

Freedom of Information Act 2000

Decision notice

Date: 30 August 2016

Public Authority: Department for Work and Pensions
Address: Caxton House
Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant requested information relating to the Department for Work and Pension's (DWP) press relations with the Disability News Service (DNS). The DWP refused to confirm or deny whether information was held, but confirmed that if it was held it would be refused under section 40(2) of the Freedom of Information Act 2000 (the Act) because it would be third party personal data. This in effect is a refusal under section 40(5)(b)(i).
2. The DWP breached section 17(1) because of the failures in its refusal notice. However, the Commissioner does not require any steps to be taken in respect of the section 17(1) breach, as this notice effectively informs the complainant of the change in the DWP's position.
3. The Commissioner's decision is that the DWP incorrectly applied section 40(5)(b)(i) in neither confirming nor denying whether the relevant information was held. The DWP provided additional submissions to withhold the held information under section 40(2), and the Commissioner's decision is that the DWP has correctly applied this exemption for all parties.
4. The Commissioner does not require the public authority to take any steps.

Request and response

5. On 19 April 2015, the complainant wrote to the DWP and requested information in the following terms:

"I am aware that you have now instituted a blanket refusal to respond to the DNS's requests for comment on stories involving yourselves.

Please supply me with:

- 1. copies of the content of all communications, both internal and external, including emails, memos, management instructions and others, relating to this decision and the original threat of it*
 - 2. copies of all other records relating to this decision, including everything to which I am entitled such as handwritten notes*
 - 3. the identity of "the chief press officer (disability)" quoted at <http://www.disabilitynewsservice.com/dwp-carries-out-threat-to-ban-questions-from-disability-news-service/>*
 - 4. the identity (name and position) of the employee or manager who made the decision to stop answering questions from the DNS."*
6. The DWP responded on 15 May 2015. It refused to confirm or deny whether information was held, but confirmed that if it was held it would be refused under section 40(2) because it would be third party personal data.
7. Following an internal review the DWP wrote to the complainant on 24 July 2015. It upheld the decision of its refusal notice of 15 May 2015.
8. During the course of the Commissioner's investigation it became clear that the DWP was refusing the request under section 40(5)(b)(i) – it neither confirmed nor denied whether it held information relevant to the request.

Scope of the case

9. The complainant contacted the Commissioner on 19 July 2015 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of the case to be whether the DWP is correct to refuse the request under section 40(5)(b)(i) of the Act. If not, then the Commissioner will also decide whether the DWP holds relevant information, and if so – whether that information is exempt under section 40(2) of the Act.

Reasons for decision

Section 17(1) – refusal of request

11. Section 17(1) of the Act states:

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

12. The DWP did not specifically state that it was relying on section 40(5) in either its refusal notice or internal review, or why the exemption applied. In doing this, the DWP has breached both section 17(1)(b) and 17(1)(c).
13. Section 17(1) also provides that the refusal notice must be provided within the time for complying with section 1(1), which is 20 working days. As the DWP did not inform the complainant of its use of section 40(2) it breached section 17(1).

Section 40(5) – neither confirm nor deny in relation to personal data

14. Section 40(5)(b)(i) of the Act states:

(5) The duty to confirm or deny –

...

(b) does not arise in relation to other information if or to the extent that either –

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded,"

15. For the DWP to have correctly relied on section 40(5)(b)(i) the following conditions must be met:

- confirming or denying whether information is held would reveal personal data of a third party; and
- confirming or denying whether information is held would contravene one of the data protection principles.

Is the requested information personal data?

16. Personal data is defined in the DPA as information which relates to a living individual who can be identified from that data, or from that data along with any other information in the possession or is likely to come into the possession of the data controller. The definition also includes opinions expressed about the individual.

17. For items 1 and 2 of the request, the Commissioner considers that this – if held – would be the personal data of Mr Pring along with whoever else was involved in the correspondence. The external correspondence would contain Mr Pring's contact details, and the internal correspondence and notes on Mr Pring would contain expressions of opinion about Mr Pring.

