

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 October 2012

Public Authority: Department of Health, Social Services & Public Safety

Address: Room A3.5b, Castle Buildings
Stormont
Upper Newtownards Road
BELFAST
BT4 3SJ

Decision (including any steps ordered)

The complainant submitted a request to the Department of Health, Social Services and Public Safety ("the DHSSPS") under the Freedom of Information Act 2000 ("FOIA") for information relating to the application process for a position. The Commissioner has investigated the complaint and finds that the DHSSPS was correct to apply section 40(2) by virtue of section 40(3)(a)(i) of FOIA to part of the withheld information, however it incorrectly applied section 41 of FOIA to the remaining withheld information. The Commissioner is satisfied that the remaining withheld information may be disclosed to the complainant.

The Commissioner requires the DHSSPS to take the following steps to ensure compliance with the legislation:

- disclose the remaining withheld information (a copy of the information the Commissioner finds can be disclosed has been sent to DHSSPS by separate cover).

The DHSSPS 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

1. On 13 December 2011, the complainant wrote to the DHSSPS and requested the following information relating to the position of non-executive lay member to the NI Medical and Dental Training Special Health and Social Care Agency:

"I would welcome you furnishing me with the following information:

1. A statement of the number of applicants for the position
 2. A statement of the number of applicants deemed eligible for shortlisting
 3. A breakdown of the applicants in terms of (i) gender and (ii) religion
 4. Copies of those applications which met your criteria and resulted in placement of the applicants on your shortlist (naturally I would expect that names would be blacked out.)
 5. The name and qualifications of the person leading the shortlisting process
 6. The names of members and the breakdown of the shortlisting panel by (i) gender and (ii) religion
 7. Details of the experience and training in recruitment selection of each of your panelists (with training dates given).
 8. A detailed explanation of what each of your assessment bands 1-7 in the evaluation of applications means (not simply the summary marking frame provided).
 9. A descriptive list of the selection indicators used within each band from 'very good' to 'very poor' – i.e. what experiences and qualities are and were held to justify each band number ascribed by the panel to each of the questions and all applications for the above position?
 10. A breakdown of scores given prior to the 'moderation' process as recorded in the panelists' notes."
2. The DHSSPS responded to the complainant on 15 December 2011 providing some of the information she requested. It referred her request for certain information, namely that in part 4 of her request, which was for copies of the applications of the 9 candidates which met the criteria and who were therefore short-listed for the position, to the DHSSPS' Information Management Branch for consideration.

3. The DHSSPS responded to that part of the request on 20 January 2012, citing the exemptions under sections 40(2) and 41 of FOIA as a basis for non-disclosure of the remaining requested information ("the withheld information"). She requested an internal review of that decision on 6 February 2012. The result of this was provided to her on 24 February 2012. The reviewer upheld the original decision.

Scope of the case

4. The complainant contacted the Commissioner to complain about the way her request for information had been handled, in particular part 4 of her request. The Commissioner, having perused the withheld information, considers that pages 4-8 of the candidates' applications are the relevant withheld information within the scope of part 4 the complainant's request. This is because those pages detail specifically how each candidate meets the criteria. The Commissioner has therefore only considered those specific pages and not the entirety of the applications.
5. The Commissioner has considered the DHSSPS' handling of the complainant's request and whether or not it was correct in applying the above exemptions to the withheld information.

Reasons for decision

Section 40(2): personal information

6. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied.
7. One of the conditions, listed in section 40(3)(a)(i), is where disclosure of the information to any member of the public would contravene any of the data protection principles as set out in schedule 1 to the Data Protection Act 1998 (the DPA.)
8. The Commissioner established during the course of his investigation that the DHSSPS was of the view that the withheld information was personal data, and that its disclosure would breach the first data protection principle.
9. The first data protection principle requires that the processing of personal data be fair and lawful and,
 - at least one of the conditions in schedule 2 is met, and

- in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.

10. In order to reach a view on the DHSSPS' application of this exemption, the Commissioner initially considered whether or not the information in question was in fact personal data.

