

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 May 2023

Public Authority: Department for Environment, Food and Rural Affairs

Address: Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant submitted a request to the Department for Environment, Food and Rural Affairs ("Defra") for information relating to the Seasonal Worker scheme.
2. The Commissioner's decision is that Defra was entitled to rely on section 40(2) of FOIA, with reliance on section 40(3)(a), to withhold information in relation to question three, but that it was not entitled to rely on section 43(2) nor section 41(1) to withhold the information in relation to question one. He also considers that on the balance of probabilities, Defra does not hold any information in relation to questions two, seven and eight and has therefore complied with section 1 of FOIA. However, in relation to question six, the Commissioner's decision is that Defra did not carry out sufficient searches to confirm, on a balance of probabilities, whether the information is held.
3. The Commissioner requires Defra to take the following steps to ensure compliance with the legislation:
 - To carry out further searches and to respond again to question six of the request as required by section 1 of FOIA.

- To disclose the information in relation to question one of the request.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 24 January 2022, the complainant made the following requests for information under FOIA:

“According to the government website the information requested below is data that the pilot operators are `required to provide to Defra and the Home Office to allow the effective monitoring and evaluation of the Extended Pilot’.

Could you please provide me with the following data for 2020 and 2021 broken down per month and if possible per pilot operator. If the data isn't available per month can you provide per quarter.

1. The number of workers recruited by each of the four Seasonal Worker Scheme Pilot operators (AG Recruitment and Management, Concordia, FruitfulJobs and Pro-Force Ltd).
2. The local authorities where farms that took seasonal workers were located. If possible, could you also provide the number of workers that went to each local authority.
3. The names and locations of the farms where migrant workers were placed. If possible, could you also provide the number of migrant workers that went to each farm.
4. The number of reported GP visits by migrant workers on the scheme.
5. The number of reported hospital visits by migrant workers on the scheme.
6. The number of sick days taken by migrant workers on the scheme.
7. Type and location of accommodation used to house migrant workers on the scheme.

8. The average number of hours worked per week by migrant workers on the scheme.
9. The average hourly pay of workers on the scheme.

If some of this data is unavailable or is too costly to gather, please provide the data that is available.”

6. On 21 February 2022, Defra provided a response in which it withheld information under section 43(2) of FOIA in relation to questions one, three, four, five and nine and confirmed the information was not held in relation to questions two, six, seven and eight.
7. Upon receiving this response, the complainant requested an internal review on 4 March 2022. On 2 August 2022, Defra provided its internal review response and maintained its original position in relation to questions one, two, six, seven and eight. It disclosed some information in relation to questions four, five and nine, and applied section 40(2) in relation to question three.

Scope of the case

8. The complainant contacted the Commissioner on 24 August 2022 to complain about the way their request for information had been handled.
9. In submissions to the Commissioner, Defra confirmed that it was also applying section 41(1) to question one of the request.
10. The scope of this case is to consider whether on the balance of probabilities, Defra holds any further information within the scope of the complainant’s request, and to examine its application of section 40(2) to question three and section 43(2) to question one.
11. Should section 43(2) not apply to the information requested in question one, the Commissioner will go on to consider the application of section 41(1) to the withheld information.

Reasons for decision

Section 1 (Held/Not Held)

12. Section 1(1) of FOIA states that:

Any person making a request for information to a public authority is entitled-

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

13. The Commissioner has sought to determine whether, on the balance of probabilities, Defra holds the requested information in relation to questions two, six, seven and eight.
14. In relation to question two, Defra explained that it does not hold information on local authorities where farms that took seasonal workers were located.
15. In their internal review, the complainant challenged this stating that Defra "admits it has the addresses of where the farms are located so could easily provide the local authorities" and at this point the complainant recommends inserting the addresses individually into a government search function. The complainant then stated that if this was not possible, then they were happy to receive the postcode district, which Defra then provided.
16. With regards to question six, Defra explained that it doesn't hold that information but believes that the pilot operators may hold it.
17. In their request for an internal review, the complainant disputed this by providing a link¹ which they state shows that pilot operators have to provide Defra a summary of sick days taken. In response, Defra explained that the link provided "should not be taken as indicative of the kinds of data operators are required to provide to Defra".
18. In response to question seven, Defra explained that it does not hold the requested information, but in its internal review Defra did explain that each horticulture business is different and it provided a list of typical accommodation to house migrant workers.