18. For items 3 and 4 of the request, the Commissioner also considers that this – if held – would be personal data, as the complainant has requested names of DWP staff whom would be identifiable from those details.

Would confirming or denying whether information is held contravene one of the data protection principles?

19. The complainant made his request following the publication of an article on the DNS website regarding its editor – Mr John Pring – having his journalistic privileges removed by the DWP Press Office.¹
20. The article shows that the DWP's decision to remove Mr Pring's journalistic privileges has already been put into the public domain by Mr Pring. It has been commented on through social media sites, and the complainant has used the information to make a request through the whatdotheyknow.com website to the DWP.
21. In order for the Commissioner to uphold a section 40(5) refusal it would need to be demonstrated that confirmation or denial of relevant information being held would reveal personal data, and contravene one of data protection principles.
22. In this instance, one of the parties has clearly given consent for the the personal data to be in the public domain, and has taken active steps to ensure that it is known by as wide an audience as possible. Were the withheld information to relate to sensitive personal data then the decision may be different, but it is not seen as unfair to confirm that a journalist had their right of access removed when it is already public knowledge. Under these circumstances, the Commissioner cannot support maintaining the use of section 40(5)(b)(i).

Section 40(2) – third party personal data

23. Section 40(2) of the Act states that:

“(2) 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) [requester's own personal data], and

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

(3) The first condition is –

¹ <http://www.disabilitynewsservice.com/dwp-carries-out-threat-to-ban-questions-from-disability-news-service/>

(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,"

24. The Commissioner has considered the most relevant data protection principle, which in this case is the first data protection principle. 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."

25. In order to reach her decision, the Commissioner will need to determine whose personal data comes within the scope of the request. She will then go on to determine whether it is fair to process the personal data – ie disclose it into the public domain. Should the Commissioner find that it is fair to process the personal data she will go onto to consider whether any of the conditions from Schedule 2 of the DPA can be met.

Is the withheld information personal data?

26. The withheld information consists of internal communications between the DWP Press Office, as well as external communications between the DWP Press Office and Mr Pring. The internal communications are seen as the personal data of DWP members of staff, as they can be identified from their names, as well as being the personal data of Mr Pring as it features comments about him from which he can be identified. The external communications are also the personal data of Mr Pring and the DWP staff, as they can all be identified by name from the information. In addition, the external communications also refer to a member of the public who made certain allegations against the DWP. She can be identified as her name is provided in these emails.
27. The Commissioner considers that the withheld information consists of the personal data of members of the DWP Press Office, Mr Pring, and the member of the public ("Person A"). The Commissioner will make distinctions where necessary between these parties based on the different factors that need to be considered when deciding whether it is fair to process their personal data.

Is it fair to process the personal data?

28. In considering whether it is fair to process the personal data the Commissioner has considered the following:

- The nature of the information
- The consequences of disclosure
- The reasonable expectations of the individuals
- Balancing rights of the individual against any legitimate interest in disclosure of the information

Nature of the information

29. The withheld information consists of the official letter from the DWP Press Office informing Mr Pring that he was losing his journalistic privileges, and supporting information for this letter. This consists of internal communications discussing the content and exact wording of the letter, as well as external communications with Mr Pring about their working relationship before his privileges were removed.
30. In the Commissioner's view the initial discussions between Mr Pring and the DWP Press Office is standard correspondence between a journalist and their contacts within a public authority. The level of detail contained in this is usually kept from the public domain by both the public authority and the journalist in the interests of press freedom and maintaining a practical working relationship.
31. The later internal communications discuss Mr Pring's conduct and the DWP's opinions of why the working relationship was problematic. This is then followed by the copy of the letter that was sent to Mr Pring informing him of the removal of his privileges. The Commissioner accepts that this is not a common occurrence and so needs to be considered separately.
32. The information also contains the answers to items 3 and 4 of the complainant's request, the "chief press officer" named in the article ("Person B") and the manager who made the decision to remove Mr Pring's privileges ("Person C"). The relevant personal data will be considered separately again as there are different considerations for these individuals.

