

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 October 2018

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

Decision (including any steps ordered)

1. The complainant requested information from the Ministry of Justice (MoJ), including information relating to the pay and gender of prison staff working in a particular department.
2. The MoJ confirmed it held the requested pay and gender information. However, it refused to disclose it, citing section 40(2) (personal information) of the FOIA.
3. The Commissioner's decision is that the MoJ is entitled to rely on section 40(2) and is not obliged to disclose the withheld information.
4. The Commissioner requires no steps to be taken as a result of this decision.

Background

5. The gender pay gap is the difference in the average hourly wage of all men and women across a workforce. If women do more of the less well paid jobs within an organisation than men, the gender pay gap is usually bigger¹.

¹ <https://gender-pay-gap.service.gov.uk/>

6. The gender pay gap is not the same as unequal pay which is paying men and women differently for performing the same (or similar) work. Unequal pay has been unlawful since 1970.

Request and response

7. On 16 April 2018, the complainant wrote to the MoJ and requested information in the following terms:

"1. The amount paid to the staff working in HMP Swinfen Hall's programmes department 2016-2017 along with their genders.

2. The cost of the 'artwork' opposite the Chapel at HMP Swinfen Hall".

8. The MoJ responded on 14 May 2018. It provided some information within the scope of the request, namely the cost of the artwork, but refused to provide the remainder. It cited the following exemption as its basis for doing so:

- section 40(2) personal information.

9. Following an internal review, the MoJ wrote to the complainant on 6 June 2018 maintaining its original position.

Scope of the case

10. The complainant contacted the Commissioner, in a letter dated 29 June 2018, to complain about the way his request for information had been handled.
11. Specifically, he was dissatisfied that his request for pay and gender information had been refused. He disputed that anyone could be identified from their pay and gender.
12. The Commissioner notes that, in its correspondence, the MoJ told the complainant that it had interpreted his request as referring to individuals' salaries and not, for example, salary bands or ranges.
13. The complainant did not question that interpretation when bringing his complaint to the Commissioner.
14. During the course of the Commissioner's investigation, the MoJ confirmed that it would be content with providing the salary bands for each role in the Programmes Department.

15. The Commissioner is mindful that the complainant, although not required to do so, said that the reason for his request was to see if there is any 'gender pay gap'. However, this would not be apparent from salary band information.
16. The analysis below therefore considers the MoJ's application of section 40(2) of the FOIA to the information requested at part (1) of the request.

Reasons for decision

Section 40 personal information

17. Section 40(2) of the 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(3) or 40(4) is satisfied.
18. In this case the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (DPA).
19. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 cannot apply.
20. 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 data protection principles under the DPA.

Is the information personal data?

21. The definition of personal data is set out in section 1 of the Data Protection Act 1998 (DPA), the legislation in force at the time of this request. Section 1 defines personal data as:

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

a) from these 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."

22. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable.
23. 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 or has them as its main focus.
24. During the course of the Commissioner's investigation, the MoJ confirmed that the information in question is:

"...the personal data of a small number of staff working across a range of grades within the prison..."
25. The Commissioner is satisfied that information about a person's pay and gender undoubtedly relates to them.
26. The second part of the test is whether the withheld information identifies any individual.
27. The complainant disputes that he has requested personal information. He told the Commissioner that he had not requested anyone's name or any other personal identifier.
28. During the course of her investigation, the MoJ argued that providing the requested information could lead to the identification of individual staff.
29. The MoJ explained that if the requested information was disclosed, the complainant could identify individual's salaries by using the requested information in conjunction with other information he would have available to him, such as the structure of the team and the number of staff in each band. He could also make assumptions based on staff's length of service.
30. The MoJ told the Commissioner:

"This, along with the release of their genders, would significantly increase the risk of individual's salaries being identified"
31. Similarly, in its submission to the Commissioner, the MoJ argued that the knowledge held by other employees at HMP Swinfen Hall and across HMPPS would also enable salaries to be linked to individual members of staff.
32. The MoJ added that even if it were to provide the salaries without the corresponding gender information it would reveal the salaries of the part time members of staff. It said:

"It would be known by other individuals which members of staff were employed on a part time basis and due to the low number a

reasonable assumption could be made on which salary belonged to which individual, based on other factors such as length of service”.

