

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 17 February 2011

Public Authority: The Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Summary

The complainant requested copies of the interview notes taken by the panel when they interviewed prospective candidates for the vacancy of Information Commissioner. The Ministry of Justice (MoJ) confirmed it held the requested information but refused to provide it on the basis that it was exempt from disclosure by virtue of section 40(2) (personal data). The Commissioner has decided that the MoJ was correct to withhold the information as disclosure would breach the first data protection principle.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. No-one involved in the investigation of this complaint, or in the preparation and issuing of this Notice, applied for the vacancy of Information Commissioner.
3. Although he is aware that this complaint has been received by his office, the Information Commissioner, Christopher Graham, has not

- been involved, at any stage, in either the investigation into the complaint or the preparation and signing of this Notice.
4. References in the Notice to 'the Commissioner' are made in accordance with the ICO's standard decision notice terminology and refer generically to the powers invested in the Information Commissioner and his office.
 5. This Notice has been signed by the Deputy Commissioner and Director of Freedom of Information acting in accordance with his statutory powers.

The Request

6. On 2 March 2010, the complainant wrote to the Ministry of Justice (MoJ) with the following request:

"Please could you provide me with copies of the interview notes that were taken by the panel when they interviewed prospective candidates for the vacancy of Information Commissioner that was filled by Christopher Graham.

Please note I appreciate that the notes may have to have some personal details redacted".
7. The MoJ responded on 24 March 2010. In this correspondence, the MoJ confirmed that it held the requested information. However, it refused to disclose it, citing the exemption in section 40(2) of the Act. It explained that the basis of its refusal was that disclosure would be unfair to the data subjects.
8. The complainant requested an internal review of this decision on 8 April 2010.
9. The MoJ upheld its decision not to disclose the requested information in its internal review correspondence dated 19 April 2010.

The Investigation

Scope of the case

10. On 21 April 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled, particularly the MoJ's application of section 40(2).
11. Both in correspondence with the complainant and during the Commissioner's investigation, the Ministry of Justice only argued that the requested information is exempt from disclosure by virtue of the exemption in section 40(2) of the Act. The Commissioner has therefore focussed his investigation on the MoJ's application of that exemption.
12. In order to assist with the Commissioner's investigation, the MoJ arranged for the withheld information in this case to be viewed. The withheld information comprises free-format, handwritten, notes.
13. The Commissioner understands that, as part of the interview process, each candidate gave a presentation to the panel, as well as answering questions put to them by members of the panel. For the purposes of this Notice, the notes recording these aspects of the interview will be referred to as "the full notes".
14. In the Commissioner's view, the full notes provide a comprehensive record of each candidate's interview. They include the notes taken by an individual whose role was to act as the official scribe to the panel (the scribe), the independent assessor of the Office of the Commissioner for Public Appointments (OCPA) (the independent assessor), and a member of the interview panel.
15. As well as the notes recording each candidate's presentation and interview answers, there is a brief note summarising the panel's opinion of each candidate. The Commissioner understands that this was recorded by the scribe in the course of a discussion by the panel members at the conclusion of the interviews. For the purposes of this Notice, these will be referred to as "the summary notes".
16. Having due regard to an objective reading of the wording of the request, the Commissioner considers the full notes as well as the summary notes to be within the scope of the request.

Chronology

17. The Commissioner wrote to the MoJ on 9 July 2010 asking it for further explanation of its reasons for citing section 40(2) in relation to the request.
18. The MoJ provided a substantive response on 23 July 2010.
19. The Deputy Commissioner and the case officer inspected the withheld information at the Ministry of Justice on 11 August 2010.

Analysis

20. The Commissioner has taken into account the fact that the identity of the applicant and the purpose of the request is irrelevant to consideration of a Freedom of Information request and that therefore he must consider whether or not it is appropriate for the information to be released to the general public.
21. However, the Commissioner is aware, from information published by the complainant in this case, that the complainant has suggested that a case involving Leicester City Council is relevant to the issue being considered here. That case, which was considered in an earlier Decision Notice (FS50184888), also addressed the issue of whether it was fair to disclose personal data.
22. In that case, the complainant, who worked for the Council, applied unsuccessfully for two internal vacancies. The Commissioner notes that the posts applied for in that case, namely Head of Department posts, were not public appointments.

Regulation of the appointments processes for a public appointment

23. The Commissioner for Public Appointments (CPA) regulates the processes by which appointments are made to the boards of certain public bodies in England and Wales. However, she does not regulate appointments processes in relation to all public appointments. A public appointment will only fall within the CPA's remit if it is to a body listed in the Schedule to the relevant Public Appointments Order in Council or has been specified by the Minister for the Cabinet Office by Instrument in Writing as falling within her remit. Appointment to the position of Information Commissioner is one of the appointments that meet these criteria.

