 1430 (Admin).

Personal Data exemption - conclusion

27. Although information about how specific groups responded could, in certain circumstances, be personal data, he does not think that the group detail is personal data in this case. Also, he does not think that the methodology information or the engagement information constitutes personal data. The personal data exemption is therefore not engaged. No individual can be identified from the group detail, the methodology information or the engagement information.

Confidentiality exemption

28. The Commissioner then went on to consider the exemption cited by the public authority, namely the confidentiality exemption at section 41.
29. Section 41(1) of the Act states that:

"Information is exempt information if-

a) it was obtained by the public authority from any other person (including another public authority), and

b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would

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http://www.ico.gov.uk/for_organisations/guidance_index/data_protection_and_privacy_and_electronic_communications.aspx#personal

⁴ <http://www.parliament.the-stationery-office.com/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>

constitute a breach of confidence actionable by that or any other person."

30. The Commissioner considers that "person" can be a legal or natural person.
31. Therefore for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party that is a legal or natural person **and** the disclosure of that information has to constitute an actionable breach of confidence.
32. With regard to the second criterion, in most cases the approach adopted by the Commissioner in assessing whether disclosure would constitute an actionable breach of confidence is to follow the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415 (the "Coco test").
33. This judgment suggested that the following three-limbed test should be considered in order to determine if information was confidential:
 - Whether the information had the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and
 - Whether an unauthorised use of the information would result in detriment to the confider.
34. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.
35. In light of the above, the Commissioner is not satisfied that any of the withheld information is exempt under the confidentiality exemption. The Commissioner's decision turns on the fact that no individual can be reliably identified from the withheld information. The Commissioner's preferred approach in these circumstances does not consider it necessary to consider the usual limbs of the section 41 test in any detail. Where the subject of the information cannot be identified as a result of the withheld information being disclosed then there can be no expectation of confidence, no quality of confidence and no detriment by way of an invasion of

privacy. As nobody can be identified it follows that there would be no breach of confidence to action.

36. The Commissioner acknowledges the public authority's concern about the collective and negative impact disclosure might have on its staff. However, these arguments were not relevant to section 41 in this case.

Right of appeal

37. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

38. 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.
39. 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

Steve Wood
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