Consequences of disclosure

33. The DWP has argued that there might be repercussions against the members of its staff involved should the withheld information be disclosed. This is based on some of the reactions to the article, and

the DWP referred to the type of words used on social media to describe its actions: “immoral”, “shameful” and “appalling”. The Commissioner has seen the comments and in her view they do not suggest that there would be repercussions against DWP staff members. It is clear that the comments are not supportive of the DWP’s decision but there is nothing abusive or offensive about the language used. The DWP argued that disclosure of the individuals involved would lead to “inappropriate attention” for the members of staff concerned. The Commissioner’s view is that it would be inappropriate for junior members of staff to have attention drawn to their involvement of a more senior member of staff’s decision, and she notes the DWP’s argument that it would be unfair to these junior members of staff because they would have no right of reply. However, for the more senior members of staff the Commissioner is not convinced that the attention would be inappropriate. There has to be a place for accountability for taking the significant step of removing someone’s journalistic privileges. The argument that there is no right of reply does not convince, as the DWP is perfectly capable of explaining why it chose to remove Mr Pring’s right of access to its press team.

34. Regarding Mr Pring, the Commissioner considers that there would likely be adverse consequences should the withheld information relating to Mr Pring be disclosed. This information contains details of Mr Pring’s working methods as a journalist, as well as opinions of him put forward by DWP staff. By disclosing the former, the Commissioner considers that this could reveal Mr Pring’s methods and the processes he uses to obtain stories. By disclosing the latter, it would allow other individuals to see the DWP staff’s free and frank views of the journalist. The Commissioner considers that disclosure of this information would likely impact upon Mr Pring’s work, which is seen as an unjustified adverse effect upon his ability to work as a professional journalist.
35. The Commissioner also wishes to add that she considers there is a risk of invasion into the privacy of Person A. They were mentioned by name by Mr Pring and were not privy to the correspondence. For their name to be disclosed considering their lack of involvement might deter individuals from approaching journalists in relation to news stories. The Commissioner considers that this risk is pertinent and carries serious weight in the decision about whether it is fair to process Person A’s personal data.

Reasonable expectations of the data subjects

36. For Mr Pring, the Commissioner considers that he would have a reasonable expectation that the information would not be disclosed. It is not established practice to reveal a journalist’s communications

with a public authority. Mr Pring was acting in a professional capacity as a journalist, and there is a reasonable expectation that information about how a news story is obtained is protected from disclosure to the public domain. Similarly, the Commissioner's view is that it is reasonable to expect the comments made about Mr Pring by DWP staff to be withheld, as they reveal free and frank comments about Mr Pring that do not tend to be placed in the public domain.

37. For Person A the Commissioner considers that they would have a reasonable expectation that their name would not be disclosed. Their name was cited by Mr Pring in relation to questions he was setting to the DWP Press Office, and from the information it is evident that she was not involved in this correspondence. The individual is a member of the public and so there is no expectation that her name would be revealed unless it was absolutely necessary. In this instance the Commissioner does not consider that to be the case, and so is of the view that Person A could reasonably expect not to have her name revealed in response to a freedom of information request.
38. For the DWP Press Office's junior members of staff the Commissioner considers that there is a reasonable expectation that their names would not be disclosed. They are not senior members of staff and so conventionally their names are not revealed unless there are strong arguments to support this, such as their names already being in the public domain in relation to an issue, or are involved in a public facing role. Whilst the Commissioner notes that press officers would interact with members of the public, it would largely be communicating with journalists working in their professional capacity rather than with the public at large. The Commissioner's view is that no factors are evident that would suggest there is a reasonable expectation to disclose the individuals' personal data, so in this instance so the Commissioner considers that there is a reasonable expectation to withhold the names of junior DWP staff.
39. For Person B, the Commissioner considers that there would be a reasonable expectation that their name would be withheld. Whilst the individual is a manager, it is still a relatively junior grade. The correspondence shows that this individual was not the person who signed off the decision to remove Mr Pring's journalistic privileges, so there is a less pressing need for the name to be disclosed into the public domain.
40. The DWP argued that it was significant that Mr Pring did not disclose this individual's name in the article and the Commissioner considers that this argument has merit. It is established practice for journalists not to name their contacts and link statements to an individual who is acting as the messenger for decisions made elsewhere. The Commissioner sees that this can apply to considering the reasonable

