Information Commissioner's Office

Requests for personal data about public authority employees

Freedom of Information Act
Environmental Information Regulations

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1. The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities.

2. The Environmental Information Regulations 2004 (EIR) give rights of public access to environmental information held by public authorities.

3. An overview of the main provisions of FOIA and the EIR can be found in the Guide to Freedom of Information and the Guide to the Environmental Information Regulations.

4. This is part of a series of guidance, which goes into more detail than the Guides, to help public authorities to fully understand their obligations and to promote good practice.

5. This guidance explains to public authorities what they should bear in mind when dealing with requests under FOIA or the EIR that would involve disclosing personal data about their employees and how section 40 FOIA and regulation 13 of the EIR apply in such cases.

Overview

When a public authority receives a request for information that constitutes personal data about its employees, it must decide whether disclosure would breach Principle 1 of the Data Protection Act (the DPA), ie whether it would be fair and lawful to disclose the information.

Whether the disclosure is fair will depend on a number of factors including:

- whether it is sensitive personal data;
- the consequences of disclosure;
- the reasonable expectations of the employees; and
- the balance between any legitimate public interest in disclosure and the rights and freedoms of the employees concerned.

If the public authority decides that it would be fair, the disclosure must also satisfy one of the conditions in Schedule 2 of the DPA.

In addition, if the information constitutes sensitive personal data, the disclosure must also satisfy one of the conditions in Schedule 3 of the DPA.

In some circumstances the authority may neither confirm nor deny that it holds the requested information.

This general approach can be applied to various types of employee information, including:

- Salaries and bonuses
- Information about termination of employment and compromise agreements
- Lists and directories of staff
- Names in documents
- Registers of interests

Where employees request their own data, this is exempt under FOIA and the public authority should instead handle this as a subject access request under the DPA.

Employees do not have a right under the DPA to request personnel information that falls into 'category (e)' of the definition of personal data. If the information is requested by others the exemption is qualified, rather than absolute.

It may be fair to disclose the names of people representing other organisations.

If the information requested is environmental information, the public authority must deal with the request under the EIR. The provisions in the EIR relating to personal data correspond to those in FOIA.

What FOIA says

6. The relevant parts of FOIA and the DPA are set out in the Annex to this guidance. FOIA section 40 provides an exemption from the duty to disclose information where it constitutes personal data, as defined in the DPA section 1(1). FOIA section 40(1) applies when the requester is asking for personal data about themselves; the public authority should deal with these requests as subject access requests under the DPA. FOIA section 40(2) provides an exemption when the requester is asking for someone else's personal data – in this case personal data relating to the public authority's employees. The exemption is engaged when a condition in section 40(3) or 40(4) applies; most commonly, this means situations under section 40(3)(a)(i) when disclosing the information would

contravene one of the data protection principles in the DPA Schedule 1. This is an absolute exemption; unlike qualified exemptions it does not require a public interest test, but it may involve balancing the rights and freedoms of the employees with any legitimate interest in disclosure.

Personal data about employees

7. Requests for information relating to a public authority's staff can cover a wide range of topics, including the names of staff, organisation charts and internal directories, as well as other data where individual employees can be identified, such as information on salaries and pensions, severance payments and compromise agreements, disciplinary or grievance cases, sickness statistics and training records.

8. The inclusion of category (e) in the definition of data in section 1(1) of the DPA, together with categories (a) to (d), means that any recorded information held by public authorities that identifies individuals will constitute personal data.

9. When information relates only to a post, without reference to an identifiable individual who holds that post, it would not constitute personal data. A record that a post with certain responsibilities exists in an authority is not in itself personal data; a record that an individual held a certain post, and therefore had certain responsibilities, is personal data about them. The job description for a post does not in itself constitute personal data about anyone who may happen to hold that post. However, if the post holder is identifiable from that job description, or from the job description and other available data, for example where the name and job title of the postholder are shown on the authority's website, this is personal data. However, even though a job description may constitute personal data in these circumstances, it is likely that it would be fair to release it in response to a FOIA request (see the explanation of fairness below).

10. There is a further explanation of what constitutes personal data in our guidance on the DPA. In addition, our guidance on the exemption for personal data explains how FOIA section 40 works in general terms; this guidance focuses on how the exemption relates to information about public authority employees in particular.

Requests for information about employees: our approach

11. When a request is for personal data about an authority's employees other than the requester, it is exempt under section 40(2) and section 40(3)(a)(i) if it would contravene any of the data protection principles to disclose it. The principle that is most likely to be relevant is the first principle; the processing (in this case the disclosure) must be fair. If disclosure would **not** be fair, then it would contravene the first DPA principle, and the information is exempt under FOIA section 40(2). If it is decided that it **would** be fair to disclose the information, it is then necessary to establish that the disclosure would also satisfy one of the conditions in the DPA Schedule 2. If the information is sensitive personal data as defined in the DPA section 2, the disclosure must also met one of the conditions in the DPA Schedule 3. Finally, in order to satisfy the first DPA principle, the disclosure must also be lawful. Therefore, the first question to answer in deciding whether employee information is exempt under section 40(2) is, would it be fair to disclose it?

