

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 May 2024

Public Authority: Department for Infrastructure

Address: Clarence Court
10-18 Adelaide Street
Belfast
BT2 8GB

Decision

1. The complainant has asked the Department for Infrastructure (DfI) for information about members of staff in the Driver and Vehicle Agency (DVA). The Commissioner's decision is that the DfI is entitled to withhold the information it holds under section 40(2) of FOIA as it is personal data of third persons (some being special category data) and disclosure would be unlawful.
2. The Commissioner requires no steps to be taken.

Request and response

3. The complainant made the following information request to the DVA on 13 September 2023.

"I have attached a previous response from the Chief Executive of the DVA that confirms there are 7 members of staff who have been granted personalised hours/days.

I would like to request details of the religious beliefs, gender (male/female/other) and work locations of these 7 staff.

I can confirm that I don't require any correlation to be given, just the information separately to ensure anonymity as regards the 7 staff.

I also request confirmation of the number of applications for personalised/flexible working hour/day requests that have been granted or rejected at first application for TG1 Vehicle Examiners in the DVA on the EDW shift in the past 3 years. Along with how many of these are granted and rejected again following appeal.

Also I request confirmation of the average time scale in which these requests were completed in the last 3 years including those at first instance and on appeal."

4. The DVA responded to the complainant's request on 29 September 2023. It refused to disclose the information in part 1 of the request, citing section 40(2) of FOIA as a basis for non-disclosure. It also stated that it did not hold information in relation to parts 2 and 3 of the request and directed the complainant to the relevant department.
5. On 26 November 2023 the complainant requested an internal review of the DfI's response. That internal review response was provided on 20 December 2023 by the DfI as the DVA is an agency which sits within the DfI. The reviewer upheld the original decision.

Scope of the case

6. The complainant contacted the Commissioner about this matter on 29 January 2024. They specified that their complaint solely related to the first part of their request, therefore the Commissioner has considered the DfI's handling of that part and has not gone on to consider whether the DfI holds the information requested in the second part of the request.

Reasons for decision

Section 40 - personal information

7. 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.
8. In this case the relevant condition is contained in section 40(3A)(a). 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').

9. The first step for the Commissioner is to determine whether the requested 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.
10. 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?

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

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

12. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
13. 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.
14. 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.
15. In the circumstances of this case, having considered the requested information, the Commissioner is satisfied that the information does relate to the data subject(s). This is because it relates to a small number of individuals within a specific category, who could be identified from that information.
16. The complainant considers that the requested information would be anonymised as they have not asked for the names of the individuals concerned. However, as the DfI has pointed out, the overall number of vehicle inspector TG1s is too small to allow for anonymisation. Although there are 380 overall in all the test centres, it is very likely, especially in an agency within such a small society as Northern Ireland, that disclosing the requested information in relation to seven individuals within one category would lead to identification as the data relating to gender and workplace location (i.e. narrowed down to a specific test centre) would easily be able to be cross-referenced by colleagues and members of the public.

17. The Commissioner agrees with the DfI that all the requested information can therefore be categorised as personal data. Furthermore, as it relates to religious beliefs, some of the requested information can be categorised as special category personal data.

Special category data

18. Special category data is particularly sensitive and therefore warrants special protection. It can only be processed (which includes disclosure in response to an information request) if one of the stringent conditions under Article 9 of the UK General Data Protection Regulation (UK GDPR) are met.
19. In this case the relevant condition has not been met. The Commissioner has seen no evidence or indication that the data subjects have consented to the disclosure of the information or that the information has been made manifestly public by the data subjects and none of the other conditions in Article 9 are relevant.
20. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this data would therefore contravene a data protection principle; that set out under Article 5(1)(a) of the UK GDPR. The information is therefore exempt under section 40(2) of the FOIA.

Personal data

21. 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.
22. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

23. 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”.

24. 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.
25. 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

26. 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”¹.

27. 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.

28. 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

29. 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.

30. 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

¹ 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 sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

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.

31. The Commissioner accepts that the complainant has a legitimate interest in receiving the information and has gone on to consider whether disclosure under FOIA is necessary to satisfy this.

Is disclosure necessary?

32. '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.
33. The complainant has stated that they have an interest in identifying potential workplace discrimination. The DfI has acknowledged this and has stated that it considers that making a FOIA request is not an effective means of identifying or investigating potential workplace discrimination.
34. The DfI has stated that other avenues are available that may well prove more effective in addressing the complainant's concerns about preferential treatment of certain staff, including the DfI's complaints or grievance procedures or seeking Union support. There is no guarantee that they will result in a specific outcome, however they appear more tailored to addressing any concerns about fair treatment than a request under FOIA.
35. The Commissioner agrees that there are less intrusive means, as outlined above, of achieving the complainant's legitimate aim of identifying potential discrimination in the workplace. Therefore he considers that disclosure is not necessary to satisfy this aim.
36. As the Commissioner is satisfied that disclosure is not necessary, there is no lawful basis for disclosure and therefore the DfI was entitled to rely on section 40(2) of FOIA to withhold the information.

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: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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

Deirdre Collins
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