

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 25 October 2019

**Public Authority:** Legal Ombudsman  
**Address:** PO Box 6806  
Wolverhampton  
WV1 9WJ

#### **Decision (including any steps ordered)**

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1. The complainant has requested information specific to the ethnic and religious background of the Chief Executive, Chief Ombudsman and any other Legal Ombudsman staff involved in the decision of their complaint.
2. The Commissioner's decision is that the requested information constitutes personal data and that its release would clearly contravene the data protection principles. She therefore considers the Legal Ombudsman ("the Ombudsman") is entitled to rely on section 40(2) to withhold the information.
3. The Commissioner does not require the public authority to take any further steps.

## **Request and response**

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4. On 11 January 2019 the complainant wrote to the Ombudsman and, in response to the outcome of a complaint they made to that office, requested information concerning the ethnic and religious background of the Chief Executive, Chief Ombudsman and any Legal Ombudsman staff involved in reaching the decision in their complaint.
5. The Ombudsman responded on 21 January 2019. It confirmed that it held some information falling within the scope of the request but that it considered this information to be exempt from disclosure under section 40(2) of the FOIA.
6. Following an internal review the public authority wrote to the complainant on 18 March 2019. It upheld its reliance on section 40(2) in response to the request.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 24 March 2019 to complain about the way his request for information had been handled.
8. In their complaint of 24 March 2019, the complainant also made a similar request for information to the ICO. Further details of this request are provided in the 'Other Matters' section of this Decision Notice.
9. The Commissioner considers the scope of her investigation to be to establish whether the public authority is entitled to withhold the requested information under section 40(2) of the FOIA.
10. As the Commissioner is also the regulator of data protection legislation, she has decided that she has sufficient information to reach a decision in this case without seeking detailed arguments from the Ombudsman.

## **Reasons for decision**

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### **Section 40 - Personal information**

11. 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(3A)(3B) or 40(4A) is satisfied.

12. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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 General Data Protection Regulation ('GDPR').
13. 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 the FOIA cannot apply.
14. 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?***

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

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

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.
18. 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.
19. In the circumstances of this case, the complainant is requesting information specific to the ethnic and religious background of certain Ombudsman staff that dealt with their complaint. The Commissioner is satisfied that this information clearly relates to identifiable living individuals and is information about them, linked to them and has biographical significance for them.
20. The Commissioner also notes that the complainant in this case will be familiar with some of the Ombudsman staff that dealt with their complaint. She is confident that information as to the ethnic and

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA

religious background of specific staff members that may already be known to the complainant could be used to further identify them.

21. In the Commissioner's view the requested information clearly constitutes the personal data of third parties. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
22. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
23. The most relevant DP principle in this case is principle (a).

***Would disclosure contravene principle (a)?***

24. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

25. 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 lawful, fair and transparent.
26. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
27. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

***Is the information special category data?***

28. Information relating to special category data is given special status in the GDPR.
29. Article 9 of the GDPR defines 'special category data' as personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data or biometric data for the purpose of uniquely identifying a natural person, including data concerning health or data concerning a natural person's sex life or sexual orientation.
30. Information specific to the ethnic and religious background of specific Ombudsman staff clearly falls under the category of special category data. The Commissioner has reached this conclusion on the basis that information specific to a living individual's ethnicity and religious beliefs is defined as special category data in Article 9 of the GDPR.

31. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
32. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.

### **The Commissioner's view**

33. The Commissioner notes that the complainant in this case is requesting information that relates to personal aspects of the lives of specific members of public authority staff (their religious and ethnic background). She does not consider there to be a reasonable expectation that this special category personal data would be made available unless it has been published deliberately by the individuals themselves or shared with their consent.
34. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world at large or that they have deliberately made this data public.
35. The Commissioner does not agree with the complainant's assertion that the Ombudsman is refusing him access to "diversity data". The complainant is at will to make a request for more generalised diversity information from the Ombudsman. The scope of the request in this instance concerns the ethnic and religious background of specific public authority employees, some of whom will already be known to the complainant. There is clearly a risk of identification and/or discrimination to the individuals involved should this information be disclosed in response to the request.
36. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.
37. The Commissioner has therefore decided that the Legal Ombudsman was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

## Other matters

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38. In their complaint of 24 March 2019, the complainant also submitted a similar request for information to the Information Commissioner's Office.
39. After receiving further clarification from the complainant, the request was scoped as follows:

*'general diversity data for all those employed at the ICO (1) at different levels of management including the senior officer levels, and (2) and as a general percentage then of all those dealing with my claim'*
40. In response to part 1 of the request, the Information Commissioner provided some information which set out the current general diversity data for staff in job levels E – H.
41. In relation part 2 of the request, the Information Commissioner explained that a single Case Officer would likely deal with his complaint. With this in mind, the Commissioner asserted that diversity information relating to specific staff members dealing with a complaint would constitute personal data.

## Right of appeal

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43. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

44. 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.
45. 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 .....**

**Mr Phillip Angell**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**