1

<https://web.archive.org/web/20220201011008/https://www.gov.uk/government/publications/seasonal-workers-pilot-request-for-information/seasonal-workers-pilot-request-for-information>

19. With regards to question eight, Defra explained that it does not directly collect this data and that it is calculated based on a number of other data points provided by the pilot operators. It further explained that in 2020 and 2021, due to "some small inconsistencies in calculations", Defra were unable to provide estimated average hours worked by each migrant worker. However, it did state that there is a "30-hour minimum requirement per week and the hours worked by individual workers on individual farms are all different."

The Commissioner's decision

20. On the balance of probabilities, the Commissioner is satisfied that Defra does not hold any information with regards to question two of the complainant's request. This is because FOIA applies to information that a public authority already holds in recorded form, at the time of the request, and it is not for the public authority to create information, as requested by the complainant, in their internal review.
21. Regarding questions seven and eight, and on the balance of probabilities, the Commissioner is satisfied that Defra does not hold any information and that Defra has complied with its obligations under section 1(1) of FOIA. Furthermore, the Commissioner is aware that the complainant has been provided some information in relation to both questions.
22. In relation to question six of the request, having looked at the link the complainant provided and at Defra's response, the Commissioner is not satisfied that Defra has conducted appropriate searches to determine whether or not it holds the data relating to the number of sick days taken by migrant workers on the scheme.
23. The Commissioner therefore requires Defra to carry out further searches for relevant information in relation to question six, and to respond to this part of the complainant's request, as required by section 1 of FOIA.
24. This decision does not exclude the possibility that Defra's further searches may fail to locate relevant information.

Section 40(2) – personal data

25. Section 40(2) of FOIA provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.

26. Section 3(2) of the Data Protection Act 2018 (DPA) defines personal data as:

“any information relating to an identified or identifiable living individual.”

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

28. The Commissioner has seen the withheld information and is satisfied that it is personal data, for it relates to the names and locations of the farms where migrant workers were placed.

29. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focused here on principle (a) which states:

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

30. 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, fair, and transparent.

31. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider if there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.

32. The Commissioner considers that the complainant is pursuing a legitimate interest in seeking to understand the distribution of migrant workers across the country.

The Commissioner's decision

33. The Commissioner considers that through disclosing the postcode district in response to question two, Defra has fulfilled the legitimate interest. Therefore, the Commissioner does not consider that the disclosure of the names of the individual farms is necessary to meet the legitimate interest in this case.

34. As the Commissioner has decided that, in this case, disclosure is not necessary to meet the legitimate interest identified, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing, and it would be unlawful. It therefore does not meet the requirements of principle (a) (lawful processing).

35. The Commissioner's decision is that Defra is entitled to rely on section 40(2) of FOIA, with reliance on section 40(3)(a), to withhold the requested information in relation to question three.

Section 43(2) – commercial interests

36. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
37. The Commissioner's guidance² states that there are many circumstances in which a public authority might hold information with the potential to prejudice commercial interests.
38. In this case the withheld information consists of the recruitment data of the pilot operators, and Defra considers that disclosing this would likely result in prejudice to these third parties.
39. Defra explains that disclosure of the information, could "weaken the ability of these companies to participate competitively in any future commercial activity."
40. In highlighting harm, Defra explains that the requested information will be "interpreted as a metric of success and will allow competitors to compare the number of visas allocated to each pilot operator against the total number of visas they each issued". It further explains that this information could then be used to assess the relative competency of each operator and could give them a competitive disadvantage, impacting the ability of these companies to participate competitively in any future commercial activity.
41. Defra further explained that it had contacted the pilot operators involved and they have all made it clear that they believe that release of the information would prejudice their commercial interests.
42. The complainant argues that "companies regularly publish metrics...including annual accounts which contains several metrics of success", and that disclosure of the information is important to "assess the competency of each government appointed operator".

