

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 March 2020

Public Authority: Equality and Human Rights Commission
Address: 2nd Floor, Arndale House
The Arndale Centre
Manchester
M4 3AQ

Decision (including any steps ordered)

1. The complainant requested details of the salaries of staff in a particular office. The Equality and Human Rights Commission ("EHRC") refused both requests because it considered the information to be personal data.
2. The Commissioner's decision is that the information in question is personal data and its disclosure would be unlawful. EHRC was therefore correct to rely on section 40(2) of the FOIA to withhold the information. However, in the case of the second request, it failed to issue its refusal notice within 20 working days and thus breached section 17 of the FOIA.
3. The Commissioner does not require any further steps.

Request and response

4. On 15 March 2019, the complainant wrote to EHRC and sought information in the following terms:

"Please find attached a table which requests details from the Birmingham EHRC office, Victoria Square House, namely by, employees in post by grade/name, job title and salary as at 9th February 2017.

Please note that, the existing names in this table are only a guide. Please add, delete or change as appropriate so as to make it an accurate and transparent picture."

5. EHRC responded on 25 March 2019. It provided the number of employees at each pay grade and the details of the width of each pay grade. It refused to provide more detailed information, relying on section 40(2) of the FOIA to do so.
6. The complainant sought an internal review of this request on 3 May 2019. EHRC completed its review on 4 June 2019. It upheld its position, but provided some further information as to why disclosure of the information would amount to the unlawful processing of personal data.
7. On the same day as making her internal review request, the complainant also submitted a further request for information:

"Can you apply EHRC's pay gap method to the data and provide me with your results"
8. On 28 August 2019, EHRC responded. It stated that it held the information requested, but that it was once again exempt from disclosure under section 40(2) of the FOIA.
9. The complainant sought an internal review of this decision on 2 October 2019. The EHRC completed its internal review on 30 October 2019. It upheld its original position.

Scope of the case

10. The complainant contacted the Commissioner on 14 November 2019 to complain about the way her request for information had been handled.
11. Having reviewed the correspondence, the Commissioner contacted the complainant to offer her view that the requested information would be personal data and that she could identify no lawful basis for processing it. The complainant did not accept that view and asked the Commissioner to issue a decision notice.
12. The Commissioner considers that the scope of her investigation is to determine whether the requested information is personal data and, if it is, whether disclosure of this information would contravene the data protection principles.
13. EHRC set out, in its internal reviews, why it considered the withheld information to be personal data and why it considered that disclosure of that information would be unfair.

14. As the Commissioner is also the regulator of data protection legislation, she has decided that she has sufficient information to reach a decision in this case, based on the internal review arguments and her own expertise, without seeking further arguments from EHRC. She has also not sought the withheld information as she does not consider that the content of the information itself would affect her decision.

Reasons for decision

Section 40 - personal information

15. Section 40(2) of the 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.
16. In this case the relevant condition is contained in section 40(3A)(a)¹. 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 General Data Protection Regulation ('GDPR').
17. 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 the FOIA cannot apply.
18. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the requested information personal data?

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

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

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

¹ As amended by Schedule 19 Paragraph 58(3) DPA2018.

21. 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.
22. 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.
23. The complainant's first request sought precise details about individuals, their salaries and their grade or job title. It also sought this information in tabular form, whereby each employee would have their information recorded on a separate row.
24. In the Commissioner's view, this amounts to the creation of a unique job "profile" for each employee. Whether their name is redacted or not makes little difference, as individuals could be identified from this job profile alone.
25. The Commissioner notes from EHRC's previous responses that, at the date the complainant specified in her request, only 8 employees were working in the office in question. The low number of employees would make it even easier for a motivated individual to link some, if not all, of those employees with a profile. That individual would then have each employee linked to a job title and an individual salary (as opposed to a salary band).
26. It appears from the correspondence that the complainant has at some point been employed by EHRC and this would make it easier for her to identify individuals. However, even if the complainant herself were unable to identify individuals, because the information would be disclosed to the world at large, there is a distinct possibility that it would come into the hands of people who would be able to "de-anonymise" the data.
27. How much an employee is paid for doing their job is clearly information which relates to them. The Commissioner is therefore satisfied that the information in question both relates to and identifies the employees in the Birmingham Office. It would thus be their personal data.
28. In relation to the second request, the Commissioner considers that this request essentially seeks the same information in a slightly different format.
29. Under the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 ("the Gender Pay Regulations"), organisations employing 250 or more people must publish the mean and median hourly rates of pay for

both its male and its female employees. They must also publish the proportion of men and women in each pay quartile, as well as a range of other statistics.

30. EHRC noted that it had not carried out such an exercise for the Birmingham Office alone, but that, in theory it could do so, as it held the raw data to produce the statistics.
31. Whilst the Commissioner notes that the statistical data would, at least to some extent, mask the raw data. However she considers that, because of the numbers of employees involved, the statistical analysis could be unravelled sufficiently to reveal the raw data.
32. The Gender Pay Regulations require the publication of six distinct statistics. Whilst manipulating this data would take much longer than in the case of the first request, the Commissioner nevertheless considers that a person who was aware of the gender split in the Birmingham Office would be able to combine that information with the pay band information EHRC has already disclosed to work out at least some of the individual salaries.
33. To calculate a median average from a data set containing n numbers, you would first place the numbers in order from highest to lowest. Once that has been done, you then pick the number that is exactly halfway along the set of numbers (ie. there should be as many values in the data set higher than the median as there are lower than the median). Where n is an odd number, the median will be an actual value from the data set (if there are 21 numbers in the set, for example, the median would be the 11th number), where n is an even number, the median is half the total of the two middle values (in a set of 22 numbers, the median would be half the sum of the 11th and 12th value).
34. Therefore, if the Birmingham Office had (for example) five female and three male employees, the median salary for both male and females and females would be an actual salary of a male and a female employee.
35. The Commissioner is not convinced that the statistical manipulation that the complainant is proposing would be sufficient to mask the underlying raw data. She therefore does consider that there is a risk that individuals could be identified and the information is therefore personal data for the same reasons set out earlier.

Would disclosure contravene principle (a)?

36. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under

the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

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

38. Article 5(1)(a) of the GDPR states that:

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

39. 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.

40. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

41. 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"².

42. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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;

² 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 GDPR would be contravened by the disclosure of information, Article 6(1) of the 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".

- 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.
43. 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

44. In considering any legitimate interest(s) in the disclosure of the requested information under the 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.
45. 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.
46. There is always an inherent interest in bodies, which are funded by taxpayers, being held accountable for the way they spend that money. In addition, whilst there is some debate about the relevance of gender pay gap data, certain organisations are required to publish that data by law. Given that EHRC is the watchdog responsible for highlighting organisations which fail to publish that data and for investigating when organisations' performance in this regard is not deemed to be of the required standard, there is a further legitimate interest in ensuring that the body responsible for policing the law is itself an exemplar of best practice. The implication in the complainant's correspondence is that she perceives there to be a gender pay imbalance at the Birmingham Office.

Is disclosure necessary?

47. '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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

48. In this particular case, the Commissioner does not consider that disclosure of the information, under the FOIA, is necessary to achieve the legitimate interests she has identified.
49. The Commissioner notes that, as disclosure under the FOIA is disclosure to the world at large, she is only able to consider whether there is a legitimate interest in disclosure to the world at large and not to any particular individual.
50. Therefore when considering the question of necessity the Commissioner must consider whether there is a pressing social need for the disclosure of the information by identifying what the legitimate interests are.
51. The Gender Pay Gap Regulations do not require the publication of data by every organisation, nor do they require the data to be broken down further into individual sections of the organisation. Only organisations of 250 employees or more are required to report. The EHRC already does this at an organisational level. There is no legal requirement for it to go further.
52. In this case, the Commissioner considers that the legitimate interest in ensuring that EHRC is complying with the law is met by its publication of gender pay gap data. The Commissioner sees no good reason why a particular part of an organisation, containing only eight employees, would require a separate set of data published in isolation. More detailed salary information will be available to the EHRC's human resources department which would be able to analyse that data in a way that is much more considerate to the privacy of the individuals involved than disclosure under the FOIA.
53. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
54. The Commissioner has therefore decided that the Trust was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Procedural Matters

Timeliness

55. Section 17(1) of the FOIA states that when a public authority wishes to withhold information or to neither confirm nor deny holding information it must:

within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies.*

56. In this case, EHRC did not issue its refusal notice to the request the complainant made on 3 May 2019 until 28 August 2019 – well in excess of the 20 working days required by the legislation.

57. The Commissioner therefore finds that EHRC breached section 17 of the FOIA in responding to the request.

Advice and Assistance

58. The complainant, in her grounds of complaint, argued that EHRC could have provided her with more advice and assistance to help her reframe her request.

59. Section 16 of the FOIA obliges a public authority to provide “reasonable” advice and assistance to those making (or proposing to make) requests for information.

60. In this particular case, EHRC did provide the complainant with some information, namely the salary bands of the employees. Given EHRC’s legitimate concerns about personal data, the Commissioner is not convinced that there was any further advice and assistance that EHRC could reasonably have been expected to offer. She therefore finds that EHRC complied with its section 16 duty.

Right of appeal

61. 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: 0870 739 5836

Email: grc@justice.gov.uk

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

62. 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.
63. 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

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