

29 June 2022

Dear

Complaint in respect of Request for Information – reference ATISN 16304

Thank you for your letter of 1 June 2022 asking us to review our decision to withhold information regarding your request for information with the above reference. In your request you asked for:

All available documents relating to the Minister for Climate Change's decision in April/May this year to agree to payment of a third party claim regarding a cycle accident where the Welsh Government (WG) accepted liability and has paid compensation to the claimant.

You have also asked where the accident happened, when, why the WG accepted liability and how much compensation was paid.

Although we confirmed that we held no information on any claim where WG accepted liability, we were able to identify a case where compensation that was paid but where no liability was accepted and we understood this to be the case you were asking about. Nevertheless the information was withheld, citing Section 40(2) of the Freedom of Information Act (FOIA), as the information held constitutes personal data.

You have asked us to reconsider our reasoning and public interest arguments as follows:

1. Please consider again whether revealing the sum paid would lead to the identification of the claimant. Likewise, revealing the nature of the accident.

2. Please consider whether there is a public interest in revealing the above, for reasons of transparency and accountability, and to be sure that lessons have been learned from the case.

The case in question is a unique one. This has allowed us to identify the case you are interested in, but also presents challenges as the release of any information might lead to identification of the third party. You specifically asked us to consider whether revealing the sum paid, on its own, would reveal the identification of the claimant.

Section 40 Exemption – Personal Data

In considering whether the exemption has been correctly applied, I must first consider whether the information withheld is personal data. If it is not personal data then S.40 of the FOIA cannot apply. Only if the information is found to be personal data do I need to further consider whether disclosure of the information would be in breach of the Data Protection principles

Personal Data

The DPA defines personal data as “any information relating to an identified or *identifiable* individual” (my emphasis). In this case the data, including the sum paid out, is clearly a unique settlement that relates to the claimant. It is personal data relating to the individual’s claim and is personal data. However your query is whether the sum paid out, of itself, and without other documentation we have withheld, would represent *identifiable* personal data.

In my consideration of whether this question was correctly considered by officials, I have made reference to ICO case reference FS50821908 (June 2019) where the Crown Prosecution Service (CPS) similarly withheld amounts of compensation to a small number of individuals because release of the information would be likely to reveal the identities of claimants.

Nevertheless I bear in mind that each case must be evaluated on its own merits and have also reviewed relevant notes and representations that indicate why the information may be identifiable in this specific case.

In the ICO decision upholding the CPS decision to withhold information under FOIA S.40, they said, inter alia:

27. The second part of the test is whether an individual can be identified from the withheld information.
28. The complainant disputed that disclosure of the requested information would disclose personal details.

29. Having viewed the withheld information, the Commissioner accepts that the numbers within the scope of the request are low.
30. The Commissioner is also mindful that the issue to be considered in a case such as this is whether disclosure to a *member of the public* would breach the data protection principles.
31. She accepts that different members of the public may have different degrees of access to the ‘other information’ needed for re-identification to take place.¹
32. A test used by both the Commissioner and the First-tier Tribunal in cases such as this is to assess whether a ‘motivated intruder’ would be able to recognise an individual if he or she was intent on doing so. The ‘motivated intruder’ is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.
33. The ICO’s Code of Practice on Anonymisation notes that: “*The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA*”.
34. In summary, the motivated intruder test is that if the risk of identification is reasonably likely, the information should be regarded as personal data.
35. The CPS argued that the withheld information: “... *could have the potential to have a high impact on an individual or organisation therefore it is likely to attract a ‘motivated intruder’*”.
36. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to CPS staff member(s). She is satisfied that this information both relates to and identifies the staff member(s) concerned. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
37. She has reached that conclusion on the basis that the focus of the information is the individual(s) who were paid compensation and that the information is clearly linked to those individual(s) because it is about the nature of the claim(s) and the amount of compensation paid.

¹ <https://ico.org.uk/media/for-organisations/documents/2614720/personalinformation-section-40-and-regulation-13-version-21.pdf>

38. In the circumstances of this case, the Commissioner is further satisfied that the individual(s) concerned would be reasonably likely to be identifiable from a combination of the requested information, the low number of individuals involved and other information which is likely to be in, or come into, the possession of others.

This case is comparable with the above case in that I understand that this accident was a unique circumstance with significant and identifiable impact upon the claimant. In the CPS case there were small numbers affected, and that is the case here. However the CPS case differs in that locale is known in that case whereas in this case no locale has been indicated.

I believe paragraphs 32 and 33 in the above ICO case are significant. The *motivated intruder* test could be applied in this case. Even though the locale of the accident is not known, it remains the case that *some* motivated intruder might be able to make use of knowledge that is available in the public domain, including through news reporting and through mosaic requests, to identify the individual. This would particularly be true of those who live in the same locale as the claimant. As release under FOI is release to the world, the information supplied would be available to any member of the public, including those who would be in a position to identify the claimant.

As in the CPS case, identification of the claimant would have high impact, as would identification of the size of award received. This would make it reasonably likely that a motivated intruder might attempt to use this knowledge to identify the claimant. Thus this meets the threshold for personal data exempt under Section 40(2) of the FOIA.

Would disclosure contravene the data protection principles?

I must now consider whether officials correctly assessed that disclosure of the information would contravene the data protection principles.

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.

I have been made aware of a court anonymity order in this case that prohibits the disclosure of any personal data relating to the claimant. Disclosure of the personal data would not be lawful – indeed it would be a contempt of court.

I therefore uphold our decision to apply FOIA S.40

Section 44 – Prohibitions on Disclosure

Having reviewed the case and having been made aware of the above mentioned court anonymity order that imposes upon WG a duty to keep the claimant's identity and other personal data confidential, I am also of the view that officials should have cited Section 44(1)(c) of the FOIA, which states:

Prohibitions on disclosure.

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

(a) is prohibited by or under any enactment,

(b) is incompatible with any, or

(c) would constitute or be punishable as a contempt of court.

As there is a court order prohibiting disclosure of identifying information regarding the claimant, the identifying information is also exempt under this section of the FOIA. That is to say disclosure of the information is prohibited by court order, and release of the information would constitute or be punishable as a contempt of court.

This exemption, like section 40, is an absolute exemption and is not subject to the public interest test.

I apologise that this exemption was not also cited in the original response, although I note that as the information is exempt under S.40, as per our original response, it was correctly withheld.

If you remain dissatisfied with this response you also have the right to complain to the Information Commissioner at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Tel: 01625 545 745

Fax: 01625 524 510

Email: casework@ico.gsi.gov.uk

Also, if you think that there has been maladministration in dealing with your request, you have the option to make a complaint to the Public Services Ombudsman for Wales who can be contacted at:

Public Services Ombudsman for Wales
1 Ffordd yr Hen Gae

Pencoed
Bridgend
CF35 5LJ

Telephone: 0845 6010987 (local rate)
Email: ask@ombudsman-wales.org.uk

Yours sincerely

Ruth Conway
Deputy Director for Public and Integrated Transport