

Freedom of Information Act 2000: Section 40(2)

Section 40(2) together with the conditions in section 40(3)(a)(i) or 40(3)(b) provides an absolute exemption if disclosure of the personal data would breach any of the data protection principles.

‘Personal data’ is defined in sections 3(2) and (3) of the Data Protection Act 1998 (‘the DPA 2018’) and means any information relating to an identified or identifiable living individual. 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.

We have concluded that, in this instance, the information requested contains third party personal data.

Under Section 40(2) of the FOIA, personal data is exempt from release if disclosure would breach one of the data protection principles set out in Article 5 of the GDPR. We consider the principle being most relevant in this instance as being the first. This states that personal data must be:

“processed lawfully, fairly and in a transparent manner in relation to the data subject”

The lawful basis that is most relevant in relation to a request for information under the FOIA is Article 6(1)(f). This 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”.

In considering the application of Article 6(1)(f) in the context of a request for information under FOIA it is necessary to consider the following three-part test:-

- **The Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- **The Necessity test:** Whether disclosure of the information/confirmation or denial that it is held is necessary to meet the legitimate interest in question;
- **The Balancing test:** Whether the above interests override the interests, fundamental rights and freedoms of the data subject.

Our consideration of these tests is set out below:

Legitimate interests

We recognise the general public interest in transparency and accountability. However, we do not consider there to be a legitimate public interest in the disclosure

of personal data that would identify a private individual. Disclosure of the individual's identity would not enhance public understanding of Welsh Government's handling of the matter.

Necessity of disclosure

We do not consider disclosure of the personal data to be necessary. The information disclosed provides sufficient information about the substance of the correspondence and Welsh Government's consideration of the matter. Disclosure of the withheld information would serve primarily to identify a private individual rather than further public understanding.

Balancing test

The withheld information relates to a private individual who would not reasonably expect their personal data to be disclosed under the Freedom of Information Act. Given the limited public interest in disclosure of the personal data itself, we consider that the individual's rights and freedoms outweigh any legitimate interest in disclosure.

Conclusion

We have concluded that disclosure would be unlawful under the UK General Data Protection Regulation and the Data Protection Act 2018. Accordingly, the information has been withheld under section 40(2) of the Freedom of Information Act 2000. As section 40 is an absolute exemption, it is not subject to the public interest test.