

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 3 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 held by Oxford Direct Services Limited (ODSL) that relates to disciplinary action taken against any employees investigated for, and found to have committed, fraud against ODSL.
2. The Commissioner's decision is that ODSL is entitled to rely on the exemption at section 40(2) (personal information) of FOIA, as its basis for refusing the complainant's request.
3. The Commissioner does not require further steps to be taken by ODSL as a result of this decision notice.

#### **Request and response**

---

4. By way of background, on 29 August 2023, the complainant wrote to ODSL and requested information held in relation to any investigations carried out where it was found that an employee had committed fraud against ODSL.
5. ODSL's response confirmed that one employee had been investigated and was found to have committed fraud. ODSL also confirmed that one individual had "been disciplined as a result of being guilty of fraud", and that no employees had been "fired" as a result of being found to have committed fraud.

6. On 20 November 2023, as part of the complainant's request for an internal review, they asked ODSL to provide the following information.

"What, if any, disciplinary action was taken against the employee found guilty of fraud?"
7. On 29 November 2023, ODSL advised the complainant that it considered the question set out within their internal review request to be a new request for information.
8. In response to the complainant's new request, ODSL advised that as only one employee had been investigated and found to have committed fraud, it believed that any information held relating to any actions that may have resulted from the investigation could allow for that individual to be identified, and it was therefore refusing the request under section 40 of FOIA.
9. On 29 November 2023, the complainant requested an internal review. They queried how confirmation that disciplinary action taken against the individual found to have committed fraud would identify that individual. The complainant went on to say that they considered there to be a strong public interest in knowing that ODSL employees, who are funded by the taxpayer, are disciplined in some way if they commit fraud.
10. On 22 January 2024, ODSL provided its internal review response, maintaining its position that the requested information should be withheld under section 40 of FOIA.
11. On the same date, the complainant wrote to ODSL saying that its responses to their requests had been confusing and that ODSL had failed to provide clarity as to whether someone was disciplined, or not. The complainant went on to say that if ODSL confirmed that it had been correct when saying in its response of 22 September 2023, that one employee had been disciplined, then this may have "violated" ODSL's own "confidentiality agreement".
12. On 1 February 2024, ODSL advised the complainant that its previous responses had confirmed that one person had been investigated and found to have committed fraud. ODSL also said that it could confirm that the employee would have been disciplined in accordance with disciplinary policy. It said that the provision of this information did not breach any duty of confidentiality as it was satisfied that it would not allow for the identification of any one individual.
13. However, ODSL went on to say that it considered that revealing any disciplinary action that may have been taken could identify an individual, and therefore it considered it was correct to refuse to provide such information under section 40.

## Reasons for decision

---

14. This reasoning covers whether ODSL is entitled to rely on section 40(2) of FOIA when refusing to comply with the complainant's request of 20 November 2023.

### Section 40 - personal information

15. 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.
16. 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').
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 FOIA cannot apply.
18. 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?

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.
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. ODSL has argued that details of any disciplinary action which may have been taken against the employee found to have committed fraud would make it possible for that individual to be identified.
24. Having considered the withheld information provided by ODSL, it is the Commissioner's view that, at the very least, there are likely to be other employees at ODSL who, if sufficiently motivated to do so, would be able to piece together the specific information requested with other information known to them in order to identify the individual concerned.
25. The Commissioner is therefore satisfied that the withheld information falls within the definition of 'personal data' in section 3(2) of the DPA.
26. 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.
27. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

28. 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".

29. 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.
30. 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**

31. 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"<sup>1</sup>.

32. 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.
33. 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**

34. 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.
35. 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.
36. The Commissioner accepts that there is a legitimate interest in understanding the processes and procedures followed by a public authority, which has a responsibility to protect public money, in relation

---

<sup>1</sup> 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".

to allegations of fraudulent activities within its organisation. Disclosure would promote openness and transparency, enabling members of the public to satisfy themselves that the appropriate measures are in place, and appropriate action is taken, when ODSL deals with disciplinary matters relating to fraud.

37. The Commissioner therefore considers that the complainant is pursuing a legitimate interest, and that disclosure of the requested information is necessary to meet that legitimate interest.

### **Is disclosure necessary?**

38. '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.
39. The Commissioner is 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**

40. 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.
41. 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.
42. 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.

43. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
44. ODSL has advised the Commissioner that it expects employees to maintain certain standards of integrity, honesty and accountability, and that given this, any action taken by an employee which could be considered as potential fraud would automatically result in an investigation. It would also result in some sort of disciplinary action where evidence is found that any type of fraud has been committed.
45. ODSL has said that disciplinary action can take different forms, depending on the severity of the employee's actions. ODSL considers that it is important to take this into account when considering the balance of the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms.
46. ODSL states that, in this case, the employee would not reasonably expect information that would reveal their identity and that they had been the subject of disciplinary action, to be made available to the public.
47. ODSL has said that it has provided some information in response to the complainant's requests as it accepts that they relate to a serious issue, that being fraud committed by an employee of a public authority. However, ODSL has said that it believes that the privacy and rights of the employee should be protected in the circumstances of this case, and that the disclosure of information which would allow them to be identified would cause them harm.
48. The Commissioner accepts that there will be certain circumstances where it is considered to be appropriate to release information into the public domain relating to the outcome of an investigation into an employee who has been found to have committed fraud.
49. However, having considered the information available, the Commissioner considers that, in the circumstances of this case, the relevant employee would have a very firm and reasonable expectation that information relating to the investigation into their conduct would remain private between themselves and their employer, and that they would have no expectation that such information would be disclosed to the wider public. This approach was recognised by Tribunal in the case

of Rob Waugh v Information Commissioner and Doncaster College (EA/2008/0038, 29 December 2008), which found:

“there is a recognised expectation that the internal disciplinary matters of an individual will be private.”

50. ODSL has confirmed that there has been one case where an employee was found to have committed fraud, that appropriate disciplinary action was taken in that case, and that no individual has had their employment terminated after being found to have committed fraud. The Commissioner considers that this information goes some way in meeting the legitimate interest in openness and transparency regarding any potential incidents of fraud identified and investigated by ODSL.
51. Furthermore, the Commissioner considers the potential harm caused to the relevant employee in terms of damage and distress as a result of the disclosure of the requested information to carry significant weight in this case.
52. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the relevant employee’s 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 requested information would not be lawful.
53. 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.
54. The Commissioner has therefore determined that ODSL was correct to apply section 40(2) of FOIA to the complainant’s request.



## Right of appeal

---

55. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

56. 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.
57. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Suzanne McKay**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**