

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 02 March 2020

Public Authority: Highways England
Address: Piccadilly Gate
Store Street
Manchester
M1 2WD

Decision (including any steps ordered)

1. The complainant has requested information relating to performance related pay. Highways England refused to provide the requested information citing the exemption under section 40(2) of the FOIA (third party personal data) as its basis for doing so. The Commissioner's decision is that Highways England has correctly applied section 40(2) of FOIA to the withheld information. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

2. On 19 June 2109 the complainant made the following request for information:

'A recent response to another FOI request (https://www.whatdotheyknow.com/request/remuneration_packages_exceeding) provided details of roles with a salary in excess of £100,000.

For each role in receipt of a salary in excess of £100,000 please advise the most recent performance related pay (bonus) award awarded.'

3. On 25 June 2019 Highways England refused to provide the requested information and cited the exemption section 40(2) of the FOIA (third party personal information).
4. On 25 June 2019, the complainant requested an internal review arguing that the information was not, or need not be, personal information.

5. On 23 July 2019 Highways England provided the outcome of the internal review and upheld the decision: *'due to the nature of the roles i.e. there being only 1 director in a lot of departments, there is no way to provide the requested information without it being identifiable to individuals within Highways England.'*

Scope of the case

6. The complainant contacted the Commissioner on 16 September 2019 to complain about the way the request for information had been handled. She stated that *'I subsequently made an additional request for the same information in an anonymised format.'* This request was also refused and the complaint is considered separately at FS50869478.
7. The Commissioner considers the scope of this case to be to determine if Highways England has correctly applied section 40(2) FOIA to the withheld information in this request.

Reasons for decision

Section 40 Personal information

8. 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.
9. In this case the relevant condition is contained in section 40(3A)(a)¹. 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 set out in Article 5 of the General Data Protection Regulation (GDPR) ('the DP principles').
10. 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 FOIA cannot apply.
11. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of

¹ As amended by Schedule 19 Paragraph 58(3) of the Data Protection Act 2018

that data would breach any of the data protection principles under the DPA.

Is the information personal data?

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

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

13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

14. 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.

15. 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.

16. In this case, Highways England has withheld information about payments related to staff employees' personal performance.

17. The Commissioner has viewed the withheld information and notes that it is a list of Position Titles and the Performance Related Pay (PRP) Bonus for 2018/19.

18. The Commissioner's guidance on what is personal data² states that if information 'relates to' an 'identifiable individual' it is 'personal data' regulated by the DPA.

19. The information in this case doesn't directly identify individuals. However, because the name of an individual is not known, it does not mean that an individual cannot be identified. The aforementioned guidance states the following:

'A question faced by many organisations, particularly those responding to Freedom of Information requests, is whether, in disclosing information that does not directly identify individuals, they are nevertheless disclosing personal data if there is a reasonable chance

²<https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf> & https://ico.org.uk/media/for-organisations/documents/1549/determining_what_is_personal_data_quick_reference_guide.pdf

that those who may receive the data will be able to identify particular individuals.'

It also states:

'The starting point might be to look at what means are available to identify an individual and the extent to which such means are readily available. For example, if searching a public register or reverse directory would enable the individual to be identified from an address or telephone number, and this resource is likely to be used for this purpose, the address or telephone number data should be considered to be capable of identifying an individual.

When considering identifiability it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals. Examples would include investigative journalists, estranged partners, stalkers, or industrial spies.'

20. Highways England stated that a staff member receives a bonus based on their performance through the reporting year: *'performance is evaluated against both the delivery of goals and the demonstration of behaviours, and values...A staff member's bonus is linked to performance and performance is linked to a 5 'box mark' rating system (1 being the top rating receiving the largest bonus). Performance ratings are not publicly available, but the above information is available to all staff and we believe the requestor to be a member of staff.'*
21. Highways England explained to the complainant that in many departments there was only one director. Having viewed the withheld information the Commissioner notes that there is only one position title that is repeated (Divisional Director) that may relate to more than one individual and is therefore satisfied that the Position Titles refer to individuals.
22. The Commissioner understands that the complainant may have access to further information (as a member of staff) that would allow a clear understanding of performance ratings and the identity of the Position Titles. The Commissioner has also conducted her own search online and is able to add names to some of the Position Titles.
23. Therefore, the Commissioner is satisfied that this information both relates to and identifies individuals. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
24. 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 data protection principles.

25. The most relevant data protection principle in this case is principle (a).

Would disclosure contravene principle (a)?

26. 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”.

27. 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 (i.e. it would meet one of the bases of lawful processing listed in Article 6(1) GDPR as well as being generally lawful), be fair, and be transparent.

28. 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. In this case, Highways England did not consider the information to be special category data.

Lawful processing: Article 6(1)(f) of the GDPR

29. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that “*processing shall be lawful only if and to the extent that at least one of the*” lawful bases for processing listed in the Article applies.

30. The Commissioner considers that the lawful basis most applicable is basis (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”³.

³ 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:-

31. In considering the application of Article 6(1)(f) of the 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.
32. 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

33. 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.
34. Legitimate interests may range widely. They can be the requester’s own interests or the interests of third parties, and 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.
35. In the circumstances of this case the Commissioner understands that the complainant is interested in the performance related bonus payments paid to employees earning over £100,000 and she considered that *‘there is a legitimate interest in how a public body distributes bonus payments’*.
36. The Commissioner accepts that the complainant has a legitimate interest in making this request and has gone on to consider whether disclosure is necessary in order to meet the legitimate interest.

Is disclosure necessary?

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the 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”.

37. '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.
38. The Commissioner accepts that the withheld data may link with other information or knowledge, such as information online from other FOIA requests (including the one referred to by the complainant in her request and the one found by the Commissioner identifying senior staff).
39. Highways England provided the Commissioner with details of how the PRP is calculated based on a simple formula: *'a staff member's bonus is linked to performance and performance is linked to a 5 'box mark' rating system (1 being the top rating receiving the largest bonus).'*
40. Highways England considered that *'disclosure of the pay award (bonus) information in addition to the performance related pay information available internally... and the salary information disclosed in error quoted in the request, would make it possible for individuals performance/box marking ratings to be deduced.'*
41. The Commissioner notes that disclosure of the bonus payments with the specific job titles could be easily linked to the salary information already disclosed in the previous FOIA request with the same specific job titles. It would be possible to view the bonus payment as a percentage figure of the salary payment and therefore make a reasonable assessment of the performance of the individual, which is clearly very personal information that is not made publicly available. This assessment of performance could be made without any detailed 'insider' knowledge of the PRP scheme.
42. If the complainant's legitimate interest is in knowing how much money Highways England spends on rewarding its senior staff, then in considering necessity, the issue is whether that objective can be achieved by disclosing information that would not allow the bonus paid to individual post holders (who could then be identified). So it should be possible to provide more general information such as the overall amount of bonus payments, or a list of individual bonus payments without a Position Title to adequately meet that legitimate interest. This would be a less intrusive way of meeting the objective and therefore the disclosure of the bonus payments as personal data would not be necessary.
43. Therefore, the Commissioner considers that disclosure in the detail requested here is not necessary to meet the complainant's legitimate interest in this case. The complainant has separately requested the

same information in a more generalized format which would satisfy the legitimate interest in how a public body distributes bonus payments. (This is considered separately at FS50869478.)

44. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
45. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

46. The Commissioner has therefore decided that Highways England was entitled to withhold the information under section 40(2), by way of section 40(3A)(a). She has not gone on to consider the application of section 43, commercial interests.

Right of appeal

47. 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

48. 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.
49. 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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