Is the withheld information personal data?

11. Section 1 of the DPA defines personal data as data which relates to a living individual who can be identified:

- from those data,
- or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

12. The withheld information, i.e. pages 4-8 of the completed application forms of the shortlisted applicants, contains information about those applicants who were shortlisted for the position. That information consists of details of current and previous positions held by the applicants, from which the individual applicants could easily be identified. It is the position of the DHSSPS that redaction of such information from the withheld information would render the information meaningless.

Can personal details be redacted from the withheld information?

14. The Commissioner has considered whether it would be possible to disclose the withheld information in an anonymised format, i.e redact any details which could lead to the identification of individual applicants. He does not accept that, where a data controller holds information which could potentially be used to identify living individuals from the anonymised data, this turns the anonymised data into personal data. The Commissioner considers that even where the data controller holds that additional 'identifying' information, this does not prevent it from anonymising that information to the extent that it would not be possible to identify any living individual from that information alone, and thus it would no longer be personal data.

15. The Commissioner draws support for this approach from the House of Lords' judgment in the case of the Common Services Agency v Scottish Information Commissioner¹.
16. However if a member of the general public could identify individuals by cross-referencing the anonymised data with information already in the public domain, then the information will be personal data. Whether it is possible to identify individuals from the anonymised data is a question of fact based on the circumstances of the specific case.
17. The DHSSPS has stated that it believes redaction of identifying details from the withheld information would render it meaningless. However, the Commissioner, having perused the withheld information, disagrees. He believes that it would be perfectly possible to disclose part of the withheld information without such disclosure leading to the identification of individual applicants.

Would disclosure breach the first data protection principle?

18. The DHSSPS claimed that disclosure of the applicants' personal information would be unfair as they would have provided this information as part of a job application process, which is by nature and necessity a private process. They would therefore have had a reasonable expectation that their details would be kept private and not disclosed to the public. The Commissioner has considered whether such disclosure would be unfair and as such breach the first data protection principle.
19. The first data protection principle states that:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met".

¹ [2008] UKHL 47

20. In deciding whether disclosure of the withheld information would be unfair the Commissioner has taken into account a range of factors including the potential consequences of disclosing the information, i.e. would this cause detriment to the individuals concerned?

Would disclosure of the information be fair?

21. The Commissioner's guidance on section 40 suggests a number of issues that should be considered when assessing whether disclosure of information would be fair, namely:

- the individual's reasonable expectations of what would happen to their personal data;
- the seniority of any staff;
- whether the individuals specifically refused to consent to the disclosure of their personal data;
- whether disclosure would cause any unnecessary or unjustified distress or damage to the individuals;
- the legitimate interests in the public knowing the requested information weighed against the effects of disclosure on the individuals.

22. Furthermore, the Commissioner's guidance suggests that when assessing fairness, it is also relevant to consider whether the information relates to the public or private lives of the third party. The guidance suggests that:

"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."

23. Further, notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure of their personal information, the Commissioner believes that it may still be fair to disclose that information if it can be argued that there is a compelling public interest in doing so. Therefore, when assessing fairness under the first data protection principle and conditions, the Commissioner will balance the rights and freedoms of the data subjects with the legitimate interests in disclosing the withheld information.

Reasonable expectations of the data subject

24. A data subject's general expectations are likely, in part, to be influenced by generally accepted principles of interaction and social norms, such as the right to privacy, as enshrined in Article 8 of the ECHR. However, transparency and openness in relation to disclosure of information is also an inherent part of today's society and culture. Therefore, an individual's expectation of privacy must be balanced against that culture of openness and transparency.
25. The Commissioner accepts that individuals who apply for a vacant position would have a reasonable and legitimate expectation that their personal information would be kept private and not disclosed to the public. Naturally, personal information relating to such an application would be collected under circumstances which would give rise to an expectation of confidentiality and privacy. Individual applicants would have no expectation that their personal details would be disclosed to the public.
26. The Commissioner notes that the DHSSPS did not seek the consent of the applicants regarding disclosure of their personal information. However, given the nature of the information and the reasonable expectations of the applicants, as set out above, the Commissioner does not consider that such consent would have been likely to have been forthcoming.