24. The CPA publishes a code of practice to be followed by those responsible for public appointments processes. This Code of Practice (the Code) sets out the regulatory framework for the public appointments process.

25. The CPA describes the Code as providing:

"a clear and concise guide to the steps that must be followed to ensure fair, open and transparent appointments processes which command public confidence".

26. Compliance with the Code is monitored by:

- independent scrutiny during the appointment process by Independent Public Appointments Assessors; and
- regular audit of appointments processes within her remit.

27. According to the CPA's website, the role of Independent Public Appointments Assessors is to:

- *assist the Commissioner for Public Appointments, Ministers, other appointing authorities and departments in the task of making effective public appointments which command public confidence;*
- *provide an assurance that the appointments process has conformed to the Principles and practices set out in the Code of Practice; and in particular,*
- *ensure that appointments have been made on merit after a fair, open and transparent process.*

The appointment of the Information Commissioner

28. The Information Commissioner is appointed by Her Majesty The Queen. The Queen appoints the Commissioner by Letters Patent, on advice from the Prime Minister, who is, in turn, advised by the Secretary of State for Justice following a selection process undertaken by his Department and scrutiny of the preferred candidate by the House of Commons Justice Committee. The Secretary of State for Justice's Department is the MoJ.

The withheld information

29. Interviews for the vacancy of Information Commissioner took place in December 2008. The Commissioner has therefore first addressed the fact that the MoJ held the requested information at the time of the request (2 March 2010).

30. With regard to the retention of information relating to interviews, he has consulted his own publication "*The Employment Practices Code*". This code is intended to help employers comply with the Data Protection Act (DPA) and to encourage them to adopt good practice. With respect to interviews, the Employment Practices Code advises employers to:

"ensure that personal information that is recorded and retained following interview can be justified as relevant to, and necessary for, the recruitment process itself or for defending the process against challenge"

and to

"make provision for interview notes to be destroyed after a reasonable time, allowing the organisation to protect itself from any potential claims such as those for race or sex discrimination".

31. On this basis, the Commissioner would consider it likely that notes relating to interviews held in December 2008 would have been destroyed by 2 March 2010, the date of the request in this case.

32. However, in this case, the interviews were in relation to a public appointment that came within the remit of the OCPA.

33. In accordance with the OCPA Code of Practice and to facilitate the regular audit of appointments processes within the remit of the CPA:

"All documentation (including any paperwork handled by recruitment consultants, and interview evaluation forms) must be held by the department for safekeeping for at least two years".

34. The Commissioner is therefore satisfied that there are special rules regarding the retention of recruitment and interview data in the case of public appointments such as that of the Information Commissioner. It follows that it was appropriate, in this case, for the MoJ to be holding the requested information at the time of the request.

Exemptions

Section 40 Personal information

35. Section 40(2) of the Act is an absolute exemption which relates to the personal information of persons other than the requestor.

"Any information to which a request for information relates is also exempt information if –

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied."

36. Section 40(2) together with the condition in section 40(3)(a)(i) or 40(3)(b) provides an absolute exemption if disclosure of information falling within the definition of personal data contained in section 1(1) of the Data Protection Act 1998 (the DPA) would breach any of the data protection principles.
37. In order to reach a view on the MoJ's arguments in relation to this exemption, the Commissioner has first considered whether the withheld information is the personal data of one or more third parties.

Is the information personal data?

38. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:

"data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

39. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way. The information can be in any form, including electronic data, images and paper files or documents.
40. Having considered the withheld information, and the context in which it was obtained, the Commissioner is satisfied that the withheld information constitutes information that falls within the definition of 'personal data' as set out in section 1(1) of the Data Protection Act 1998. He has reached this conclusion on the basis that the information comprises the personal data of the candidates, to the extent that it

reveals their views and opinions on a number of topics as well as, for example, details of their current and past work experience. He is also satisfied that a small amount of the information in the full notes is sensitive personal data as defined in section 2 of the DPA (see legal annex).

41. Similarly, he is satisfied that the withheld information is the personal data of the panel members, in that it comprises their views and opinions about the candidates, their performance at interview and suitability for the job.
42. With respect to the scribe, the Commissioner accepts that they were acting in a purely administrative capacity, recording the views of others. He does not consider the scribe to be a member of the interviewing panel. The withheld information does not include personal data of the scribe.

Would disclosure breach one of the data protection principles?

43. Having accepted that all the information requested constitutes the personal data, and in part the sensitive personal data, of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles. He considers the first data protection principle to be most relevant in this case.

The first principle

44. 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”.*

Would it be fair to disclose the requested information?

45. In determining whether a disclosure is fair under the first principle of the Data Protection Act 1998 for the purposes of section 40 of the Freedom of Information Act, the Commissioner considers it appropriate to balance the consequences of any disclosure and the reasonable

expectations of the data subject with general principles of accountability and transparency.

46. As the Commissioner considers there to be two distinct sets of data subjects, namely the candidates and the panel members, he has considered each in turn.
47. As the Commissioner also considers there to be two distinct elements within the withheld information, namely the full notes and the summary notes, he has also considered these separately where appropriate.

Reasonable expectations of the data subjects – the candidates

48. The MoJ told the complainant that, in its view, the candidates would have a reasonable expectation that it "*would hold the notes of their interviews in confidence*". It argued that candidates may be less inclined to be candid in expressing their opinions if they thought the interview notes would be made public.
49. In correspondence with the Commissioner, the MoJ confirmed that the candidates were not told how their personal data would be used. However, it told him:

"we consider that the candidates and panel members would have every expectation that their personal data would not be released to third parties".

50. The Commissioner considers that, given the nature of the position for which they were being interviewed, the candidates would expect to express their views in some detail during their presentation and to be asked probing questions during their interview. He also considers it likely that, in response to such questions, they would expect to respond candidly, providing substantial evidence to demonstrate their ability to do the job, including evidencing the competencies required, by giving examples from experience gained during current and previous roles.
51. The Commissioner notes that the request was made some time after the interviews were conducted. Nevertheless, he gives weight to the argument that, at the time of the request, the candidates would have a reasonable expectation that their personal information, as divulged in the course of the interviews, would not be disclosed.

Reasonable expectations of data subjects - the panel members

52. With respect to the panel members, the MoJ told the Commissioner that it considered they would not expect their personal data to be released. However, it did not provide the Commissioner with any evidence or explanation as to why this should be the case.
53. In considering the MoJ's argument, the Commissioner has considered the extent to which the views of the panel members relate to their public or private life.
54. The Commissioner is of the opinion that disclosing personal data is generally less likely to be considered unfair in cases where the personal data relates to an individual's public or professional life rather than their private life. In his view, the threshold for releasing professional information will generally be lower than that in releasing information relating to an individual's private or home life.
55. When considering whether any information about a data subject's public/professional life should be disclosed, the Commissioner's view is that it is useful to take account of the following factors:
- the seniority of the role;
 - whether the role is public facing; and
 - whether the position involves responsibility for making decisions on how public money is spent.
56. The Commissioner considers that public sector employees should expect some information about their roles and the decisions they take to be disclosed under the Act. This approach is supported by the Information Tribunal decision in the case of *House of Commons v Information Commissioner and Norman Baker* (EA/2006/0015 and 0016). This decision involved a request for information about the details of the travel allowances claimed by MPs. In its decision the Tribunal noted that:
- "where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives".* (para 78).
57. In this case, the Commissioner considers that the panel, which included senior public sector employees, was responsible for selecting a preferred candidate for the appointment of a new Information Commissioner, a post paid for by the public purse.

58. The Commissioner has also compared the intrusive nature of the information held about the candidates with the nature of the information held about the panel members.
59. The MoJ has argued that the panel members would not expect their personal data to be released to third parties. However, the Commissioner recognises that, simply because an individual has an expectation that information held about them will not be disclosed, this does not necessarily mean that this expectation is a reasonable one.
60. In this particular case the Commissioner is not satisfied that, considering the nature of the information and given their role in the appointments process and their seniority, the panel members had a reasonable expectation that their personal data would not be disclosed.

Have the data subjects actively put some or all of the requested information into the public domain?

61. The Commissioner is not aware that the prospective candidates actively made it known, publicly, that they were being interviewed for the role of Information Commissioner. Nor, in the context of being selected for interview and to the extent that the requested information reflects their views, opinions and answers to interview questions, is he aware that they have actively put some or all of the requested information into the public domain.
62. Similarly, the Commissioner is not aware that the views of the members of the panel involved in the interviewing of the prospective candidates have been made public.

Have the data subjects consented to the disclosure?

63. During the Commissioner's investigation, the MoJ confirmed that it had approached neither the candidates nor the members of the interview panel to seek their consent to disclosure.

Could the data be "de-personalised"?

64. The complainant made it clear in his request for an internal review that he was seeking the de-personalised notes for each candidate. He confirmed that he did not want to know the name of the person the notes refer to. As he explained:

"What I am after is the de-personalised notes that were logged for each candidate. I don't want to know the name of the person that the notes refer to, just the notes".

65. The MoJ told the complainant in its internal review correspondence that it was not possible to de-personalise the notes as they "*would always contain sufficient information to identify the individuals*". In support of this argument, it told the complainant that, in its view,:

"because of the small pool of candidates, 5 were interviewed, it would be relatively easy to identify individuals from the interview notes".

The "full notes"

66. Having reviewed the withheld information, the Commissioner is satisfied that, in respect of the full notes, they provide a full account both of the content of the presentations given by each of the candidates as well as their responses to the questions they were asked during the interview. In this respect, he is satisfied that the full notes not only reflect the views and opinions of the candidates, but also necessarily include details of their background and experience in current and previous roles. He accepts that it would be possible to use this information to identify the candidates.
67. With respect to de-personalising the full notes, the Commissioner accepts that they can easily be de-personalised to the extent that the names of the individuals involved concerned can be redacted.
68. However, as previously described, the full notes contain biographical information on the candidates which could be used to identify them even with their names redacted. The Commissioner has therefore considered whether it is possible to de-personalise the full notes in such a way as to remove all references that could lead to the identity of the candidates becoming known and end up with information that, in isolation, would be meaningful and fair to disclose.
69. In this respect, he accepts the MoJ's argument that it is not possible to de-personalise the full notes.
70. As the Commissioner has reached the conclusion that it would not be possible to de-personalise the full notes effectively, it follows that he also concludes that it would not be fair to disclose the full notes.
71. In the light of the above conclusion, the following sections in this Notice relate to the summary notes only.

The "summary notes".

72. With respect to the summary notes, the Commissioner considers that this information can be de-personalised both by redacting the names of the candidates to whom the views and opinions relate and by removing the identity of the individual panel members to whom the views are attributed.

Consequences of disclosure on the data subjects – the candidates

73. Addressing the matter of the candidates work experience, the MoJ told the Commissioner that it considered there was "*an implicit agreement with prospective candidates that this information would be held in confidence*".
74. The Commissioner acknowledges the likelihood that job applicants, when they apply for a job, will have a clear expectation that the potential new employer will keep the fact of their application confidential in order to safeguard their existing employment. Although he gives weight to this argument, he is of the view that prevention of the candidates from being publicly identified can be achieved by redaction of the summary notes and therefore, in this case, there will be no detriment to the candidates' future employment prospects via disclosure.
75. Redaction would significantly reduce the likelihood of public identification of the candidates, although inferences could be drawn as to the information which relates to the successful candidate, whose identity is known to the public. However, the Commissioner has also considered the likelihood that at least some of the candidates will be aware of the identity of some or all of their fellow candidates. In his view, this increases the likelihood that the candidates will be able to attribute the panel members' opinions of other candidates to identifiable individuals. This likelihood is further increased once comments about the (now identified) successful candidate have been eliminated.
76. The Commissioner therefore considers that the disclosure of the summary notes would be unfair to the candidates and so in breach of the first data protection principle. Furthermore, he does not consider that disclosure of the minimal information in the summary notes would serve a legitimate public interest. Scrutiny of the appointment process is achieved through the oversight of the CPA and in particular the full involvement of the CPA's independent assessor in the interviews. This significantly weakens any argument that disclosure is required to demonstrate the integrity of the appointment process. Consequently,

even if his conclusion that disclosure of the summary notes would be unfair is incorrect, he is satisfied that there is no schedule 2 condition applicable to the disclosure. Disclosure would therefore be in breach of the first data protection principle on that basis also.

Consequences of disclosure on the data subjects – the panel members

77. The MoJ has not put forward any arguments in relation to the consequences of disclosure on the panel members. However, in the light of the Commissioner's conclusion above, it is unnecessary for him to consider that matter further.

The Decision

78. The Commissioner's decision is that the public authority dealt with the request in accordance with the requirements of the Act, as the requested information is exempt from disclosure by virtue of section 40(2) of the Act.

Steps Required

79. The Commissioner requires no steps to be taken.

Right of Appeal

80. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

Dated the 17th day of February 2011

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 40 Personal information

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Data Protection Act Section 2 provides that:

“In this Act ‘sensitive personal data’ means personal data consisting of information as to –

- (a) the racial or ethnic origin of the data subject,*
- (b) his political opinions,*

(c) his religious beliefs or other beliefs of a similar nature,
(d) whether he is a member of a trade union (within the meaning of the [1992 c. 52.] Trade Union and Labour Relations (Consolidation) Act 1992),
(e) his physical or mental health or condition,
(f) his sexual life,
(g) the commission or alleged commission by him of any offence, or
(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings."