

Working Assumption – Public and Senior Civil Service Appointments

Category of information

1. Any information relating to public appointments or senior civil service appointments, including information about candidates or possible candidates, and details of the methodology of the appointment or recruitment exercise, including job specifications, selection criteria and assessment of candidates.

Working assumption

2. **Release:** Information, other than personal data, relating to the selection exercise, including job specifications, advertising and selection criteria, types of questions asked and anonymised statistical information on the results of the exercise, such as how many people applied and how many were interviewed.

Names of panel members, once the exercise has been completed, unless this would clearly prejudice the willingness of board members to take part in future exercises.



Personal data about a candidate who makes a subject access request under the Data Protection Act 1998 (subject to the exemptions to the right of subject access in that Act).

Withhold: Personal data and any information which might identify candidates or potential candidates, including notes made of interviews and assessments of candidates, recommendations made to Ministers and details of processes which might lead to identification of candidates or potential candidates (e.g. date/location of interviews).

Any information identifying those who took part in the recruitment, such as panel members, should be withheld while the appointment exercise is still running.

Any information relating to a contract with a recruitment agency whose disclosure would prejudice the commercial interests of the agency or the department. Also, any information which, if disclosed, would, or would be likely to, prejudice any other person's commercial interests (e.g. information which would prejudice candidates' existing employment).

3. Relevant exemptions may be:



- s40 (personal information),
- s35 (formulation of government policy) - in particular s.35(1)(a),
- s36 (prejudice to effective conduct of public affairs) – in particular s.36(2)(b) and (c),
- s 41 (information provided in confidence) if the information was obtained from any other person and if disclosure of it would constitute an actionable breach of confidence,
- s43 (commercial interests).

Reasons for the assumptions

4. Details of vacancies, whether of senior civil service posts or public appointments will normally be in the public arena. Even if they are not routinely made public, it is unlikely that harm would arise from disclosure of such information. It is also likely to be the case that the methods employed to identify and recruit people to such posts will be either in the public arena, or will not attract any exemption from disclosure. Only where disclosure of the recruitment procedure might prejudice the procedure itself, and hence the future supply of suitable candidates might an exemption apply to this type of information.



5. Section 40 of the FOIA provides exemption from disclosure for certain personal data – i.e. information concerning a living identifiable person. Disclosure of such personal information must be considered in terms of the Data Protection Act 1998 (DPA). Where releasing personal data about another individual (candidate or board member) would breach any of the data protection principles in that Act, s40 of the FOI Act is an absolute exemption. Broadly speaking, requesters will be entitled to information about themselves (subject to any exemptions in the DPA) but requesters will only be entitled to information about other individuals where that would be considered reasonable in terms of the DPA. Disclosure of an individual's personal data must comply with the data protection principles, in particular the first principle (fair processing) which requires that, among other things, one of the conditions set out in Schedule 2 to that Act is met. The conditions are:

1. The data subject has given consent to the processing.

2. The processing is necessary—

(a) for the performance of a contract to which the data subject is a party, or



(b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract

4. The processing is necessary in order to protect the vital interests of the data subject.

5. The processing is necessary—

(a) for the administration of justice,

(b) for the exercise of any functions conferred on any person by or under any enactment,

(c) for the exercise of any function of the Crown, a Minister of the Crown or a government department,
or

(d) for the exercise of any other functions of a public nature exercised in public interest by any person.



6.—(1) 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.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.

6. Candidates It is unlikely that the disclosure of personal data held on any candidates would be legitimised by one of the above categories (although a candidate might conceivably consent to disclosure of such information, if it suits his or her interests to do so.). Information which would identify, or could lead to the identification of any candidate, including assessments made of them and possibly dates and locations of interviews, should therefore be withheld, both during and after the exercise. Some of this information might be disclosable once the exercise has concluded, such as dates and times of interviews.



7. Board members Information identifying or concerning any member of a sift panel or recruitment or assessment board should usually be withheld while the exercise is continuing. Once the appointment process is over, it is more likely to be reasonable to disclose the identities of people who constituted an interview panel, especially for filling a very senior and public post, in order to demonstrate that the selection had been made by people possessed of the necessary knowledge and qualities to make that choice. Such disclosure might be legitimised under Schedule 2 section 5(d) or 6(1). Whether disclosing information is appropriate in these circumstances will depend on the context. There clearly is a public interest in disclosing who is making such important decisions, and if there is no difficulty in getting people to serve on a panel, it would be difficult to argue that the public interest requires their identity to be withheld. On the other hand if we have good evidence that it is extremely difficult getting people to serve on a particular panel, and that the risk of publicly identifying panel members would make it harder to find appropriate members to serve in future, that could swing the public interest balance away from disclosure and towards withholding.
8. Formulation of policy/free and frank advice. S 35 may be relevant where the information held concerns the formulation of



government policy. It is more likely, however, that s36(2)(b) may be engaged, for example where advice has been given to Ministers (but only if it can be shown that the free and frank provision of advice to Ministers, or the free and frank exchange of views, would, or would be likely to, be inhibited. In each case, where it is proposed to withhold information, a public interest balancing test must be carried out. There is a public interest in being reassured that appointment exercises are carried out fairly and efficiently. However, Ministers must also be able to consider recommendations put to them and consider alternatives. Disclosure of such advice might deter those offering such advice from being fully frank and open.

9. It should be noted that there is already independent scrutiny of ministerial public appointments as all departments are required to follow the Commissioner for Public Appointments' Code of Practice. An important part of the Code is that an OCPA-trained Independent Assessor must be involved in all public appointments processes. In addition, the Commissioner is charged with the responsibility of investigating complaints against departments' handling of appointments processes. This might reduce the public interest in disclosure of the information.
10. Confidentiality Where information has been given and confidentiality has been requested, or there is an implied duty of



confidentiality, this information might be withheld under s41, but only where the information is genuinely confidential. Simply marking a document as being in confidence does not automatically give it the necessary quality of confidence. Only where disclosure of the information would constitute an actionable breach of confidence in the courts will there be a reasonable prospect of s41 applying. Where a panel member has insisted on his identity being kept confidential, including after the conclusion of the exercise, we might well accept the duty of confidentiality, especially if there were few alternative members. In those circumstances, his identity should be kept confidential.

11. Commercial interests Requests for information concerning contractual relationships with outside firms, such as recruitment agencies, should be considered in the light of whether any commercial harm would arise from disclosure of any elements of the contract. It may well be possible to disclose much of the contract while withholding any commercially sensitive information under s43. Any information relating to a contract with a recruitment agency whose disclosure would prejudice the commercial interests of the agency or the public authority should be withheld. Also, any information which, if disclosed, would, or would be likely to, prejudice any other person's commercial interests (e.g. information which would prejudice



candidates' existing employment) should be withheld. Any assertion of commercial confidentiality should be assessed on a case by case basis.

12. Timing The timing of disclosure will be relevant. Identifying assessment board members before an interview could expose them to lobbying or undue political or other influence. Disclosure of their identities after the selection had been made would be less likely to expose them to such pressures. Although there should be a presumption that names may be disclosed, especially in the case of more senior appointments, such disclosure might prejudice the ability to mount successfully future recruitment exercises, as people might not wish to be involved in the recruiting process if their names are likely to be released. The likelihood of this occurring will need to be considered on the facts of each case. It would clearly not be in the public interest if the best people for a recruitment exercise (particularly a high-level one) were not involved.

Referral points

13. Working assumptions do not fit all situations. The referral points set out below describe specific situations where the working assumption (either to release information or withhold information) should not be used. The fact that the assumption



does not apply **does not mean you should automatically release the information.** In these circumstances, the information request should be **referred** to a more senior member of staff, or a dedicated FOI practitioner, for them to consider:

- You do not think the assumption applies to the information;
- The request states that the applicant is asking for an internal review of an earlier decision to refuse to release information – working assumptions are only designed to be used on the first occasion that information is requested. Appeals against decisions to withhold information may need more careful consideration and should therefore be referred;
- Part or all of the information is already in the public domain, either through official channels, or through leaks or unattributable briefing. In these cases, the assumption could have the effect of confirming that a leak has taken place. In all such cases, extra care is needed to ensure that refusals to release information are more carefully framed to avoid this, and all cases of this type should be referred.
- The information relates to a matter covered by the Environmental Information Regulations (EIRs). The EIRs have



been closely aligned with the FOI Act to ensure that there are as few operational differences as possible. However, there are some differences between the two regimes, particularly in that some of the exceptions in the EIRs are worded differently from the FOI Act exemptions, and all of the EIR exceptions are subject to the public interest test. If there is any doubt as to whether or not information is covered by the EIRs, the case should be referred. Further guidance on the EIRs can be found at <http://www.foi.gov.uk/guidance/exguide/sec39/chap02.htm> and <http://www.defra.gov.uk/corporate/consult/envinfo/index.htm>

