

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 February 2024

Public Authority: Crown Prosecution Service
Address: 102 Petty France
London
SW1H 9EA

Decision (including any steps ordered)

1. The complainant has asked the Crown Prosecution Service ('the CPS') for information about the salary of the Independent Assessor of Complaints ('the IAC'). The CPS refused to disclose some information, citing section 40(2) (Personal information) of FOIA. During the Commissioner's investigation, it said it did not hold other information specified in the request.
2. The Commissioner's decision is that section 40(2) was correctly engaged and that, on the balance of probabilities, the CPS does not hold the other information. However, by failing to tell the complainant in its refusal notice that it did not hold the other information, it breached section 1(1)(a) of FOIA.
3. No steps are required as a result of this decision.

Background

4. The CPS told the Commissioner the following regarding the post of the IAC:

"...[the CPS business area] have confirmed that this post holder is not a CPS employee, the Independent Assessor of Complaints (IAC) operates independently from the CPS and is responsible for the handling and investigation of complaints from members of the public in relation to

the quality of the service provided by the CPS and its adherence to its published complaints procedure.

The IAC reports to the CPS board once a year, as outlined on the CPS website once the IAC has completed their review, a final report...will be sent to the Private Office for the Director of Public Prosecutions (DPP) and Chief Executive Officer (CEO). They may also be sent to the relevant Chief Crown Prosecutor/Head of Division."

Request and response

5. On 11 June 2023, the complainant wrote to the CPS and requested information in the following terms (numbers added for clarity):

"1) I would like the last job advert, job profile and job spec of the Independent Assessor of Complaints and any remuneration details contained within it when you advertised the role.

2) I would like to know the Independent Assessor of Complaints daily rate of pay and whether there is any retainer or equivalent paid to them. I would like confirmation whether that has changed in the last ten years.

3) I would like the Independent Assessor of Complaints rate of pay for the last 10 years in 5k pay bands."

6. The CPS responded on 10 July 2023. For point (1) of the request, it cited section 21 (Information accessible by other means) of FOIA and provided a weblink to the most recent advert for the post, dated June 2018, which was still published on a recruitment website. It refused points (2) and (3), citing section 40(2) (Personal information) of FOIA.
7. On 27 July 2023, the complainant requested an internal review of the decision to refuse points (2) and (3). He disagreed that he had requested personal information, noting that the salary had been published in the advert.
8. The CPS provided the outcome of the internal review on 21 September 2023. It maintained that section 40(2) of FOIA had been applied correctly.

Scope of the case

9. The complainant contacted the Commissioner on 21 September 2023 to complain about the way his request for information had been handled.
10. During the Commissioner's investigation, the CPS revised its position in respect of points (2) and (3) of the request. As regards point (2), it advised the Commissioner that no retainer is, or was, paid for the post of IAC and it said it was content for this fact to be confirmed publicly. The Commissioner considers this to have been done via disclosure in this decision notice and he has excluded this part of point (2) from the analysis below.
11. As regards point (3), the CPS said that it did not hold the information specified in that part of the request.
12. The analysis below therefore considers whether the CPS was entitled to rely on section 40(2) of FOIA to withhold the IAC's daily rate of pay (point (2) of the request) and whether, on the balance of probabilities, it holds the information requested in point (3) of the request.
13. The Commissioner has viewed the withheld information.

Reasons for decision

Section 40(2) – Personal information

14. The CPS is relying on section 40(2) of FOIA to withhold the IAC's daily rate of pay for the post.
15. Under section 40(2) of FOIA, information is exempt from disclosure if it is the personal data of someone other than the requester and a condition under section 40(3A) is satisfied.
16. In this case, the relevant condition is contained in section 40(3A)(a). This applies where disclosing 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 UK General Data Protection Regulation ('UK GDPR').
17. First, the Commissioner must determine whether the withheld information can be categorised as 'personal data' as defined by the Data Protection Act 2018 ('the DPA'). If it is not personal data, then section 40(2) of FOIA cannot apply.
18. Section 3(2) of the DPA defines personal data as:-

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

19. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier, such as their name. 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.
20. The CPS told the Commissioner:

“The CPS considers that the details of the salary details of the Independent Assessor of Complaints (IAC) clearly falls within the description of personal data as defined by the DPA. This is because this information relates directly to identifiable living individuals.

...

The IAC is a single position within the CPS. The identity of the incumbent post holder of IAC is readily available from the CPS website, as are the identities of previous post holders therefore the salary would be directly attributed to them and their income.”

21. The Commissioner acknowledges that although not named in the request, the current IAC is easily identifiable from information on the CPS website and other online sources. As they are identifiable, and the withheld information relates to their personal financial circumstances, it 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 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 UK 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, personal information 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 UK GDPR must apply to the processing. It must also be generally lawful.

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

27. Article 6(1) of the UK GDPR sets out the requirements for lawful processing. It says 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.

28. The Commissioner considers that the lawful basis most applicable is basis 6(1)(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."

29. When he considers the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, the Commissioner has to consider the following three-part test:

Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;

Necessity test: Whether disclosure of the personal data is necessary to meet the legitimate interest in question; and

Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

30. The Commissioner considers that the test of 'necessity' must be met before the balancing test can be applied. If it cannot be met, the processing will be unlawful.

Legitimate interests

31. In considering any legitimate interest(s) in disclosing 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.

32. A wide range of interests may also be legitimate interests. They can be the requester's own interests, the interests of third parties, 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.

33. The complainant has not explained why he requested the information and so the Commissioner is unaware of any particular legitimate interest he may have in the information.
34. In its submissions to the Commissioner, the CPS did acknowledge that disclosure of the requested information would inform the public about the pay of a senior member of public sector staff. The Commissioner considers that there is a legitimate interest in public authorities being transparent regarding the pay of senior public officials.
35. Therefore, the Commissioner recognises there is a legitimate interest in disclosing the requested information for that purpose.

Necessity test

36. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves considering 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.
37. The CPS did not offer any arguments as to why disclosure was not necessary to meet the legitimate interests identified above.
38. With the exception of the aforementioned job advert, the Commissioner has been unable to locate any information about the IAC's remuneration in the public domain. He is therefore satisfied that the information has not otherwise been made available to the public. Therefore, there are no less intrusive means of achieving the legitimate interests identified above. The Commissioner therefore considers that disclosing the withheld information would be necessary to meet the legitimate interest identified in paragraph 34.

Balancing test

39. Since the Commissioner is satisfied that disclosure is necessary for the purpose that this legitimate interest represents, he will now go onto consider whether the identified interests in disclosure outweigh the interests or fundamental rights and freedoms of the data subject.
40. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure
41. In performing this balancing test, the Commissioner has considered the following:

- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the data subject expressed concern about the disclosure; and
 - the reasonable expectations of the data subject.
42. In the Commissioner's view, the balancing test should take into account whether the data subject has a reasonable expectation that their information would not be disclosed. This expectation may be influenced by a number of factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose which this personal information serves.
43. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to the data subject.
44. The CPS has argued that it has an implied duty of confidentiality to the data subject, who would not reasonably expect their exact, individual salary details to be disclosed, when this information is not already in the public domain. It was likely that disclosure would be intrusive and cause them distress:

"The manner in which the personal data was collected and the intended purpose for processing that data, makes it personal in nature. It is reasonable to conclude that there would therefore be a legitimate expectation from [the data subject] that their private and confidential information would not be released into the public domain during their lifetime.

...

[The data subject has] not been asked whether they are willing to consent to the disclosure of their personal data. The CPS receives a large number of FOI requests that often involve sensitivities. Many of these involve the consideration of section 40 personal data issues. In the circumstances it would not be practicable for the CPS to approach all individuals to seek their consent to the disclosure of their personal data."

45. The CPS also explained that disclosure could have a harmful impact on the data subject. It could cause them to be personally disadvantaged in any future job negotiations, if their exact salary were publicly known:

"Disclosure of the exact salary details under FoI would put this information into the public domain and would clearly lead to a greater infringement into the privacy of the individuals as it would reveal the specific details of the person's financial situation. It is therefore reasonable to consider that disclosure of this information would cause the individuals unwarranted distress or unjustified damage.

...

Salary information relates to people's personal financial circumstances and disclosure of the exact salary of an individual is more intrusive than giving a salary band or the pay scale for a post. If current/future salaries are individually negotiated or contain a significant element of performance related pay, disclosure may give significant information about that individual, which could have a detrimental effect on them.

All the IACs, former and current post holders, would have a reasonable expectation that their actual salaries will be kept private. Whilst a public authority employee should expect that some information about them may be publicly available, as there is a legitimate interest in accountability and transparency, it does not necessarily follow that they should expect their exact salary to be disclosed in response to a request made under the FOIA."

46. Although the information relates to the data subject in their professional capacity, the Commissioner is satisfied that they will have a general expectation of privacy as regards their exact salary. This is information about their personal income and they would reasonably expect that it wouldn't be disclosed to the wider world in the granular detail specified in the request.
47. The Commissioner also accepts the CPS's arguments that disclosure of exact salary details would reveal the specific details of the data subject's remuneration which would be damaging to their competitive negotiating position, if being considered for other, senior positions. It is therefore reasonable to consider that disclosure of this information could cause the data subject unwarranted distress and unjustifiable damage.
48. The Commissioner is mindful that government departments and other public bodies routinely publish information about the pay of senior public officials. Even so, the balance between transparency and privacy concerns is usually achieved through the publication of salary increments, or of lower and upper limits. His guidance on requests for

information about public sector employees¹ states that “Exceptional circumstances are needed to justify the disclosure of exact salaries when you don’t routinely published them.” In this instance, the public interest would need to clearly outweigh the detriment to the individual concerned.

49. The Commissioner considers that, whilst they are a senior official, the data subject would not reasonably expect their individual salary details would be published without exceptional justification. He is not aware of any such justification in this case and the complainant has not provided any supporting arguments. The complainant has commented that the salary was included in the job advert in 2018, however, this information was 5 years old at the time of the request and so could not be considered current or a reliable indicator of the present remuneration figure.
50. Taking all the above into account, the Commissioner considers that the general interest in transparency, while legitimate, is not sufficient to outweigh the data subject’s fundamental rights and freedoms in this case.
51. Ultimately, as the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject’s fundamental rights and freedoms, he finds that there is no Article 6 basis for processing, and so disclosing the personal data would not be lawful. Given the above conclusion that disclosure would be unlawful, the Commissioner does not need to go on to consider separately whether disclosure would be fair or transparent.
52. The Commissioner’s decision is therefore that the CPS was entitled to withhold the information about the IAC’s daily rate of pay (requested in point (2) of the request) under section 40(2) of FOIA, by way of section 40(3A)(a).

Section 1 – Information held

53. Section 1 of FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and, if so, to have that information communicated to them.

¹ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

54. Section 8 of FOIA deals with the validity of requests for information. Section 8(1)(c) specifies that a request must "describe the information requested". Section 84 of FOIA clarifies that 'information' means recorded information.
55. In cases where there is some dispute over whether a public authority does or does not hold the information that has been requested, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds the information specified in the request. In doing so, he will take into account any specific reasons as to why it is likely – or unlikely – that the information is held.
56. In this case, point (3) of the request asks for "...the Independent Assessor of Complaints rate of pay for the last 10 years in 5k pay bands."
57. The CPS's position is that it does not hold this information. This is because there is a fixed, annual fee for the post; it does not fall within a salary range or pay band, with a corresponding upper and lower limit. The CPS says it therefore does not hold recorded information from which to answer a request for the salary in 5k pay bands.
58. The CPS has explained that the IAC is not a CPS employee and so their remuneration is awarded differently to CPS posts. The IAC operates independently from the CPS and so, unlike other CPS roles, for which the CPS does hold pay bands (and for which recorded information on upper and lower limits could, potentially, be extracted and disclosed), it does not hold one for this position. For each year, it holds only a fixed, annual fee.
59. The Commissioner has considered whether the CPS could respond to point (3) of the request by, for each year, rounding up or down the annual, fixed fee to the nearest 5k, and disclosing that. However, he is mindful that this would involve the creation of new information. On that point, his guidance² says:

² <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/determining-whether-we-hold-information/#create>

“Do we need to create information to satisfy an information request?”

No. FOIA only applies to information that a public authority already holds in recorded form at the time of a request.

If you don't hold a particular piece of information that someone has asked for, you don't have to create it.”

60. It is clear from the guidance, then, that the CPS is not required by FOIA to create new information about the IAC's remuneration, that it does not already hold, in order to answer this FOIA request.
61. Having considered the CPS' submissions, the Commissioner is satisfied that the CPS does not hold the information specified in point (3) of the request.
62. However, he finds that the CPS breached section 1(1)(a) of FOIA by failing to deny that it holds the information, when initially responding to the request.

Right of appeal

63. 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

64. 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.
65. 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

Samantha Bracegirdle
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