

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 January 2023

Public Authority: Pension Protection Fund
Address: 12 Dingwall Road
Croydon
London
CR0 2NA

Decision (including any steps ordered)

1. The complainant submitted a multi-part request to Pension Protection Fund (PPF), for information about a whistleblowing investigation and a particular recruitment process. PPF disclosed some information in response to the request, but withheld some information, citing section 40(2)(third party personal information) of FOIA.
2. The Commissioner's decision is that PPF is entitled to rely on section 40(2) to refuse to disclose the withheld information.
3. The Commissioner does not require PPF to take any steps as a result of this decision.

Request and response

4. On 12 January 2022, the complainant wrote to the public authority and requested information in the following terms:

"In accordance with the Data Protection Act and Freedom of Information Act, as applicable, please provide me with:

[1] All documents, correspondence and other information you hold regarding the whistleblowing report that I made in September 2021, including but not limited to the investigation, report and conclusions and actions taken as a result

[2] All documents, correspondence and other information you hold regarding the recruitment process for the Head of Actuarial (SMS) position, including but not limited to decisions made regarding the job description, how to advertise the job including what to include in the advert (including, but not limited to, the essential and desirable characteristics and the advertised salary range) and who to advertise it to, the questions to ask in interviews and how to score answers. Please include details of all draft versions and correspondence around these so the sequence of events is clear.

[3] All documents, correspondence and other information you hold regarding my application of the Head of Actuarial (SMS) position, including but not limited to all notes and scoring documents made during and after my interview and all correspondence concerning my application before and after my interview

[4] Details of the current pay scale(s) for all the Head of Actuarial or equivalent roles (SMS and otherwise)

[5] Details of the pay scales over the last five years for all Head of Actuarial or equivalent roles (SMS and otherwise)"

5. The public authority responded on 9 February 2022. It disclosed multiple documents within the scope of the request, but refused to disclose some information on the basis of it being third party personal information - citing section 40(2) of FOIA.
6. Following an internal review the public authority wrote to the complainant on 1 April 2022. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 19 April 2022 to complain about the way their request for information had been handled. In particular they argued that information provided to PPF by its employees in relation to a whistleblowing enquiry cannot be those individuals' personal information, as it is information provided to PPF in an official capacity about work which they have been involved in.
8. The Commissioner feels that it is important to note at this point that PPF has clarified that due to the nature of the information being sought, it is difficult to separate out the complainant's own personal information from the other information within the scope of the request. It would have been technically correct for PPF to neither confirm nor deny that it holds the complainant's own personal data under section 40(5) of FOIA, and to provide that information in a separate Subject Access Request

(SAR) response, but it considered that that approach may have appeared unhelpful to the applicant in the particular circumstances of the case. Therefore, it provided one response to cover all aspects of the request. Any personal information of the complainant was disclosed under the provisions of a SAR, however, the remaining information which is not the personal information of the complainant was considered under the provisions of FOIA.

9. The Commissioner considers the scope of his investigation to be to establish whether PPF is entitled to withhold the remaining information under section 40(2) of FOIA.

Reasons for decision

Section 40 personal information

10. 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.
11. 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').
12. 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.
13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

14. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

¹ As amended by Schedule 19 Paragraph 58(3) DPA

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. 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.
18. In the circumstances of this case, the Commissioner has reviewed a copy of the withheld information and is satisfied that it relates to a number of other identified or identifiable individuals. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
19. The fact that information constitutes the personal data of identifiable living individuals 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.
20. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

21. 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".

22. 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.
23. 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.

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

24. 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"².

25. 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.
26. The Commissioner further considers that these tests should be considered in sequential order, ie if the legitimate interest is not met then there is no need to go on to consider the necessity test, and so on.

Legitimate interests

27. 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.
28. 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.
29. The PPF noted that there is a general legitimate interest in understanding its whistleblowing procedures, and whilst the outcome of
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² 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 GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

the whistleblowing investigation was provided to the applicant, it does not consider that there is a wider legitimate interest in the matter as it did not relate to an organisational issue but to matters taken within the specific department.

30. The Commissioner agrees that it is reasonable to identify a legitimate interest in informing a whistleblower of the outcome of an investigation so that they are able to understand how their concerns have been dealt with. However, having inspected the withheld information, the Commissioner is not persuaded that there is a wider legitimate interest in disclosing the withheld third party personal information in order to inform the general public about this case.

Is disclosure necessary?

31. '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.
32. The Commissioner is satisfied that any general interests in PPF's whistleblowing procedures are covered by its whistleblowing policy, which is available to the public on its website. Therefore, disclosure of the withheld third party personal information is not necessary to meet this interest.
33. The Commissioner has taken into account that the legitimate interest in this case relates only to the complainant in their capacity as the whistleblower. The Commissioner does not consider there to be a wider societal benefit or public interest in disclosing the withheld third party personal information, given that the whistleblowing investigation relates to one specific matter rather than PPF's conduct more generally. As indicated above, the Commissioner has inspected the withheld information and he is not persuaded that the circumstances of this case, or the content of the withheld information, indicate that there is any wider benefit to disclosure.
34. The Commissioner has also taken into consideration that PPF has provided the complainant with a substantial amount of information surrounding the whistleblowing investigation and its outcome and actions to be taken. The Commissioner is of the opinion that this disclosure is sufficient to meet the limited legitimate interest of the complainant understanding how their concerns have been handled. The Commissioner understands that the complainant is of the view that information provided to a whistleblowing investigation by employees is

not personal information but official information relating to their work, and that disclosure of the withheld information would assist the public in ensuring that a public authority is complying with its legal obligations. However, the Commissioner must consider if disclosure under FOIA of the specific withheld information is necessary, and he has not seen sufficient evidence to persuade him that it is in fact necessary in this case.

35. In light of the above, the Commissioner finds that the necessity test is not met, therefore PPF cannot rely on Article 6(1)(f) as a lawful basis for processing the personal information in question. It follows that disclosure of the withheld third party personal information would not be lawful, and would contravene principle (a). For this reason the Commissioner finds that PPF was entitled to rely on the exemption at section 40(2) of FOIA.

Right of appeal

36. 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

37. 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.
38. 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

Catherine Fletcher
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