Fairness

12. There are a number of factors that could indicate whether disclosure would be fair, including whether it is sensitive personal data, the consequences of disclosure, the employees' reasonable expectations and the balance between their rights and any legitimate public interest in disclosure:

Sensitive personal data

13. If the information is sensitive personal data, as defined in the DPA section 2, disclosure is unlikely to be fair. This data is likely to relate to the most personal aspects of employees' lives, for example their health or sexual life, rather than their working life. Employees would have a reasonable expectation that this data would not be made public. Furthermore, such a disclosure would also have to meet a condition in both Schedule 2 and Schedule 3 of the DPA.

Consequences of disclosure

14. Disclosure is unlikely to be fair if it would have unjustified adverse effects on the employees concerned. Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the

information relates to their public role rather than their private life. If an authority wishes to claim that disclosure would be unfair because of the adverse consequences on the employees concerned, it must be able to put forward some justification for this claim.

> **Example**
> Decision notice FS50401773 concerned a request to the UK Border Agency (UKBA), an Executive Agency of the Home Office, for copies of guidance for Customs Officers on the criteria for stopping and searching vehicles. The documents included the names of certain junior officials in UKBA. The Home Office withheld these names under section 40(2); they claimed that, in the past, correspondence from UKBA officials had been published on the internet which had led to officials being targeted. The Commissioner accepted that the nature of the information could lead to individuals being targeted, and the distress this would cause was a factor in making the disclosure unfair.

Reasonable expectations

15. A key issue to consider in assessing fairness is whether employees have a reasonable expectation that their information will not be disclosed. This will depend on a number of factors, including:

- **Whether the information relates to the employee in their professional role or to them as individuals**

16. Information about an employee's actions or decisions in carrying out their job is still personal data about that employee, but given the need for accountability and transparency about public authorities, there must be some expectation of disclosure. On the other hand, information that may be held in a personnel file about their health or disciplinary record or payroll information about their tax code all relate to them as individuals and to their personal circumstances and there is a greater expectation that a public authority would not disclose such information.

- **Seniority**

17. It is reasonable to expect that a public authority would disclose more information relating to senior employees than more junior ones. Senior employees should expect their posts to carry a greater level of accountability, since they are likely to be

responsible for major policy decisions and the expenditure of public funds. However, the terms 'senior' and 'junior' are relative. It is not possible to set an absolute level across the public sector below which personal information will not be released; it is always necessary to consider the nature of the information and the responsibilities of the employees in question.

> **Example**
> The First-tier Tribunal in *Dun v Information Commissioner and National Audit Office* (EA/2010/0060, 18 January 2011) said at paragraph 40:
>
> > "The Tribunal does not accept that there is a blanket level at which all junior civil servants are shielded from disclosure of their personal data. This has to be decided on a case by case basis, through consideration of the role and responsibilities of the individual and the information itself."

- **Public facing roles**

18. It may also be fair to release more information about employees who are not senior managers but who represent their authority to the outside world, as a spokesperson or at meetings with other bodies. This implies that the employee has some responsibility for explaining the policies or actions of their authority; it would not apply simply because an employee deals with enquiries from the public or sends out material produced by others.

> **Example**
> In *Joe McGonagle v Information Commissioner and Ministry of Defence* (EA/2011/0104, 4 November 2011), the First-tier Tribunal accepted the MoD's argument that, while officials who speak to the media or represent the Department at outside functions may expect their names to be disclosed, this was not the case for junior civil servants who only corresponded with members of the public.

- **Any general policy followed by the authority or other prior indication as to what may be disclosed**

19. Current government policy is to promote greater transparency throughout the public sector by more proactive publication of

information. This has a bearing on what information people may reasonably expect public authorities to disclose. Furthermore, where an authority has a policy on the disclosure of personal information and has publicised this to its staff, this will also affect their expectations (see the section on Good practice below), but the policy alone cannot determine whether the disclosure would be fair in any particular case. The issue is not simply whether an employee had an expectation that their personal data would not be disclosed, but whether that expectation was a reasonable one to hold. Considering the factors listed above will help the authority to assess whether employees could reasonably expect their data would be withheld in any particular case.

Balancing rights and freedoms with legitimate interests

20. Even though disclosure may cause distress to the employees concerned, and they may have a reasonable expectation that the information will not be disclosed, this does not mean that disclosure would necessarily be unfair. The public authority must consider the legitimate public interest in disclosure and balance this against the rights of employees.

21. The interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest. This is because, when information is disclosed under FOIA, it is effectively disclosed to the world at large, not only to the requester.

22. Under the DPA the exercise of balancing the rights and freedoms of the employees against the legitimate interest in disclosure is different to the public interest test that is required for the qualified exemptions listed in section 2(3) FOIA. In the public interest test, there is an assumption in favour of disclosure because the public authority must disclose the information unless the public interest in maintaining the exemption outweighs the public interest in disclosure. In the case of section 40(2) the interaction with the DPA means the assumption is reversed; a justification is needed for disclosure.

Example
ICO decision notice FS50125350 concerned a request to the National Police Improvement Agency for information about a contract for an electronic fingerprint identification system. The information included the names of senior staff in the authority

who worked on this project. The Commissioner established that there was a legitimate public interest in knowing "who was responsible for important decisions involving significant sums of public money." He found that "disclosure is necessary for the public to be able to establish the seniority of those involved" and that "there would be no unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the senior-level individuals concerned."

23. The disclosure must not cause an unwarranted interference with the employees' rights. This means that the public authority should follow a proportionate approach; it may be possible to meet the legitimate public interest by disclosing some of the information, rather than all the detail that the requester has asked for.

Schedule 2

24. If, having considered all the issues above, the public authority decides that disclosure would **not** be fair in these terms, then the information is exempt under section 40(2) and should not be disclosed. On the other hand, if decides that disclosure **would** be fair, there is then a further step to take. This is because, in order to satisfy Principle 1, the disclosure must not only be fair but must also meet one of the conditions in Schedule 2 of the DPA. The conditions that are most likely to be relevant in such cases are conditions 1 or 6.

Condition 1
The data subject has given his consent to the processing

25. The Data Protection Directive 95/46/EC, which the DPA implements, defines consent in Article 2(h) as:

"any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed"

26. The consent must therefore be a true indication of the employees' wishes. It must be a genuine choice, without any element of coercion. Furthermore, the employees must

understand the implications of what they are consenting to, in particular that personal data about them will be disclosed not just to the requester, but to the world at large. If the employees have given their consent in these terms to the information being disclosed, then the condition is satisfied.

27. However, it is not necessary to have the employees' consent in order to release the data. Consent is only one of the possible conditions for disclosure; if consent is not given, the disclosure may still satisfy another condition in Schedule 2.

28. It follows that the authority is not obliged to seek the consent of their employees before releasing their personal data under FOIA or the EIR. In novel or contentious situations it may be helpful for the authority to seek their views, but this only helps the authority to make its own decision as to whether disclosure would be fair. If the employees have specifically objected to the potential disclosure, then any concerns they have expressed may be relevant to the question of whether there would be an unwarranted interference with their rights and freedoms, as discussed above.

29. The Schedule 2 condition that is more likely to be relevant is condition 6:

> **Condition 6**
> The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

This condition effectively creates a three-part test:

- there must be a legitimate public interest in disclosing the information;
- the disclosure must be necessary to meet that public interest; and
- the disclosure must not cause unwarranted interference with the rights, freedoms and legitimate interests of the employee.

30. Our view, as set out above, is that a public authority will already have considered the issues of legitimate interests in

disclosure and unwarranted interference in the rights and freedoms of the employees as part of the general determination of fairness. Therefore, the question to answer in relation to Schedule 2 condition 6 is whether the disclosure is **necessary** to meet the legitimate interests. For example, could the legitimate interests be met by other means that interfere less with the employee's rights and freedoms? Is it necessary to provide all of the information requested? If not, full disclosure is not necessary, and the additional information is thereby exempt.

31. In the case of *Corporate Officer of the House of Commons v Information Commissioner* [2008] EWHC 1084 (Admin), the High Court said at paragraph 43 that 'necessary' in Schedule 2 condition 6 meant that there must be a "pressing social need" for disclosure. There is a general social need for transparency about the policies, decisions and actions of public bodies and this is the purpose of FOIA. In order to meet the condition and disclose the personal data in question, it may also be necessary to show that there is some more specific social need that would be met by disclosure of the personal data in question. It is likely to be easier to demonstrate a need to release personal information about more senior decision makers than about more junior staff.

Schedule 3

32. If the employee information constitutes sensitive personal data, then as noted above, disclosure is unlikely to be fair, but even if it would be fair, the information is still exempt from disclosure unless one of the conditions in the DPA Schedule 3 is met.

33. Given that the definition of sensitive personal data in the DPA covers a number of areas, this does not mean that any information falling within that definition will never be disclosed. For example, where an employee has deliberately (rather than inadvertently) made such information public, disclosure may be both fair and meet Schedule 3 condition 5. This could be relevant if a request concerned details of trade union membership and an employee had made it publicly known that they were a member of a trade union.

Lawfulness

34. Finally, if disclosure would be fair and would meet a condition in Schedule 2 (and Schedule 3 if appropriate), the disclosure must still be lawful. It will not be lawful if it would breach statute (i.e. any legislation) or common law; this includes a breach of a duty of confidence or a legally enforceable contractual agreement.

Neither confirm nor deny

35. In some cases it may be appropriate for a public authority to neither confirm nor deny that it holds information on an employee. FOIA section 40(5)(b)(i) says that the duty to confirm or deny that information is held does not arise if giving the confirmation or denial would itself contravene the DPA principles. This can arise, for example, in relation to information about disciplinary investigations; it may be unfair to an employee to confirm (or deny) that they have been disciplined or are the subject of an investigation.

> **Example**
> ICO decision notice FS50391625 concerned a request to Central and North West London NHS Foundation Trust for a report said to relate to disciplinary action against a named nurse. The authority refused to confirm or deny whether the information was held. The Commissioner found that the nurse had a reasonable expectation that the authority would not confirm or deny whether they held such information because it would cause the employee damage and distress. There was a legitimate public interest in knowing that health professionals are fit to practice but it was not necessary to disclose the existence of any internal report to meet this interest, since if a disciplinary case leads to a public hearing by the Nursing and Midwifery Council, the name of the employee and other details are made public at that stage.

Types of information

36. The factors listed above are described in general terms. It is not possible to lay down specific and absolute standards about what should be disclosed, and public authorities will have to consider the circumstances of the case for each FOIA request.

37. As a guide, the following sections consider how the factors discussed above apply to some of the main types of information about employees. They discuss some of the key issues relating to these types of information, but in any particular case public authorities will need to consider other aspects of the approach to section 40 outlined above as appropriate.

Salaries and bonuses

38. In recent years public authorities have published an increasing amount of information on salaries of officials in the public sector. This is a result of the general trend towards transparency in society to which FOIA itself contributes, the direction of government policy and changes in statutory requirements.

39. Government departments and other public bodies now routinely publish the names, job titles and salaries of senior civil servants (Senior Civil Service level 2 and above) on www.data.gov.uk, as part of the government's policy on transparency. Salaries are given in bands of £5,000 (eg £120,000 to £124,999). For more junior posts the job title and pay scales are shown.

40. The Accounts and Audit (Amendment no 2) (England) Regulations 2009 require local authorities, fire and police authorities and certain other bodies in England to publish in their annual accounts for the previous financial year the actual salaries, allowances, bonuses, compensation and employer's pension contributions paid to each employee who earned over £50,000 and in addition to publish the names of those staff who earned over £150,000. This applied for the first time to accounts covering the financial year 2009-2010.

41. The Code of recommended practice for local authorities on data transparency, published in September 2011, says that local authorities in England should routinely publish the current salaries of all employees earning over £58,200, which is equivalent to the Senior Civil Service minimum pay band, together with their job descriptions and their names (with an option for individuals to refuse consent to their name being published).

42. These developments have the effect of placing a great deal of salary information in the public domain. Information on salaries

that is already published and accessible to requesters is likely to be exempt from disclosure under FOIA section 21 (information accessible to the applicant by other means). Public authorities should include details of the information they routinely make available in their publication schemes.

43. Following the approach to fairness set out above, in order to decide whether it would be fair to disclose salary information that is not routinely published, eg more detailed information or exact salaries, public authorities need to consider:

- **The possible consequences of disclosure**

44. Salary information relates to people's personal financial circumstances and disclosure of the exact salary of an individual is more intrusive than giving a salary band or the pay scale for a post. It may also prejudice the individual's interests in ongoing financial or legal negotiations. If salaries are individually negotiated or contain a significant element of performance related pay, disclosure may give significant information about that individual, which could have a detrimental effect on them.

- **The reasonable expectations of the employees concerned**

45. Seniority is a factor here; if there is there is a cut-off point in the salary scale for the routine publication of detailed salary information, derived for example from statute or a code of practice, this is likely to create a reasonable expectation that the same level of detail would not be released for more junior staff. However, a public authority must decide each case on its individual circumstances. The fact that a public authority has not specifically warned an employee that this information may be disclosed is not necessarily a bar to disclosure.

Example
In ICO decision notice FS50307784, the exact salary of a council officer was requested from West Berkshire District Council. The Commissioner accepted that the officer would have had a reasonable expectation that their salary would not be released, as they were not in a senior position and had no management or budgetary responsibilities. While there was a legitimate public interest in expenditure of public money on salaries, this could be met by providing a salary band, rather than the exact salary. To disclose the exact salary would be unwarranted and cause them distress. Disclosure would therefore be unfair and the information was exempt under

section 40(2).

- **The balance between the rights of the employees and any legitimate interests in disclosure**

46. There is a legitimate public interest in knowing how public money is apportioned across an organisation, which includes salaries at lower levels. In order to meet this interest it may be sufficient to disclose the advertised salary range for these posts. If the range is particularly wide or there is a significant element of performance related pay in addition to the advertised range, it may be necessary to disclose more detailed information, in order to give a true picture. In such cases the legitimate interest may be met by disclosing the salary figures in bands of £5,000. It should be possible to break down bonus payments into bands in the same way for disclosure. However, this is not a definitive rule and what is appropriate will depend on the circumstances. Authorities should take a proportionate approach, balancing the public interest in disclosure and the privacy rights of the employee, and taking account of the sector in which the public authority operates.

