

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 June 2023

Public Authority: Crown Prosecution Service
Address: 102 Petty France
London
SW1H 9EA

Decision (including any steps ordered)

1. The complainant requested information relating to the remuneration of the Independent Assessor of Complaints (IAC). The Crown Prosecution Service (CPS) refused to provide the requested information, citing section 40(2) (personal information) of FOIA.
2. The Commissioner's decision is that the CPS was entitled to apply section 40(2) in this case.
3. The Commissioner does not require any steps to be taken as a result of this decision.

Request and response

4. On, or around, 27 November 2022, the complainant wrote to the CPS and requested information in the following terms:

“Provide the remuneration per year and per day [for the Independent Assessor for Complaints for the CPS]. Provide it for last ten years.”
5. The CPS responded on 22 December 2022. It confirmed it held the requested information but refused to disclose it, citing section 40(2) (personal information) of FOIA.
6. Following an internal review the CPS wrote to the complainant on 21 February 2023, maintaining its position.

7. The following analysis explains why the Commissioner is satisfied that the CPS was entitled to apply section 40(2) to withhold the requested information.

Reasons for decision

Section 40 personal information

8. 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.
9. 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').
10. 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.
11. 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?

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

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

13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. 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

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

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

15. 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.
16. In this case, the request for information specifies the remuneration for a third party role, namely the role of IAC. How much an individual is paid for doing a job is clearly information which relates to them.
17. The Commissioner is satisfied that the requested information relates to those individuals who hold, or have held, the role of IAC during the timeframe specified in the request.
18. While he accepts that the request for information does not name individuals, the Commissioner is satisfied that the individuals concerned can be identified. He accepts that the identity of the current post holder is available on the CPS website. He also accepts that the identities of the previous post holders are also publicly available.
19. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
20. 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.
21. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

22. 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”.

23. In the case of a 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.
24. 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

25. 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.

26. In considering the application of Article 6(1)(f) of the 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.

27. 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

28. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to

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”.

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

29. The Commissioner recognises that there is a legitimate interest in the public having confidence in the accountability and transparency of public authorities. He also accepts that the requester may have a personal interest in the requested information.

Is disclosure necessary?

30. '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.
31. The CPS told the Commissioner that it demonstrates transparency and openness regarding the IAC's post, its remit, and responsibilities and that it did not consider that release of the IAC's remuneration is necessary.
32. However, the Commissioner is prepared to accept that disclosure of the withheld information is necessary to meet the interests identified above.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

33. 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.
34. 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.

35. 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.
36. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
37. In this case, the Commissioner accepts that, while the complainant considers that it is appropriate to provide the daily rate for the role, plus remuneration for the last ten years, he did not put forward any other arguments regarding disclosure.
38. In the circumstances of this case, the Commissioner acknowledges that there is a public interest in transparency and accountability.
39. The Commissioner has also taken into account that the individuals concerned have not been contacted for consent to release their personal data. However, he notes that, in its submission, the CPS said that the IAC would have a reasonable expectation that their actual salary would be kept private.
40. With regard to the consequences of disclosure, which under FOIA is disclosure to the world at large, not to the individual requester, the CPS argued that disclosure of specific earnings is intrusive.
41. With respect to providing reasonable advice and assistance to the complainant, the CPS confirmed that it had considered whether it could provide some generic information in relation to remuneration. However, it told the Commissioner there is no published pay range for this post.
42. The Commissioner has consulted his guidance 'Requests for personal data about public authority employees'³. In that guidance, in the section entitled 'Salaries and bonuses', the Commissioner acknowledges that, in recent years, public authorities have published an increasing amount of information on salaries of public sector officials.

³ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

43. The guidance also states:

“However when considering the legitimate interests test for salary information which is not routinely published, you should consider how much significant information you are disclosing about an individual’s personal financial circumstances. It is clear that more detailed information or exact salaries are more intrusive than giving a salary band or the pay scale for a post”.

44. It goes on to say that exceptional circumstances are needed to justify the disclosure of exact salaries when a public authority does not routinely publish them.
45. From the evidence he has seen, the Commissioner does not consider that exceptional circumstances apply in this case.
46. In light of the wording of this request, which seeks information about the remuneration for a specific role, the Commissioner is satisfied that disclosure in this case would disclose information about the financial circumstances of the individuals concerned.
47. While the legitimate interests are not trivial, nor are they compelling.
48. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects’ fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
49. 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.
50. The Commissioner has therefore decided that the CPS was entitled to withhold the requested information under section 40(2), by way of section 40(3A)(a).

Right of appeal

51. 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

52. 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.
53. 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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