



Ministry
of Justice

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Date: March 2023

Dear Sir or Madam

Freedom of Information Act (FOIA) Request – 230221034

Thank you for your request dated 22nd February 2023, in which you asked for the following information from the Ministry of Justice (MoJ):

Further to the information supplied in response to FOI request 230130004 concerning the interim guidance for considering Parole Board recommendations for transfer to open conditions, I would like to request the following information under the Freedom of Information Act.

- *The job title of the person taking the decision on whether or not to accept a Parole Board recommendation for transfer to open conditions in upper cohort cases, and in lower cohort cases where the Head of PEC or Head of PPCS decides to refer the case to that person.*
- *The experience, training and qualifications of that person which are relevant in exercising this function.*
- *Copies of any instruction or guidance (provided in correspondence, email or any other communication) that the person either received from or gave to the secretary of state to explain the meaning of the following phrase in the note explaining the procedure adopted from 4 May 2022:*

“In addition, the Secretary of State is clear xxx wants to take a more precautionary approach”.

Your request has been handled under the FOIA.

I can confirm that the MOJ holds some of the information you have requested, and I have provided some of it below and attached.

Section 21(reasonably accessible)

In response to your first question, this information is exempt from disclosure under section 21(1) of the FOIA provides that information is exempt from disclosure if the information requested is already reasonably accessible to the requester.

Section 21 is an absolute exemption which means there is no requirement to carry out a public interest test if the requested information is exempt.

Information about job title of the person taking the decision on whether or not to accept a Parole Board recommendation for transfer to open conditions can be found in the following link:

<https://www.gov.uk/government/publications/generic-parole-process-policy-framework>

Please see paragraphs 5.8.2 and 5.8.4.

Section 40(2)(personal data)

Turning to your second question, the MOJ will not be releasing the experience, training, or qualifications of the postholder, because that is their personal data exempt under Section 40(2).

Section 40(2) of the 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. In this case the relevant condition is contained in section 40(3A)(a). 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').

- The first step the MOJ considered was to determine whether the withheld information constitutes **personal data** as defined by the Data Protection Act 2018 ('DPA').
- Secondly, if the MOJ is satisfied that the requested information is personal data, then the MOJ went on to consider whether disclosure of that data would breach any of the DP principles.

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

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.

Your FOI request is asking about the specific experience, training, and qualifications, of the postholder. Therefore, the information being requested is clearly *relating to*, and *linked* to a specific individual. Your FOI request has the specific postholder as its

main focus and thus the information requested meets the definition of personal data according to Section 3(2) of the DPA.

The MOJ considers that the information under consideration in this case, clearly constitutes an individuals' *personal data*. In the circumstances of this case, the MOJ believes that the requested information, if disclosed, would clearly relate to the post holder, and that accordingly that information also constitutes their personal data. The MOJ have reached that conclusion on the basis that the focus of the information is of the specific individual and is linked to them. The MOJ is satisfied that the wording of the request makes it clear that the information requested could only relate to the member of staff in that specific post. The FOIA deems certain, limited, specific personal information, about senior staff members, especially those with public facing, or external public facing roles, to be disclosable. However, we can confirm that the postholder being referred to does not have an external public facing role that involves dealing directly with public, nor do they have a public profile. Therefore, they have a reasonable expectation that the specific personal data being requested would not be disclosed to the public. They have also confirmed to us directly that they do not consent to the disclosure of their personal information. Consequently, in the circumstances of this case, having considered the withheld information, the MOJ is satisfied that the information both relates to, and identifies, a specific member of staff. This information therefore falls within the definition of '**personal data**' in section 3(2) of the DPA.

The second element of the test considered by the MOJ was determine whether disclosure would contravene any of the DP principles.

The most relevant DP principle in this case is principle (a).

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.*'

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.

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. The ICO Ref: FS50762699, section 30 references the need for consideration of the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned) when considering whether disclosure of personal information is fair.

Section 40(2) is an absolute exemption and does not require a public interest test under the FOIA. Although s40 is an absolute exemption, we have considered whether there is a wider legitimate interest in disclosing this personal information, that would override the fundamental rights of those concerned, and fact they have not consented to any such disclosure.

The MOJ does not consider that there is a pressing social need to interfere with the privacy rights of the data subject: the postholder, to disclose the withheld information (which they have refused to provide consent to disclose). Individuals have a clear and strong expectation that their personal data will be held in confidence, and not

disclosed to the public under the FOIA. Especially when they have explicitly not consented to such disclosure and when there is no legitimate interest, or necessity, for any such disclosure to occur. Any legitimate interest, or necessity, in ensuring the right person is in the job is already met without the need for such disclosure under FOI. The MOJ would argue it is already met because that is the purpose and function of the rigorous, comprehensive, recruitment process that already occurs within MOJ which ensures that the appropriate qualified person, with all the necessary experience and skills are awarded the appropriate job based on their merit. Additional disclosure under FOI to allow additional scrutiny of postholders suitability is thus unnecessary. The recruitment process of appointing the postholder involves an anonymised shortlist process, whereby a diverse panel will score applicants and identify how many applicants will progress to the next stage of the process. All applicants are required to meet the pre-agreed minimum qualifying criteria to be progressed to the next stage. All shortlisted candidates are invited to an interview, where they are assessed by a diverse panel.

This above-described careful recruitment, process means further scrutiny and disclosure of personal data regarding the postholder, by disclosing their personal information to everyone under the FOIA, would be unjustified, and thus unfair disclosure. If disclosure is unfair it can not occur under the FOIA.

The MOJ is mindful that disclosure under FOIA is disclosure to the world at large. Therefore, the effect of complying with this FOI request would be that the staff member's personal details were effectively being publicly disclosed and would be accessible to anyone, for any purpose. As the MOJ has concluded that the necessity test has not been met, we have not gone on to consider the balancing test in this case. The MOJ believe releasing the withheld, requested information, into the public domain would be unlawful; the personal information is therefore exempt from disclosure under section 40(2).

Lastly, regarding your third question, the MOJ have interpreted your question as asking whether the person who sent out the note to Public Protection Casework Section staff on 4th May 2022 received any instructions or guidance from the Secretary of State to explain the phrase *"In addition, the Secretary of State is clear xxx wants to take a more precautionary approach"*. The MoJ does not hold any information in the scope of your request. The FOIA does not oblige a public authority to create information to answer a request if the requested information is not held. The duty is to only provide the recorded information held.

Outside the scope of the FOIA, and on a discretionary basis, I can for your advice and assistance, confirm that the Root and Branch, published in March 2022, sets out this view in point 66, which states *"We also intend to reform how this decision-making process works for offenders recalled to custody and offenders moved to open conditions, to ensure this precautionary approach is being applied consistently."* The Root and Branch Review was previously provided to you in our response to your last FOI request which had the case reference number 230130004 which was sent on 17th February 2023.

Appeal Rights

If you are not satisfied with this response, you have the right to request an internal review by responding in writing to one of the addresses below within two months of the date of this response.

data.access@justice.gov.uk

You do have the right to ask the Information Commissioner's Office (ICO) to investigate any aspect of your complaint. However, please note that the ICO is likely to expect internal complaints procedures to have been exhausted before beginning their investigation. The Commissioner is an independent regulator who has the power to direct us to respond to your request differently, if he considers that we have handled it incorrectly.

You can contact the ICO at the following address:

Information Commissioner's Office online portal
<https://ico.org.uk/make-a-complaint/foi-and-eir-complaints/>

Postal address

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

Yours sincerely


Public Protection Operational Policy & Support (PPOPS)