Example
ICO decision notice FS50363389 concerned a request for, amongst other information, the salaries of certain senior managers at the BBC. The BBC disclosed this information in bands of £30,000. The Commissioner agreed that to disclose the salaries of these managers in bands of £5,000 would be unfair. The BBC is in a unique position in that it is not directly comparable with other public authorities. The salaries for equivalent posts in competitor organisations in the private sector are not disclosed in £5,000 bands. The Commissioner found that the BBC had met the legitimate public interest by making the information available in the wider bands.

47. Exceptional circumstances are needed to justify the disclosure of exact salaries when they are not routinely published. In such cases there may be additional public interest factors that outweigh any detriment to the individuals concerned. These exceptional circumstances could include situations where:

- there are current controversies or credible allegations;
- there is a lack of safeguards against corruption;
- normal procedures have not been followed;
- the individual in question is paid significantly more than the usual salary for their post; or

- the individual or individuals concerned have significant control over setting their own or others' salaries.

48. If, having taken account of the above factors, a public authority decides that it would be fair to disclose detailed salary information, then they should still consider what information it is necessary to disclose, in terms of the DPA Schedule 2 Condition 6. They should only disclose enough information to meet the legitimate interests identified. If the information requested goes beyond what is necessary to meet the legitimate public interest, then there would be a breach of the first principle of the DPA and the information is exempt under FOIA section 40(2).

Termination of employment

49. These requests relate to issues such as severance payments, compromise agreements and circumstances in which an employee left the authority. As with other requests for employee information, a public authority must first consider whether disclosure would be fair.

50. Employees' expectations as to what information will be released will have to take account of statutory or other requirements to publish information. For example, the Accounts and Audit (Amendment no 2) (England) Regulations 2009 require local authorities, fire and police authorities and certain other bodies in England to publish in their annual accounts the amounts paid to employees in connection with the termination of their employment, if their total remuneration is over £50,000. These amounts are published by job title if the total remuneration is between £50,000 and £150,000 and by name if it is over £150,000. However, this legislation only directly affects reasonable expectations regarding the actual amounts of money paid out, and only for those particular authorities. Reasonable expectations in other contexts may differ, but it should be recognised that there is an increasing public expectation of transparency regarding the expenditure of public money and the performance of public authorities. This is especially the case if there is any evidence of mismanagement by senior staff in a public authority.

Example
ICO decision notice FS50349391 dealt with a request for details of any compromise agreements entered into between the Somerset Partnership NHS Foundation Trust and doctors.

There was one such agreement. The requester did not want to see the name of the doctor, but the remaining details would identify them. In this particular case the Commissioner found that disclosure of the full details of the agreement would cause them distress and they would have a reasonable expectation that the details would remain confidential and disclosure would be an unwarranted invasion of their privacy. The decision notice included a discussion of other cases concerning compromise agreements.

51. The issue of lawfulness may also be relevant to the disclosure of compromise agreements. In order to satisfy the first principle, the disclosure must be lawful. A compromise agreement is likely to contain a confidentiality clause. While public authorities cannot simply contract out of their obligations under FOIA, our view is that disclosure that would be in breach of an **enforceable** contractual term would be unlawful. Whether this applies in any particular case will depend on whether the specific information is truly confidential.

Lists, directories, organisation charts

52. An authority may receive a request for the names of employees, for example the names of all employees above a certain level or for a directory or organisation chart listing all the staff. The requester might also ask for job titles or direct contact details. The general approach outlined above will apply. The principal question is whether it is fair to release this information.

53. Authorities will usually publish the details of their most senior employees, such as their Chief Executive and Directors of departments, on their website and in other material and so the section 40 exemption will not arise in respect of this information.

54. The move towards more proactive publication of information by public authorities means that it is increasingly common for them to publish structure charts. Government departments publish 'organograms' or structure charts on www.data.gov.uk showing the job titles and reporting lines for all their posts. The Code of recommended practice for local authorities on data transparency says that local authorities, fire and police authorities and other specified bodies in England should publish an organisation chart. This does not mean that there is a

requirement to publish the names of all the post holders; usually only the names of senior managers are published.

55. If a request is received for names below this level, the issue in terms of section 40 is whether it would be fair to disclose these in the context of the specific request. It is not possible to establish a single 'cut-off' point for all authorities, below which names will never be disclosed.

56. The more senior an employee is and the more responsibility they have for decision making and expenditure of public money, the greater their expectation should be that their name will be disclosed. However, seniority within the organisational structure is not the sole determining factor. Employees who represent their authority to the outside world should also have an expectation that their authority will disclose their names.

57. The fact that a person holds a particular post is information about their working life, rather than their private life, and as discussed above, there should be a greater expectation that a public authority will disclose this. However, there may be circumstances in which, if it were made public that a person has a particular job, or works at a particular location, this may have an adverse effect on them as an individual and may affect their private life. A public authority will need to consider this as part of fairness, in weighing the legitimate public interest in transparency against the interference in their rights as individuals.

Example
Decision notice FS50276863 concerned a request to the Financial Services Authority (FSA) for a list of staff in the Enforcement/ Investigation team. The FSA disclosed the names of managers but withheld the names of investigators below that level under section 40(2).

The Commissioner found that the junior investigators had a reasonable expectation of non-disclosure. The decision notice considered their seniority, to what extent their role was public-facing and their level of responsibility. While they had some degree of autonomy, they did not have senior roles and were not responsible for the outcome of investigations. While their names would be known to the companies they were investigating, this did not constitute disclosure to the world at large. Although they had this level of contact they did not represent the 'public face' of the FSA. While they exercised a

degree of judgement, they were not accountable or responsible for the outcome of investigations.

In balancing their rights and freedoms with the legitimate interest in disclosure, the Commissioner acknowledged a general public interest in transparency about the FSA's investigations. However, he did not accept the requester's argument that their names should be disclosed so that their employment histories could be investigated, since they were already subject to employment and background checks.

Example
In Decision notice FS50146907, the Commissioner found that releasing information including names and contact details of all the lawyers in the Treasury Solicitor's Department (TSol) would not breach the first DPA principle. This included details of junior lawyers in the department.

The Commissioner found that they did not have a reasonable expectation of non-disclosure since they exercised a significant level of judgement, gave opinions and corresponded on the basis of a high level of legal knowledge. TSol had argued that disclosure "may cause disruption of their work through indiscriminate approaches or unwarranted attention from members of the public and cause distress to individual lawyers" (paragraph 62), but the Commissioner found that they were sufficiently senior to be able to deal with this.

There was a legitimate interest in transparency and in knowing that they were qualified to perform their roles. Disclosure would not cause unwarranted interference with their rights and freedoms since the information related only to their professional lives and there was no evidence that it would compromise their safety or lead to harassment.

Names in documents

58. It is often the case that information requested under FOIA includes the names of employees, for example the author of a document, the senders or recipients of internal emails or the attendees at a meeting. A public authority should follow the general approach outlined above to decide whether it would be fair to release this information.

59. If the nature of the information is such that disclosing the name of an employee would cause them harm or distress, for example by exposing them to threats or reprisals, then disclosure may well be unfair.

60. In assessing whether employees can have a reasonable expectation that their names will not be disclosed, key factors will include their level of seniority and responsibility and whether they have a public facing role where they represent the authority to the outside world. A junior employee whose name appears on an email simply because they are organising a meeting or distributing a document in an administrative capacity would have a reasonable expectation that their name would not be disclosed.

61. It is also necessary for a public authority to consider what constitutes the legitimate interest in disclosure. If a request concerned the reasons for a particular decision or the development of a policy, there may be a legitimate interest in full transparency, including the names of those officials who contributed to the decision or the policy.

62. The decision as to whether it would be fair for a public authority to release the name therefore depends on a number of factors and must be decided in the circumstances of the request. The following case illustrates how the First-tier Tribunal applied this approach.

Example
The First-tier Tribunal case of *Alasdair Roberts v the Information Commissioner and the Department for Business Innovation and Skills*, (EA/2009/0035, 26 May 2010) concerned a request for the names of the creators of documents held in the Department's electronic document and records management system, Matrix. The First-tier Tribunal found at paragraph 25 that whether the civil servants concerned could have a reasonable expectation that their names would not be disclosed depended on a number of factors including their seniority, their role and the nature of the subject matter.

> "In general terms we think that a senior civil servant (by which we mean someone at Grade 5 or above) would not have a reasonable expectation of anonymity in respect of any document, even one with sensitive content (although even then there may be an occasional

exception). At the more junior levels we think that anonymity is a reasonable expectation although that expectation may lessen with increasing seniority and be influenced by the extent to which he or she occupies a public facing role."

An official below the level of senior civil servant may still occupy "a post with a representational role which required their identity and responsibilities to be known." On the other hand, if their names were associated in the metadata with thesaurus terms relating to, for example, animal rights, this could make them a target for extremists in a manner that would prejudice their rights and freedoms.

Registers of interests

63. Many public authorities maintain a register of interests in which senior staff are required to record, for example, business interests, shareholdings, property ownership and other outside interests, such as membership of clubs and societies, that could potentially give rise to a conflict of interests with their position in the authority. A public authority may need to record this information in order to monitor any potential conflict of interest, and the scope of the register could include officers below the most senior level who nevertheless make decisions affecting the public or involving the expenditure of public money. If this information is requested under FOIA, the public clearly have a legitimate interest in knowing that any potential conflicts are monitored, to ensure that the decisions and actions of officials are not influenced by their private interests. There is a legitimate interest in transparency in order to foster trust in public authorities. At the same time, such information by its nature is primarily about the private lives of these officials. It is therefore necessary for a public authority to consider what information it would be fair to release. Relevant factors will include the seniority of the employees concerned and the extent to which disclosure would impact on their private lives. The following example shows how these issues can be addressed in practice.

