

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 June 2023

Public Authority: Department for Transport
Address: Great Minster House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant has requested all correspondence regarding the appointment of the Department for Transport (the DfT) Aviation ambassador, for a second term.
2. The Commissioner's decision is that the DfT was entitled to rely on section 40(2), when refusing to disclose the requested information.
3. The Commissioner does not require the public authority to take any further steps.

Request and response

4. On 26 January 2023, the complainant wrote to the public authority and requested information in the following terms:
"a copy of all email and written communication the Department holds regarding [name redacted] being instated for a second term as a DfT Aviation Ambassador"
5. The public authority responded on 10 February 2023. It provided a link to some relevant information and stated that the remaining information was exempt under section 40(2) as it relates to personal information.
6. Following an internal review, the public authority wrote to the complainant on 15 March 2023. It stated that it was upholding its original decision.

Scope of the case

7. The complainant contacted the Commissioner on 16 March 2023 to complain about the way their request for information had been handled.
8. The Commissioner considers the scope of his investigation to be to establish whether the public authority is entitled to withhold the requested information under section 40(2) of the FOIA.

Reasons for decision

Section 40 personal information

9. 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.
10. 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').
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 the 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”.

¹ As amended by Schedule 19 Paragraph 58(3) DPA

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, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects. The withheld information in this case consists of an individual's qualifications, current job role, written communications between the DfT and the individuals, application to become an Aviation ambassador and some contact information. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
18. 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.
19. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

20. 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".

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 GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the 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"².

24. 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;
 - 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 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.
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

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".

compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

28. The complainant advised that the reason they were interested in the requested information was to understand the DfT's reasoning for reappointing the individual in question, who does not contribute to the aviation community in a meaningful way nor attend ambassador events.
29. The complainant advised that other applicants had applied for the role, who also had relevant experience, yet were rejected from the role. They explained that any unfairness should be acknowledged by the DfT, and this accountability would lead to transparency.
30. Based on the above reasoning the Commissioner is satisfied that there is a legitimate interest in the requested information due to looking at the appointment process more generally, not just about why this individual was appointed, but why others were not.

Is disclosure necessary?

31. '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.
32. The Commissioner acknowledges that some of the withheld information may provide insight regarding why the individual in question was reappointed for this role, he is therefore having considered the views the requester, the Commissioner accepts that disclosure of the withheld information is necessary for the requester to understand the detail of the recruitment process, including fairness, transparency and accountability in the process.
33. As the Commissioner agrees that some of the withheld information, may provide insight into the recruitment process and why the individual in question was reappointed for the role, he will now go onto consider the balancing test.

Balancing test

34. Having determined that disclosure is necessary, to the Commissioner must now balance the legitimate interests in disclosure against the fundamental rights and freedoms of the data subjects. In doing so, it is necessary to consider the impact of disclosure.

35. In the Commissioner's view, a key issue when considering the balancing test is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to the individuals, taking into account whether or not they have consented to disclosure.
36. The Commissioner has reviewed the role of aviation ambassador and has determined that the role is not of a senior nature and there are 13 people in the post.
37. The Commissioner recognises that the DfT has provided the complainant with a relevant link explaining what is expected of each individual that is a part of this group³.
38. This link also gives a brief biography highlighting each individuals desirable qualities and experience for the role. The Commissioner also notes that due to individuals own public platforms, there is also relevant information already in the public domain which would satisfy the legitimate interests outlined.
39. As there is already information in the public domain regarding these individuals, each person would have reasonable expectation that no more information would be shared to the world a large.
40. Based on the above the Commissioner is satisfied that the DfT has correctly relied on section 40(2) when withholding the requested information.

³ [Aviation Ambassadors Group - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

Right of appeal

41. 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

42. 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.
43. 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

Catherine Fletcher
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF