

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 July 2024

Public Authority: Oxford Direct Services Limited
Address: St Aldates Chambers
109 St Aldates
Oxford
OX1 1DS

Decision (including any steps ordered)

1. The complainant has requested information relating to redundancies made by Oxford Direct Services Limited ('ODSL'). ODSL refused the request on the basis that section 40(2) of FOIA applies (personal data of third parties).
2. The Commissioner's decision is that ODSL was partially correct to withhold the information under section 40(2). However, in order to meet the legitimate interests identified, he requires ODSL to take the following steps to ensure compliance with the legislation.
 - To disclose a total, overall amount for the three redundancy payments paid to the individuals falling within the scope of the complainant's request for information.
3. The public authority must take these steps within 30 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

4. On 2 February 2024, the complainant wrote to ODSL and requested information in the following terms:

“For calendar year 2023, please provide the following information:

 1. Number of voluntary and compulsory redundancies and the total monetary amount paid out for each of those categories.
 2. Please provide details of each redundancy, including month of redundancy notice, termination date etc.
 3. For any compulsory redundancies, please provide a detailed reason for redundancy, e.g., position no longer exists, organisational changes, employee performance not acceptable, misconduct etc.”
5. ODSL responded on 8 February 2024. It provided a partial response to part 1 of the request, stating that there had been two compulsory redundancies and one voluntary during the relevant period. However, it refused to disclose the amounts paid. It also refused to provide the information for parts 2 and 3 of the request on the basis that section 40(2) of FOIA applied (personal data).
6. Following an internal review, ODSL wrote to the complainant on 22 March 2024. It maintained its previous decision.

Scope of the case

7. The complainant contacted the Commissioner on 22 March 2024 to complain about the way their request for information had been handled. He argues that other authorities have disclosed similar information in the past, and that Oxford City Council, which owns ODSL, have disclosed similar information.
8. The Commissioner therefore considers that the scope of his investigation is to establish whether the public authority is entitled to withhold the requested information under section 40(2) of FOIA.

Reasons for decision

Section 40 - personal information

9. 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.
10. In this case the relevant condition is contained in section 40(3A)(a). 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 UK General Data Protection Regulation ('UK GDPR').
11. 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.
12. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. 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.
16. 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.
17. In the circumstances of this case, the Commissioner is satisfied that the information falls within the definition of 'personal data' in section 3(2) of the DPA. This is because the number of individuals involved in redundancy over the relevant period of time is so few in number that colleagues and those who know the individuals concerned would be able to identify that the information relates to those individuals. They would

therefore learn more information about the circumstances of their redundancies and any redundancy payments made to those individuals.

18. 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.
19. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

20. 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.”

21. 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.
22. 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

23. 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”¹.

¹ 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:-

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

24. In considering the application of Article 6(1)(f) of the UK 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.
25. 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

26. 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.
27. Further, a wide range of interests may be legitimate interests. 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.
28. ODSL identified that the public has a legitimate interest in knowing more about how public money is spent. As ODSL is a public authority, there is an expectancy that it will use public funds appropriately, and be transparent about its use of public money.
29. The Commissioner agrees that the public has a legitimate interest in knowing more about payments of public money paid to former ODSL employees in this instance.

Is disclosure necessary?

30. '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.

31. ODSL said that it considered that the legitimate interest it has identified could be met by disclosing an overall figure for the money paid to the individuals as a total in order to be transparent about its use of public money. However, the complainant's request for information asks for more detail than simply the overall redundancy payments made during the period.
32. The Commissioner is therefore satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

33. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. 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.
34. In considering this balancing test, the Commissioner has taken into account the following factors:
 - 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 individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
35. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by 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 for which they provided their personal data.
36. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

37. The Commissioner notes the complainant's argument that Oxford City Council has previously disclosed similar information.² Although this is the case, the disclosures of personal data needs to take into account all of the circumstances surrounding the disclosure. For instance, the Commissioner has previously issued a decision notice, again relating to Oxford City Council, in which he found that the council was correct to withhold similar information under section 40(2).³
38. Information relating to redundancies can be a mixture of both public and private information. Payments made by a public body relate to the spending of public money which the authority has a duty to be transparent about, where possible. The reasons why a redundancy occurred can be either based upon private circumstances or public reasons (i.e., that the role in question no longer exists). On the counter side, both the payments made, and the reasons for the redundancy also relate to the private life of the individuals in that they provide details of a sum of money which the individual has personally received and describe the reasons why the authority no longer employs them.
39. The Commissioner notes that colleagues of the individuals may know that they left their employment due to redundancy, however this is unlikely to be more widely known given that they were not senior officers.
40. The Commissioner considers that the seniority of the individuals concerned, the reasons behind the redundancy, and the amounts paid can all tip the balance towards disclosure in some cases.
41. The Commissioner considers that the individuals would have a strong and reasonable expectation that information about their redundancies would remain confidential to them. They were not in senior officer positions within ODSL. The Commissioner therefore considers that they would have less of an expectation that details such as the exact sums of money paid to them, or the circumstances surrounding their redundancy, would be made public in response to an FOI request.

² https://www.whatdotheyknow.com/request/staff_redundancy_statistics_2#incoming-2178980

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024407/ic-207744-f9n5.pdf#:~:text=The%20council%20considers%20that%20individuals,to%20them%20and%20their%20employer.>

42. Additionally, as they were not senior officers, there is less of a legitimate interest in the requested information being disclosed in order for ODSL to be transparent about its use of public money. As noted by ODSL, a disclosure of the total amount paid would be sufficient in order for it to be transparent about this. The other details requested are excessive in terms of meeting the legitimate interest in creating transparency over ODSL's financial decision making and its use of public money.
43. The Commissioner is not aware of the reasons why the individuals were made, or chose to become redundant. However, he considers that a disclosure of the reasons for redundancy could be intrusive and potentially distressing to the individuals if personal, rather than organisational reasons, were involved in the redundancy.
44. An unwarranted, or excessive payment may tip the balance towards disclosure in order for the authority to be transparent about its use of public funds. The Commissioner has not seen any evidence that the payments were excessive or unwarranted in this case, however.
45. In conclusion, the Commissioner has decided that ODSL should disclose the overall total amount for the three lots of redundancy payments made to employees (i.e., all three payments totalled together as one number) in order to meet the legitimate interests identified.
46. However, as regards the remainder of the requested information, based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms in this case. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
47. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
48. He has decided, therefore, that ODSL was correct to apply section 40(2) to the remainder of the requested information.

Right of appeal

49. 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

50. 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.
51. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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