33. The Commissioner considers that context is important here. She notes that the request relates to a small number of staff, who perform a specific job role, within a named prison.
34. The Commissioner is satisfied that the withheld information relates to living individuals and that, given the nature of the requested information, could lead to the identification of those individuals.
35. She has reached that conclusion on the basis that the focus of the information is the small number of staff within the Programmes department at HMP Swinfen and that the information is clearly linked to those individuals because it is about their pay and gender.
36. Having accepted that the information requested constitutes the 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.
37. The Commissioner notes that the MoJ considers that disclosure would breach the first data protection principle.
38. The Commissioner agrees that the first data protection principle is most relevant in this case.

Would disclosure contravene the first data protection principle?

39. The first data protection principle states:

“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.”

40. In the case of an 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 fair, lawful and would meet one of the DPA Schedule 2 conditions (and one of the Schedule 3 conditions if relevant). If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

Would disclosure be fair?

41. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.
42. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
 - the data subject(s) reasonable expectations of what would happen to their information;
 - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual(s) concerned); and
 - the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

Reasonable expectations

43. In the Commissioner's view, a key issue to consider in assessing fairness is whether the individual(s) concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy and also the purpose for which they provided their personal data.
44. The MoJ argued that it has a responsibility to protect the personal data of its employees. In that respect the MoJ told the complainant:

"Individuals have a clear and strong expectation that their personal data will be held in confidence and not disclosed to the public under the FOIA".
45. Similarly, it told the Commissioner:

"The members of staff are all below the Senior Civil Servant grade and are not in a public facing role so would not expect their salary to be publically known".
46. The MoJ told the Commissioner that it did not consider it fair, or reasonable, to provide the salaries of staff working within a small team within an establishment.
47. The Commissioner recognises that people have an instinctive expectation that a public authority, in its role as a responsible data controller, will not disclose certain information and that it will respect their confidentiality.
48. She acknowledges that the disputed information in this case relates to staff in a work related capacity, but that the number of staff involved is small.

49. The Commissioner is satisfied that, at the time of the request, the staff would have had a reasonable expectation that the withheld information, which constitutes their personal data, would not be disclosed to the public at large.

Consequences of disclosure

50. As to the consequences of disclosure upon the data subjects, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
51. The Commissioner considers that disclosure in this case has the potential to cause damage and distress, particularly as she has found that disclosure of the information would not have been within the reasonable expectations of the staff.

The legitimate public interest

52. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public and the private interests of the requester.
53. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in its disclosure.
54. Arguing in favour of disclosure, the complainant told the MoJ:
- "I requested the pay and gender to see if the MoJ has equal pay and clearly this is very important to the general public and should not be hidden".*
55. He explained that, in his view, as the request relates to the pay of public servants:
- "... a reasonable degree of transparency is to be expected".*
56. The Commissioner accepts that legitimate interests include the general public interest in transparency. The Commissioner is also mindful that the gender pay gap is a topical issue.
57. In that respect, the Commissioner notes, that the MoJ, as an organisation with 250 or more employees, is required to report annually on their gender pay gap. She also accepts that the MoJ confirmed that it publishes salary band information.

58. Having taken into account all the circumstances of the case, and having considered the reasonable expectations of the data subjects, the potential consequences of disclosure, and the public interest factors, the Commissioner has concluded that there is no legitimate public interest in disclosure which would outweigh the detriment which might be caused to the data subjects as a result of disclosure of the requested information. Therefore, disclosure would be unfair and would breach the first data protection principle.
59. Having concluded that it would not be fair to disclose the information, the Commissioner has not gone on to consider whether any condition of Schedule 2 to the DPA is satisfied.
60. The Commissioner is satisfied that the MoJ was entitled to withhold the information under section 40(2) by way of section 40(3)(a)(i).

Right of appeal

61. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

62. 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.
63. 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

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