expectations of an individual when considering their rights to privacy.

41. For Person C, the Commissioner considers that this individual would be likely to have some expectation that their name would be disclosed. Person C is a senior member of staff. The individual is also named in the public domain through external websites which confirm their seniority; although the Commissioner notes that the individual concerned has not been named in the public domain in relation to making this decision.
42. Senior members of staff have a greater degree of accountability due to their involvement in decision making, and that is true in this instance. The relevant individual took the decision to remove Mr Pring's journalistic privileges, a move that has significant consequences for Mr Pring's abilities to maintain DNS. As Person C is responsible for signing off on this decision there is a strong argument for accountability, which would entail a reasonable expectation that Person C's name would be disclosed.
43. The DWP made an argument regarding Person C's expectations that the Commissioner has addressed in a Confidential Annex. The Commissioner acknowledges that this impedes a complete understanding of all the factors in her decision, but it is necessary because the argument contains confidential information. The Commissioner can confirm that she did not accept the DWP's argument and it has not influenced the decision for Person C.
44. The DWP argued further that the matter was a private one between the DWP Press Office and Mr Pring, but the Commissioner disagrees. Whilst the explicit detail of the discussions between the DWP Press Office and Mr Pring remain private, the idea that this relates to a private matter as understood in relation to personal data is incorrect. The matter is clearly relating to Mr Pring's professional access to DWP resources. Mr Pring is the editor of a specialist news site and relies upon content from the DWP Press Office for context on news stories which are freely available in the public domain. Similarly, the withheld information shows that the DWP Press Office was carrying out its official duties, and there is nothing to suggest it was in any way related to the staff's private lives.

Balance of privacy rights against legitimate interest in disclosure

45. For Person A, the Commissioner's decision is that there is no legitimate interest in their name being revealed. The only reason their personal data is within the withheld information is in relation to Mr Pring using it for reference about a story he was researching.

Person A is a member of the public and there is no reasonable expectation that personal data of this nature would be disclosed.

46. For Mr Pring, the Commissioner's decision is that it could be argued that there is a legitimate interest in providing transparency over the events that led to the DWP removing his journalistic privileges, but not one that justifies an intrusion into Mr Pring's privacy rights. In the Commissioner's view Mr Pring would have a reasonable expectation that both the correspondence he sent to the DWP, and the comments the DWP staff made concerning him, would be withheld from the public domain. Further, the Commissioner considers that disclosure would likely result in unjustified adverse effects for Mr Pring's professional work as a journalist.
47. For the junior members of DWP staff, the Commissioner's decision is that whilst there is a legitimate interest in disclosure it does not outweigh the staff's right to privacy. There is a reasonable expectation for this type of information to be withheld, and the consequences for intruding upon their privacy cannot be discounted. There is a legitimate interest in disclosure due to the individual's working in a professional capacity, and that they were assisting the process of removing Mr Pring's privileges, but this is not seen as being sufficient given their junior status within the process.
48. For Person B, the Commissioner's decision is that there is a legitimate interest in disclosure but that it does not outweigh the individual's right to privacy. The member of staff is a middle-manager, which means that he is more senior than the aforementioned junior members of staff, but the Commissioner is more concerned with the fact that he was not the member of staff who took the decision to remove Mr Pring's privileges; rather he was the individual who wrote the letter. As outlined previously, Person B's involvement with Mr Pring largely comes about through communicating the decisions of others, as was the instance in this case. Whilst Person B was more involved in the process to remove Mr Pring's privileges, he is not the member of staff responsible for the decision to do so. The Commissioner's view is that there is a legitimate interest in transparency over Person B's involvement, but the Commissioner considers that this is not sufficient to justify the intrusion into Person B's privacy rights.
49. For Person C, the Commissioner's decision is that there is a legitimate interest in disclosure which does outweigh their right to privacy. Person C is the individual who elected to remove Mr Pring's journalistic privileges, a decision which has a strong effect on the ability of a journalist to carry out his professional duties. Person C is a senior member of staff, which carries with it a reasonable expectation that their involvement in public affairs will be disclosed,