Example
Mr Greenwood v the Information Commissioner and Bolton Metropolitan Borough Council and *Bolton Metropolitan Borough Council v the Information Commissioner and Mr Greenwood* (EA/2011/0131 & 0137, 17 February 2012) concerned a

request for the register of interests of officers held by Bolton Council. The register contained entries relating to Principal Officers on a salary band starting at £27,000 as well as Chief Officers, Directors and the Chief Executive. The register therefore included employees well below the level of Senior Civil Servants in central government, for which the threshold is £58,200. In considering whether the information was exempt under section 40(2), the First-tier Tribunal took a nuanced approach:

> "… the Tribunal considers that seniority is material to the expectation of Officers and is satisfied that there is less of an expectation for disclosure of personal data in the interests of transparency for the more junior grades. Both in terms of consistency of application (e.g. they would have no expectation of their salary being disclosed) and also because there are checks and balances above them in terms of line managers with decision making power. Additionally the Tribunal is satisfied that the type of information recorded will affect the expectation of the Officers. The more it relates to work or professional life the less expectation that it would remain private. However, there would be a greater expectation of privacy relating to information which but for the potential for conflict with Council business, is wholly independent of an Officer's role at the Council." (paragraph 29)

In the case of Principal Officers they found that only their names and job titles and the department and section in which they work should be disclosed. This would show that they had made a declaration on the register, but to disclose any further details would be unfair. In the case of Chief Officers, the Tribunal decided that it would be fair to release the details of their interests, but not their home address or their membership of other organisations unrelated to their work, or information that constituted personal data about third parties. It would also be unfair to release sensitive personal data relating to their political or religious beliefs or trade union membership.

Good practice

64. Authorities should list in their publication scheme the information about employees that they routinely make

available, such as organisation charts and salaries of senior staff or salary ranges. This will include information that they are required to publish by law or that they publish as a result of the move towards greater transparency in the public sector. Read our guidance on publication schemes for more information.

65. As data controllers under the DPA, public authorities have a duty to ensure that employee data is adequately protected, but they also have a duty to respond to requests under FOIA. They should not create unreasonable expectations amongst their employees as to what data will be withheld. Authorities should have a general policy on releasing employee information in response to FOIA requests. Such a policy should be reasonably constructed, avoiding, for example, a simple cut-off point based solely on grade or seniority and should take account of the move towards greater transparency. While they must consider each request on its own terms, having a general policy will help employees to form a reasonable expectation of what information may be released about them. It will also assist potential requesters to see what information is likely to be released. As an example, the ICO's policy on disclosure of employee information is published on our website; this reflects our own situation as a public authority and the criteria in our policy may not necessarily apply to other authorities.

66. It is not possible to envisage every type of request in a general policy. In novel or controversial cases, authorities should be prepared to consult with employees and take account of their views, while recognising that the wishes of the employees do not ultimately determine whether the information should be released. It is up to a public authority to decide whether to release information, following the criteria and the approach we have outlined in this guidance.

Other considerations

Requests from employees for their own data

67. This guidance is principally concerned with requests from third parties for information about employees. If an employee requests information about themselves, this is exempt from disclosure under FOIA by virtue of section 40(1), which is an absolute exemption. This is because employees already have the right under section 7 of the DPA to request their own personal data. The exemption in section 40(1) effectively

means that such requests are handled as subject access requests under the DPA, not FOIA.

'Category (e)' personnel data

68. As noted above under the heading 'Personal data about employees', the definition of personal data in section 1(1) of the DPA includes what is often referred to as 'category (e)' data. This is data that is held by a public authority but which is not electronic or intended to be processed electronically or held in a relevant filing system or an accessible record. An example of this could be when, following a meeting with an employee, a manager made some handwritten notes about the employee which they kept as an aide memoire but which were not scanned or transcribed onto a computer and which were not intended to be placed on the employee's personnel file. For a full explanation of the definitions of data in the DPA, see our separate guidance on Determining what information is data for the purposes of the DPA).

69. Under the DPA section 33A(2), category (e) data that relates to personnel matters is exempt from the data protection principles. This means that the employee cannot obtain it under a subject access request. If the employee submitted a FOIA request, the information would also be exempt under FOIA section 40(1) because it "constitutes personal data of which the applicant is the data subject". The employee therefore has no right to receive this information under FOIA or DPA. If someone else submitted a FOIA request for the same information then the exemption in FOIA section 40(4) would be engaged, because the employee does not have the right to access it, but this exemption is qualified, not absolute; the public authority would have to decide whether the public interest in maintaining the exemption outweighed the public interest in disclosure.

Representatives of other organisations

70. As well as receiving requests about their own staff, an authority may receive requests that involve disclosing the names of employees or representatives of other organisations, for example, people from outside bodies who attended a meeting with the authority. In such cases, the question is whether disclosure would be exempt under section 40(2) because it would contravene the DPA principles. Some of the considerations discussed elsewhere in this guidance will apply in these cases. The fact that, for example, someone has

attended a meeting, albeit as a representative of another organisation, is personal data about them.