Detriment to the data subject

27. The Commissioner's Awareness Guidance 1, covering Section 40 Personal Information, states that public authorities should take into account the potential harm or distress that may be caused by the disclosure. The Guidance states that, "For example, there may be particular distress caused by the release of private information about family life. Some disclosures could also risk the fraudulent use of the disclosed information (e.g. addresses, work locations or travel plans where there is a risk of harassment or other credible threat to the individual), which is unlikely to be warranted. However, the focus should be on harm or distress in a personal capacity."
28. The Commissioner is of the view that none of the individuals who were shortlisted for the position would have a reasonable expectation that their personal information would be disclosed to the public. The information consists of detail about the experience of individuals in relation to the specified position. In the Commissioner's view the individuals concerned would have, in addition to the general expectation of privacy, expected that material to be used for the specific purpose of deciding who was to be interviewed for that position

and not to be disclosed to the public.

29. The Commissioner, in considering whether disclosure would cause any unnecessary or unjustified damage or distress, has concluded that applicants in general would be distressed if their personal details were placed in the public domain. An application for a position is essentially a person's employment history and were this to be disclosed to other applicants or placed in the public domain it could cause considerable damage or distress. For example a current employer may not know of the applicant's intention to apply for the position. Disclosure of their personal details would be contrary to the applicants' reasonable and legitimate expectation that an application process is confidential and could cause the applicants unjustified damage or distress.

Legitimate interest

30. Notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, the Commissioner believes that it may still be fair to disclose personal data if it can be argued that the legitimate interest in the public accessing the material is compelling. Therefore, when assessing fairness the Commissioner will also balance the rights and freedoms of the data subject with the legitimate interests in disclosing the information into the public domain.
31. The Commissioner has considered whether there is a legitimate interest in the public accessing the withheld information. The Commissioner accepts that there is a wider public interest in transparency of public sector organisations and also a more specific public interest in knowing that those who are appointed to relatively high level positions within the public sector are properly qualified to fulfil the requirements of those posts. However, the Commissioner does not believe that any legitimate interest in the public accessing the personal details of the applicants would outweigh the potential damage and distress caused by disclosure of those details. Therefore the Commissioner is unable to conclude that disclosure of the personal details of the applicants is necessary to meet a legitimate public, rather than personal, interest.
32. The Commissioner is satisfied that some of the withheld information falls within the definition of personal data as set out in the DPA. It contains information such as previous and current employment details of the applicants. This is clearly information about living individuals who it would be possible for the public to directly identify from those data or from cross-referencing the data with other publicly available information. Since disclosure of the applicants' personal details would

be unfair and would breach the first data protection principle, the Commissioner is satisfied that the exemption under section 40(2) is engaged in relation to some of the withheld information, which consists of those personal details.

Section 41

33. The DHSSPS also sought to rely upon section 41 of FOIA (information provided in confidence) as a basis for non-disclosure of the withheld information. The Commissioner has not considered this in relation to the personal data contained in the withheld information, as he has already accepted that section 40(2) is engaged in relation to this. With regard to the remaining withheld information, in order for section 41 to apply it is necessary for all of the relevant elements of the test of confidence to be satisfied. Therefore if one or more of the elements is not satisfied then section 41 will not apply. The Commissioner has explained why he does not consider it possible to reliably identify an individual or individuals as the subject of the remaining withheld information (once identifying details have been redacted). In such circumstances he does not consider that there can be an expectation of confidence or that disclosure would cause detriment by way of an invasion of privacy. Therefore it follows that there can be no breach of confidence to action and section 41 does not apply.
34. The Commissioner therefore considers that, although section 40(2) of FOIA is engaged in relation to some of the withheld information, the remaining information can be disclosed to the applicant. He therefore orders the DHSSPS to take the following steps:
 - To disclose the withheld information, with details redacted as directed by the Commissioner, to the applicant.

Right of appeal

35. 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

36. 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.
37. 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

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