especially if they are the individual who has been heavily involved in the decision making process.

50. As the Commissioner has identified that there is a legitimate interest in Person C's personal data being disclosed she will need to go on to consider whether there is a condition from Schedule 2 of the DPA which can be met in order to support disclosure. For the other individuals' personal data, she is of the view that this should be withheld and so will not take these considerations any further.

Schedule 2 conditions

51. In making her decision the Commissioner considers that the sixth condition is the most appropriate. This states:

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

52. In reaching her decision the Commissioner has taken into account the Upper Tribunal decision of *Goldsmith International Business School v IC and Home Office* GIA/1643/2014 ("the Goldsmith decision"),² which provided clarification on the application of the sixth condition. Upper Tribunal decisions are binding on the Commissioner, so it is a requirement to apply the decision in this instance.

53. The decision found that Schedule 2 Condition 6(1) required three questions to be asked:

- i. Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
- ii. Is the processing involved necessary for the purposes of those interests?
- iii. Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

The Commissioner will address each of these questions in turn.

² <http://panopticonblog.com/wp-content/uploads/2015/01/Goldsmiths.doc>

Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?

54. The Commissioner considers that this has been demonstrated by the earlier deliberations of the balancing of the legitimate interest in disclosure against Person C's privacy rights: firstly, there is a legitimate interest in transparency over the person responsible for taking the decision to remove a journalist's right of access to the DWP Press Office; and second, the individual concerned is of a senior grade within the DWP and so would have a reasonable expectation over disclosure of their name.

Is the processing involved necessary for the purposes of those interests?

55. The judge in the Goldsmith decision stated that the definition of "necessity" would be reasonable necessity as opposed to absolute necessity. It provided the test by which this could be judged:

"The test of reasonable necessity itself involves the consideration of alternative measures, and so "a measure would not be necessary if the legitimate aim could be achieved by something less"; accordingly, the measure must be the "least restrictive" means of achieving the legitimate aim in question."

56. The circumstances of the Goldsmith decision allowed for the judge to find that there was an alternative measure that could be employed to allow the requester to obtain the personal data, which meant that the test was not found to apply.
57. The Commissioner has completed this section on necessity in the accompanying Confidential Annex. The Commissioner does not do so lightly as it is pivotal to the decision regarding Person C, but it is necessary under the circumstances as it relates to the confidential information referred to earlier. The outcome of the arguments in the Confidential Annex the question of necessity is that the Commissioner considers the interests could be met by alternative means.
62. As the Commissioner considers the question of necessity has not been met in this case it has not been necessary to go on to consider the balance between the legitimate interests of the complainant and the rights and freedoms or legitimate interests of the data subject.

Conclusion

63. The Commissioner's decision is that the sixth condition is not met in this case. Therefore, the Commissioner finds that the DWP was correct to withhold the name of Person C.

Right of appeal

64. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

65. 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.
66. 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

**Gerrard Tracey
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