FOI ATISN 26-0051 Annex 1c - Section 40(2)

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:

1. Legitimate interests

Yes. There is a legitimate interest in disclosure in terms of openness, accountability and transparency about the expertise of individuals and breath of views sought during the selection process of members of the External Accountability Group.

2. Is disclosure necessary?

No. Disclosure of the selection panels scores or notes is not necessary or proportionate to meet the legitimate interest identified above. Transparency and accountability can be achieved without revealing the panels detailed assessment and disclosure would therefore exceed what is reasonably required to meet the requester's legitimate interest.

The references contain the personal views and opinions of the referees who provided them. The referees were consulted and have not consented to the disclosure of the information they provided as it was based on their personal opinion. We therefore consider that disclosure is not necessary or proportionate for the purposes of meeting the identified legitimate interest.

3. The balance between legitimate interests and the data subject's interests or fundamental rights and freedoms.

No. The interests, rights and freedoms outweigh the legitimate interest in disclosure of the scores or notes. The requester can already see from the information provided, that relevant steps were taken to ensure references were verified and disclosure of any other contributor would therefore be unnecessary.

As release of the information would not be legitimate under Article 6(1)(f), and as no other condition of Article 6 is deemed to apply, release of the information would not be lawful within the meaning of the first data protection principle. It has therefore been withheld under section 40 of the Freedom of Information Act. Section 40 is an absolute exemption and not subject to the public interest test.