

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

### **Decision notice**

**Date:** 28 February 2023

**Public Authority:** House of Commons  
**Address:** London  
SW1A 0AA

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

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1. The complainant requested information from the House of Commons ('the public authority'). The Commissioner's decision is that the public authority is entitled to rely on section 40(2) of FOIA to withhold some of the requested information.
2. The Commissioner does not require the public authority to take any steps.

#### **Request and response**

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3. On 12 June 2022, the complainant made the following request for information to the public authority:

"Information from House of Commons files for the calendar year 2021.

- [1] Number of direct payroll staffs employed in each department under House of commons payroll including joint/common departments serving both Houses of Parliament, if any.
- [2] Number of staff employed in BAME (Black, Asian, and Minority ethnic) category under each department

- [3] Number of staff dismissed in BAME category for disciplinary reasons
- [4] Number of staff dismissed in BAME category for capability related reasons
- [5] Number of staff dismissed in BAME category for other reasons

If there is monthly/quarterly breakdown of the above numbers for the calendar year 2021, it would be much helpful.”

4. The public authority responded on 1 July 2022. It refused to provide some of the requested information citing section 40(2) (personal information) of FOIA as its basis for doing so.
5. In particular, it refused to provide the number of staff that identified as BAME in some teams (where the number was smaller than 10) and the number of staff that identified as BAME that were dismissed for disciplinary or capability reasons (where the number was smaller than five). It argued that due to the small numbers involved there was a risk of individuals being identified from the data.

## Reasons for decision

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### Section 40 - personal information

6. This reasoning covers whether the public authority was correct to apply section 40(2) of FOIA to the withheld information.<sup>1</sup>
7. Section 40(2) says that information is exempt information if it is the personal data of another individual and disclosure would contravene one of the data protection principles. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable (directly or indirectly).
8. In this case the public authority withheld information where a small number of staff were involved. It believed that disclosing this information would make it possible for individuals to be identified.

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<sup>1</sup> <https://www.legislation.gov.uk/ukpga/2000/36/section/40>

9. The Commissioner recognises that small numbers carry a greater risk of identification than larger ones – but that does not mean that every small number identifies any individual. Whether individuals can be identified will depend on the particular facts, such as the size of the overall dataset, the number of data points that have been requested and the information, already in the public domain, that could potentially be cross-referenced with the disclosed information. It is not sufficient for there to be only a hypothetical risk of identification. If there is no realistic route to identification, the information is not personal data, regardless of its sensitivity.
10. When considering the possibility of identification, the Commissioner applies the “Motivated Intruder Test.” This test starts with a hypothesis that there exists a person who wishes to identify the individuals covered by the disputed information. The person is willing to devote a considerable amount of time and resources to the process of identification. They may have some inside knowledge (i.e. information not already in the public domain) but will not resort to illegality – they are determined but not reckless. The Commissioner looks to see how such a person would go about identifying the individuals involved.
11. In response to part [2] of the request, the public authority refused to provide the number of individuals that identified as BAME within three particular teams due to the small numbers involved (fewer than 10). It argued that if individuals were identified from this information, it would reveal whether they had informed the public authority that they identified as BAME (and affect their right to identify their ethnicity only to those who they wish to know).
12. The total headcount of each of those teams was between five and 14. The quarterly breakdown also shows how the headcounts of these teams fluctuated across the year, which would make it easier to identify the individuals concerned. Applying similar reasoning to that discussed in decision notice IC-45106-R7V7, the Commissioner considers that the dataset is sufficiently small that the withheld information would enable individuals to be identified and reveal the information they provided to the public authority about their BAME status.<sup>2</sup> The Commissioner therefore considers that the information withheld at part [2] is personal data.

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618186/ic-45106-r7v7.pdf>

13. In response to parts [4] and [5] of the request, the public authority refused to provide all of the information it held due to the small numbers involved (fewer than 5). It argued that if individual(s) were identified from this information, it would reveal that they had been dismissed.
14. The public authority explained how the individual(s) could be identified through a process of 'jigsaw identification'. It argued that it did not have a high turnover of staff and any of its current or former employees might have general knowledge of colleagues who left employment within the relevant quarterly time periods and who might appear to identify as BAME:

"Once a person knows that an individual has left their employment within the relevant period, they may draw conclusions about the reason for leaving. That knowledge may already include knowing the reason why other colleagues in that department have left, therefore using a process of elimination to determine that this individual is likely to have been dismissed.

It may also include other 'pieces of the jigsaw', for example having heard comments about the quality of an individual's work, the timing or suddenness of their departure or perhaps the individual gave no details about where they would be working next."

15. The public authority also confirmed that the complainant was a former employee and believed that with their existing knowledge they would be able to identify individual(s) from the withheld information.
16. In the Commissioner's view, there are likely to be current or former employees who, if sufficiently motivated to do so, would be able to piece together the specific information requested with other information already known to them or in the public domain in order to identify the individuals concerned. In respect of parts [4] and [5], the Commissioner is therefore satisfied that the withheld information is personal data.

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

17. Article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
18. As the withheld information is personal data which reveals racial or ethnic origin, the Commissioner finds that it can be categorised as special category data.

19. 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.
20. The Commissioner considers that the only conditions that could be relevant to a disclosure under FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
21. The Commissioner has seen no evidence or indication that the individual(s) concerned have specifically consented to this data being disclosed to the world in response to the request or that they have deliberately made this data public.
22. 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 FOIA.

**Right of appeal**

23. 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: 0203 936 8963  
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)

24. 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.
25. 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 .....**

**Michael Lea**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**