

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

### **Decision notice**

**Date:** 25 July 2022

**Public Authority:** Information Commissioner's Office  
**Address:** Wycliffe House  
Wilmslow  
SK9 5AF

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

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1. The complainant requested information about the identity of a member of staff who had purchased a bulk order of chocolate gifts from a chocolate shop. The ICO stated that it held the information, however relied upon section 40(2) (third party personal data) to withhold the name of the employee.
2. The Commissioner's decision is that the ICO has correctly applied section 40(2) of FOIA to withhold the information.
3. The Commissioner does not require the ICO to take any further steps as a result of this decision notice.

#### **Jurisdiction and nomenclature**

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4. This decision notice concerns a complaint made against the Information Commissioner. The Information Commissioner is both the regulator of FOIA and a public authority subject to FOIA. He is therefore under a duty, as regulator, to make a formal determination of a complaint made against him in his capacity as a public authority – a duty confirmed by the First Tier Tribunal. It should be noted however that the complainant has a right of appeal against the decision, details of which are given at the end of this notice.

5. This notice uses the term "the ICO" to refer to the Information Commissioner dealing with the request, and the term "the Commissioner" when referring to the Information Commissioner dealing with the complaint.

## **Request and response**

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6. On 25 February 2021, the complainant made the following request for information under FOIA:

"Having adhered to your belief that the public are better off not knowing the identity of the public employee who misappropriated over £6000 of public money towards lavish chocolate sweets, until the investigation is concluded, could you now please provide the information".
7. On 27 September 2021, the ICO responded to the request and confirmed the information was held but was exempt from disclosure under section 40(2) (third party personal data) of FOIA.
8. The ICO provided an internal review of the request on 21 October 2021 which upheld the use of the exemption of section 40(2). The ICO stated they did not identify that the legitimate interest of releasing the information outweighed the right to the personal data being protected.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 9 November 2021 to complain about the way their request for information had been handled by the ICO.
10. The Commissioner considers the scope of his investigation is to establish whether the ICO is entitled to withhold the requested information under section 40(2) of FOIA.
11. The Commissioner is mindful there is a previous decision notice <sup>1</sup>relating to a broadly similar request.

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/4019357/rcrc-2021-m7z0.pdf>

## Reasons for decision

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### Section 40 personal information

12. 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.
13. In this case the relevant condition is contained in section 40(3A)(a)<sup>2</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').
14. 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.
15. 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?

16. Section 3(2) of the DPA defines personal data as:  
"any information relating to an identified or identifiable living individual."
17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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.

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<sup>2</sup> As amended by Schedule 19 Paragraph 58(3) DPA

19. 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.
20. In this case the withheld information requested is the name of a member of ICO staff. It is indisputable that disclosing the information would allow the staff member to be identified.
21. The Commissioner is satisfied that the information relates to the staff member concerned. He is satisfied that this information both relates to and identifies the staff member. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
22. 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.
23. The most relevant DP principle in this case is principle (a).

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

24. 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."

25. In the case of a 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.
26. 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.
27. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
28. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world at large in response to a FOIA request or that they have deliberately made this data public.

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

29. 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”.
30. 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>3</sup>
31. 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.

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<sup>3</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) 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 subparagraph (displaying the legitimate interests gateway in relation to public authorities) were omitted”.

32. 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

33. 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.
34. 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.
35. The complainant indicates it is in the public interest to be made aware of the identity of the individual who "misappropriated" public money. However, as indicated in decision notice reference RCRC-2021-M7Z0 a full investigation has taken place. It has been acknowledged by the ICO whilst actions fell below its own financial policy, no dishonesty occurred.
36. In this case the ICO does identify a general interest in disclosure relating to transparency and accountability – particularly having acknowledged a departure from its policy outlined in the decision notice linked above.

#### Is disclosure necessary?

37. '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.
38. The Commissioner considers disclosing the name of the individual who signed off the purchase would add little to public understanding of how any breach of financial controls took place. In the previous decision notice information was provided regarding that decision making process. It has been accepted the financial policy in place had not been adhered to in respect of this purchase.
39. In the case of the employee who physically placed the purchase order, the Commissioner does not consider that disclosure of that employee's name would aid public understanding of the decision-making process. A full enquiry has already taken place in this regard and information

released accordingly which confirmed there was no personal gain to any individual involved in that process.

40. It is clear there would appear to be no other means for the complainant to obtain the detail of the information they requested other than through release of the redacted information. However, this must be balanced against the subject's rights to have their personal data protected.

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

41. It is necessary to balance the legitimate interests in disclosure against the data subject's 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.
42. 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.
43. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation 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.
44. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
45. The ICO considers that the rights of the individual concerned should outweigh any legitimate interest in transparency. It is noted that its staff members have a reasonable expectation that the ICO would not, in most circumstances, disclose their information.

46. The Commissioner has not seen any evidence to suggest that the individual involved would have a reasonable expectation that their personal data would be disclosed in response to an information request.
47. The Commissioner considers that disclosure of this information would be disproportionately intrusive to the data subject as it would reveal information about the data subject which is not otherwise in the public domain.
48. The law provides that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate.

### **Commissioner's conclusion**

49. Whilst the Commissioner understands the complainant's wish to obtain this information and the wider public interest in accountability and openness, he is mindful that disclosure under FOIA is disclosure to the world at large and not just to the requester.
50. Without any evidence to the contrary, the Commissioner accepts the ICO's view that there is a duty of confidentiality to the person involved to ensure their identity remains confidential.
51. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms in this case. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
52. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that it is not necessary to go on to separately consider whether disclosure would be fair or transparent.
53. The Commissioner has therefore decided that the ICO was entitled to withhold the information under section 40(2) of FOIA by way of section 40(3A)(a).

## Right of appeal

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54. 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](mailto:grc@justice.gov.uk)

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

55. 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.
56. 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

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