Example
In *Department for Business, Enterprise and Regulatory Reform v ICO and Friends of the Earth* (EA/2007/0072, 29 April 2008) the Information Tribunal considered whether the names of representatives of the CBI who met with officials at DBERR were personal data. They found at paragraph 19:

> "…in relation to the facts in this case that the names of individuals attending meetings which are part of the Disputed Information are personal data. This is because the individuals listed as attendees in the minutes and elsewhere in the Disputed Information will have biographical significance for the individual in that they record his/her employer's name, whereabouts at a particular time and that he/she took part in a meeting with a government department which would be of personal career or business significance."

71. The more senior the representative of the other organisation, the more likely it is that it would be fair to release their names. Also, if someone normally acts a spokesperson for the other organisation, disclosure of their name is more likely to be fair. This is particularly the case when the other organisation is lobbying the public authority in order to influence it; in such cases there should be a general expectation that names will be released.

Example
In *Creekside Forum v ICO and Department for Culture Media and Sport* (EA/2008/0065, 28 May 2009) the Information Tribunal distinguished between the names of private individuals and junior officials and those of lobbyists:

> "… the Tribunal is satisfied that no individual working on behalf of or representing an organisation (including lobbying groups) would have an expectation that their details would remain private unless they had expressed a concern. Being representatives of an organisation there would be less general expectation of privacy. The contact details are work or those of the organization concerned rather than home details. They are no doubt

accountable to their membership or company and would therefore expect some degree of scrutiny". (paragraph 70)

Environmental Information Regulations

72. When information requested from an authority is environmental information as defined in the EIR regulation 2(1), then the request must be dealt with under the EIR, and, if that information includes personal data (for example about employees), then the personal data must also be considered under EIR. The EIR include regulations relating specifically to personal data, which largely correspond to FOIA section 40.

73. Under regulation 5(3), the duty to make environmental information available on request does not apply to personal data where the requester is the data subject. If the information is personal data about someone other than the requester, a public authority cannot release it if it is exempt under regulation 13, which corresponds to FOIA sections 40(2)-(4).

74. There is a very close correspondence between the EIR and FOIA in relation to the exemptions for personal data. Therefore, the considerations outlined in this guidance apply equally to requests that fall under the EIR. The fact that the personal data in question is also environmental information does not mean that a public authority is more or less likely to disclose it.

Example
ICO decision notice FER0409841 concerned a request to the Department of Culture Media and Sport (DCMS) for information about the decision by the Secretary of State not to list Slough Town Hall as a building of special architectural or historic interest. The DCMS withheld the names and contact details of junior officials on the basis of EIR regulation 13.

The Commissioner agreed that this information was personal data and found that it was exempt from disclosure because the condition in regulation 13(2)(a)(i) was satisfied. Disclosure would breach the DPA principle 1; it would be unfair to the junior officials concerned because they had a reasonable expectation that their details would not be disclosed. The Commissioner considered that "they are not responsible or accountable for the submissions to the Minister and it would

be unfair to disclose their names in a way that would suggest otherwise." (paragraph 45)

This reflects the issues discussed above under the heading 'Reasonable expectations'.

More information

75. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.

76. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

77. If you need any more information about this or any other aspect of freedom of information or data protection, please contact us: see our website www.ico.gov.uk.

Annex: text of relevant legislation

Freedom of Information Act

FOIA section 40:

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if—

> (a) it constitutes personal data which do not fall within subsection (1), and
>
> (b) either the first or the second condition below is satisfied.

(3) The first condition is—

> (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—
>
> > (i) any of the data protection principles, or
> >
> > (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
>
> (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

(5) The duty to confirm or deny—

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

…

(7) In this section—

- "the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
- "data subject" has the same meaning as in section 1(1) of that Act;
- "personal data" has the same meaning as in section 1(1) of that Act.

Data Protection Act

DPA section 1(1):

"data" means information which—
(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
(b) is recorded with the intention that it should be processed by means of such equipment,
(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system,
(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68; or

(e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d)
…
"personal data" means data which relate to a living individual who can be identified—
(a) from those data, or
(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

Environmental Information Regulations

EIR regulation 2:

Interpretation
2.—
…
(4) The following expressions have the same meaning in these Regulations as they have in the Data Protection Act 1998, namely—

(a) "data" except that for the purposes of regulation 12(3) and regulation 13 a public authority referred to in the definition of data in paragraph (e) of section 1(1) of that Act means a public authority within the meaning of these Regulations;
(b) "the data protection principles";
(c) "data subject"; and
(d) "personal data".

EIR regulation 5:

Duty to make available environmental information on request
5.—(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.
…
(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

EIR regulation 12:

Exceptions to the duty to disclose environmental information

12.—

…

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

EIR regulation 13:

Personal data

13.—(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

(2) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene—

(i) any of the data protection principles; or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(**1**) (which relate to manual data held by public authorities) were disregarded.

(3) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of that Act and, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

…

(5) For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether

such information exists and is held by the public authority, whether or not it holds such information, to the extent that—

(a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded; or
(b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of that Act.