

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 January 2014

Public Authority: Department for Employment & Learning

Address: Adelaide House
39/49 Adelaide Street
Belfast

BT2 8HD

Decision (including any steps ordered)

The complainant has requested information from the Department for Employment and Learning (DEL) in relation to employees dismissed by DEL under the Northern Ireland Civil Service Dignity at Work policy. DEL provided the complainant with some information in response to her request, however it refused to disclose the remainder, citing section 40(2) of FOIA by virtue of section 40(3)(a)(i) (personal data of third parties) as a basis for non-disclosure. The Commissioner's decision is that DEL has correctly applied the above exemption to the withheld information. The Commissioner orders no steps to be taken.

Request and response

1. On 18 July 2013, the complainant wrote to DEL and requested information in the following terms:

"I would like to know the total number of employees dismissed by the Department for Employment and Learning under the NICS Dignity at Work Policy.

I would like to know the total number dismissed since the NICS Dignity at Work Policy was introduced.

I would like to know the year each of these employees was dismissed, the grade of each of these employees and the details of the behaviour i.e. not simply stated as inappropriate behaviour in your response.”

DEL responded on 14 August 2013. It provided information in response to parts 1 and 2 of the complainant's request, and part of the information requested in part 3, however it refused to disclose the remaining information, i.e. details of the behaviour, citing section 40(2) of FOIA as a basis for non-disclosure.

2. Following an internal review DEL wrote to the complainant on 9 September 2013. The reviewer upheld the original decision.

Scope of the case

3. The complainant contacted the Commissioner on 13 September 2013 to complain about the way his request for information had been handled.
4. The Commissioner has considered DEL's application of section 40(2) to the remaining requested information not provided to the complainant ("the withheld information").

Reasons for decision

Section 40(2) of FOIA

5. Under section 40(2) by virtue of section 40(3)(a)(i), personal data of a third party can be withheld if it would breach any of the data protection principles to disclose it.
6. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as
"data which relate to a living individual who can be identified –
(i) From those data, or
(ii) From those data and other information which is in possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."
7. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable.

8. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, had them as its main focus or impacts on them in any way.
9. The withheld information clearly relates to living individuals as it is about behaviour on the part of those individuals which led to disciplinary action. DEL has informed the Commissioner that it considers that the individuals would be identifiable from the withheld information. The information relates to a small number of individuals, which increases the risk of identification.
10. DEL has informed the Commissioner that, if the withheld information were to be disclosed to the complainant, and therefore to the wider public, there would be a significant risk of identification by a number of people, e.g. those currently working in DEL, or having formerly worked in DEL. The Commissioner's approach to disclosure of information is that it should only be disclosed if the public authority would disclose it to anyone else who asked, i.e. the world at large. DEL does not consider that the withheld information meets this basic test, as it would not risk disclosing the information to the world at large due to the significant possibility of identification of the individuals.
11. The Commissioner accepts that the withheld information is personal data, as it relates to living individuals who could be identified from it.
12. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of FOIA are met. The relevant condition in this case is section 40(3)(a)(i), where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully".

Would disclosure of the withheld information be fair?

13. The Commissioner has first gone onto consider whether the disclosure of this information would be fair. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
 - the individual's reasonable expectations of what would happen to their information; and
 - whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned.

- Balance the rights and freedoms of the data subject with the legitimate interests of the public.

Reasonable expectations of the data subjects

14. DEL has informed the Commissioner that the information gathered in the disciplinary investigations leading to the dismissal of the data subjects was obtained under an explicit guarantee of confidence. This was to allow all those involved to speak freely, and the views and opinions of those involved remain their personal data. Staff members involved in this process would reasonably expect that their personal data would not be processed outside the disciplinary process.
15. DEL has also informed the Commissioner that the individuals involved in the disciplinary process were not senior officials, whose posts by their nature would carry greater accountability. The individuals were junior members of staff, none of whom were responsible for major policy decisions or the expenditure of public funds. Also, the behaviour for which they were disciplined did not have any major impact upon the services delivered by DEL, nor on the wider public.
16. Given the explicit guarantee of confidence provided to the individuals, together with the fact that they were junior staff with DEL, the Commissioner accepts that the individuals who were dismissed would not expect information relating to the disciplinary process which led to that dismissal to be disclosed into the public domain.

Would disclosure cause damage and distress to the data subjects?

17. The Commissioner's guidance states that,

"Disclosure is unlikely to be fair if it would have unjustified adverse effects on the employees concerned. Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life. If an authority wishes to claim that disclosure would be unfair because of the adverse consequences on the employees concerned, it must be able to put forward some justification for this claim."

18. In this case, DEL has asked the Commissioner to consider that the the adverse harm which would be likely to be caused to individuals as a result of disclosure cannot be considered insignificant. The individuals had already been dismissed as a result of their behaviour. The additional harm that disclosure of the withheld information would cause is readily identifiable:
- the information details inappropriate conduct which was considered, by DEL, as worthy of dismissal;
 - further dissemination of this information into the wider public domain could seriously harm future attempts to find employment; and
 - the potential personal social embarrassment caused to these individuals by disclosure would not be insignificant.
19. The Commissioner accepts that the three factors listed above would mean that disclosure of the withheld information would be likely to cause distress to the individuals concerned.

The legitimate public interest in disclosing the withheld information

20. DEL has informed the Commissioner that it is of the view that there is no wider legitimate public interest in disclosure of the withheld information. The individuals concerned are not senior officials responsible for decision-making at high levels within DEL, nor are they involved in or accountable for the expenditure of public funds.
21. DEL has further pointed out that the behaviours leading to the dismissal of the individuals did not concern any high profile issues such as corruption, fraud or misuse of public funds, nor did the dismissal of the individuals cause any major impact upon the wider public. It amounted to a minor employment related dispute with no far-reaching consequences.
22. The Commissioner has considered all the points made by DEL with regard to the reasonable expectations of the individuals, the lack of seniority of staff involved, the likely damage or distress caused by disclosure of the information and the lack of a wider legitimate public interest in disclosure. He has concluded that, having taken into account all the circumstances of the case, disclosure of the withheld information would be unfair and would breach the first data protection principle. Therefore, the Commissioner considers that DEL has correctly applied section 40(2) by virtue of section 40(3)(a)(i) to the withheld information

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: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: 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

Rachael Cragg
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