² <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

The Commissioner's decision

43. The Commissioner has considered Defra's arguments on the application of section 43(2) and specifically the claimed prejudice.
44. Having done so, the Commissioner is not convinced that disclosure of the information would cause the claimed prejudice. Whilst it is appreciated that the recruitment data requested may be interpreted as a metric of success, the Commissioner does not consider that Defra has sufficiently evidenced that there would be a causal affect between disclosure and the pilot operators ability to participate competitively in any future commercial activity.
45. In decision notice IC-214653-Y5J8³, the public authority sought to rely on section 43(2) on the basis that disclosure would have a negative affect on the public authority's ability to compete competitively. Whilst this decision has a different context to the one of this notice, it is noted that the Commissioner ordered disclosure on the basis that the public authority had not provided compelling arguments that disclosure would cause prejudice to its commercial interests.
46. Having considered the above, the Commissioner has concluded that Defra has not demonstrated that the exemption is engaged in relation to question one. As the exemption is not engaged, the Commissioner does not need to proceed further and consider the public interest test.
47. As the Commissioner has considered that section 43(2) of FOIA does not apply to the requested information in question three, he will go on to consider the application of section 41(1).

Section 41-information provided in confidence

48. Section 41(1) of FOIA states that information is exempt from disclosure if it was obtained by a public authority from any other person (including another public authority) and that disclosure of the information would constitute a breach of confidence.

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024869/ic-214653-y5j8.pdf>

49. In submissions to the Commissioner, Defra confirmed that the requested information was provided to it by third parties, namely the pilot operators. Having accepted this, the Commissioner must next determine whether disclosure of that information would constitute a breach of confidence.
50. For a breach of confidence to occur the Commissioner must consider a three-step test:
- The information must have the necessary quality of confidence.
 - It must have been imparted in circumstances importing an obligation of confidence, and
 - There must have been an unauthorised use of the information to the detriment of the confider.
51. Information will have the necessary quality of confidence if it is not otherwise accessible and it is more than trivial. In this case the information is not trivial as it relates to the number of workers recruited by each of the pilot operators. The Commissioner accepts that the content of the information request was not in the public domain when the request was made, and that the information was not otherwise accessible. Consequently, the Commissioner is satisfied that the information has the necessary quality of confidence.
52. Regarding the second step of the test, Defra explained that the information is provided to Defra "on a basis of trust". Defra maintains that the withheld information was provided in confidence and to release it would constitute an actionable breach of confidence.
53. Furthermore, after applying the reasonable person test, as detailed in the Commissioner's guidance⁴, the Commissioner is satisfied that the criterion is met and that the information had been imparted in circumstances importing confidentiality.

⁴ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

54. The third part of the test concerns detriment to the confider by an unauthorised disclosure. In its submissions, Defra explained that disclosing the information could have a “detrimental and irreparable effect on the principle of confidence” and that companies would be dissuaded from applying in the future.
55. Defra further explains that this would “impact the work that is needed in horticulture and poultry sectors in the UK”.

The Commissioner’s decision

56. The Commissioner has viewed the withheld information, in relation to question one, and appreciates that it has the necessary quality of, and imparted to Defra in confidence. However, in its submissions, Defra focused more on the impact of disclosure on potential seasonal work recruiters and on the horticulture and poultry sectors, rather than on the actual detriment to the current pilot operators. Therefore, the Commissioner is not persuaded that disclosure of this information would affect the individual pilot operators commercial interests, and thus be detrimental.
57. In decision notice IC-165170-X2F6⁵, the Commissioner found that the public authority was not able to rely on section 41(1) and ordered disclosure on the basis of the third step of the Megarry test (Coco v A N Clark (Engineering) Ltd [1968] FSR 415) not being met.
58. Having not been persuaded that an actionable detriment would occur, there is no requirement for the Commissioner to proceed any further. On this basis he finds that the exemption is not engaged.
59. As the Commissioner has found that Defra could not rely on sections 43(2) and 41(1) to withhold the information requested in question one, the Commissioner orders that the withheld information be released to the complainant within 35 calendar days of the date of this decision notice.

⁵ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024755/ic-165170-x2f6.pdf>

Other matters

60. There is no obligation under FOIA for a public authority to provide an internal review process. However, it is good practice to do so and, where an authority chooses to offer one, the section 45 Code of Practice sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
61. In this case the complainant requested an internal review on 4 March 2022 and Defra provided the outcome of its review on 2 August 2022, nearly five months later. The Commissioner reminds Defra of the Code of Practice and urges it to respond in a timely manner.

Right of appeal

62. 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

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

63. 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.
64. 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

Joanna Marshall
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF