

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 March 2019

Public Authority: Department for Communities Northern Ireland

Address: foi@communities-ni.gov.uk

Decision (including any steps ordered)

1. The complainant has requested information from the Department for Communities Northern Ireland ('the DfC') regarding the number of complaints it had received against a particular DA ('Disability Assessor'). The DfC refused to comply with the request and cited section 40(5)(b)(a)(i) of the FOIA as a basis for this.
2. The Commissioner's decision is that the DfC was entitled to rely on section 40(5)(b)(a)(i) FOIA as the basis for not complying with the duty set out in section 1(1)(a) FOIA to either confirm or deny whether the requested information is held.
3. The Commissioner requires no steps to be taken.

Request and response

4. The complainant on 15 August 2017 made a request for information to the DfC regarding the number of complaints it had received against a particular Disability Assessor.
5. The complainant received a response letter from the DfC on 11 September 2017. That letter was primarily a response to the complainant's complaint about his father's claim for PIP, however in the letter it also stated that Capita (the third party which employs the Disability Assessor) did not consider it appropriate to disclose personal information about one of its Disability Assessors.

6. The complainant requested an internal review of the DfC's handling of the request on 22 December 2017. On 4 January 2018 the DfC wrote to the complainant stating that his original request had not been treated as an FOI request. It further stated that the request had been passed to the Information Management branch and he would receive a response within 20 working days. A follow-up letter from the DfC referred to the complainant's request for internal review and stated that this would be carried out by 25 January 2018.
7. The Commissioner did not consider the response letter of 11 September 2017 to be an appropriate refusal notice under section 17 of the FOIA 2000, as no exemption under the FOIA was specified as a basis for non-disclosure. The Commissioner wrote to the DfC on 10 May 2018 requesting that it provide a full and proper response to the complainant's request.
8. The DfC carried out an internal review of its response and responded to the complainant with its findings on 22 May 2018. That response stated that the DfC considered that section 40(5)(b)(i) of the FOIA applied to the requested information and that therefore it was refusing to confirm or deny whether it held that information.

Scope of the case

9. The complainant first contacted the Commissioner on 13 September 2017 to complain about the way his request for information had been handled, specifically the DfC's to either confirm or deny whether the requested information is held by it.
10. Following several pieces of correspondence and responses, the Commissioner wrote to the DfC on 4 July 2018 seeking its detailed submissions as to its application of section 40(5)(b)(i) of the FOIA to the requested information.
11. The Commissioner has considered the DfC's handling of the complainant's request.

Reasons for decision

Section 40(5)(b)(a)(i)

12. As the DfC's refusal of the request was before 25 May 2018, the date the new Data Protection Act 2018 (DPA 2018) and the General Data Protection Regulation EU2016/679 (GDPR) legislation came into force, the Commissioner considers that the Data Protection Act 1998 applies in this case.

13. Under section 1(1)(a) FOIA, any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request. This requirement to inform an applicant whether information matching their request is held by the public authority is commonly referred to as the "duty to confirm or deny."
14. However, in certain circumstances, this duty does not apply and the public authority is not obliged to say whether or not it holds the information; instead, it can give a "neither confirm nor deny" response.
15. Section 40(5) of the FOIA sets out the conditions under which a public authority can give a "neither confirm nor deny" response where the information requested is, or would be, personal data. It includes provisions relating to both personal data about the requester and personal data about other people.
16. If the information would constitute personal data relating to someone other than the requester, then the public authority does not have to confirm or deny whether it holds it if one of the conditions in section 40(5)(b)(i) or (ii) applies.
17. There may be circumstances, for example requests for information about investigations or complaints, in which simply to confirm whether or not a public authority holds that personal data about an individual can, itself, reveal something about that individual. To either confirm or deny that the information is held could indicate that a person is or is not the subject of complaints. If to do so would contravene data protection principles, for example because it would be unfair, then the public authority is not obliged to confirm or deny that it holds the information.

If held, would the information be personal data?

18. The Commissioner has first considered whether the requested information would be the personal data of any person.
19. The Data Protection Act 1998 (DPA) defines personal data as data that relates to a living individual from which that individual can be identified. If held, the information would confirm whether or not the name of the individual provided in the complainant's request had been the subject of any complaints.
20. Therefore, the Commissioner is satisfied that the requested information

would be personal data. If held, it would tell the public something about the individual, namely whether or not the person was the subject of complaints.

Would confirming or denying the information is held breach any of the data protection principles?

21. If confirming or denying whether the information is held would contravene the first data protection principle, that personal data should be processed fairly and lawfully, section 40(5)(b)(i) is applicable.
22. In assessing fairness, the Commissioner considers the reasonable expectations of individuals concerned and what might be the likely consequences resulting from disclosure.
23. In this case confirming or denying whether the information is held would communicate whether or not the individual named in the request was the subject of any complaints.
24. The Commissioner notes here that there may be situations in which it could be argued that giving the confirmation or denial to a requester would not necessarily contravene data protection principles because the requester already knows or suspects whether the public authority holds or does not hold the information.
25. The FOIA is motive and applicant 'blind', and the test is whether the information can be disclosed to the public at large, not just to the requester. Therefore an authority can only disclose or confirm or deny it holds information under the FOIA if it could disclose it, or confirm or deny it holds the information, to any member of the public who requested it.
26. The Commissioner recognises that individuals have a reasonable expectation that a public authority, in its role as a responsible data controller, will respect confidentiality in this regard.
27. The Commissioner considers that DfC/Capita staff will have a reasonable expectation that records held of any complaints made about them will remain confidential. Confirming or denying if a complaint or complaints were made against a particular individual would be unfair as it may cause that individual some distress given the confidential nature of this type of information.
28. In conclusion, the Commissioner is satisfied that confirming or denying that the requested information is held would be unfair and thus contravene the first data protection principle. Therefore the

Commissioner finds that the DfC is entitled to refuse the request on the basis of section 40(5)(i)(b) of the FOIA.

29. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, it has not been necessary to go on to consider whether this is lawful or whether one of the schedule 2 conditions is met.

Right of appeal

30. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

31. 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.
32. 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

Deirdre Collins

Senior Case Officer

Information Commissioner's Office

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