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# Pay Transparency, Information Access Rights and Data Protection Law: Exploring Viable Alternatives to Disclosure Orders in Equal Pay Litigation

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ABSTRACT

Equal pay litigation is often highly technical, with a drawn out and costly legal battle for claimants. This is somewhat because of the way equal pay law is constructed, as the requirement to have specific, named comparators can be an area of intense dispute. The complexity and length of cases look set to increase as the parameters of equal pay for work of equal value are explored, and occupational segregation is challenged in the employment tribunals and courts. This article considers one of the largest obstacles to quick and efficient equal pay litigation: the imbalance of access to information between employer and employee. The difficulties of applications for disclosure orders are discussed, alongside pay transparency measures and the recent proposals for a right to direct access to a suspected comparator's pay data. We consider whether the proposed right is a viable, swifter route to information parity and greater efficiency in equal pay litigation, in light of the experience of freedom of information requests regarding equal pay. Specifically, we note the tension that may arise between the 'Right to Know' a comparator's pay, and the data protection obligations of the employer.

## 1. INTRODUCTION

One of the largest obstacles for claimants in equal pay cases is the power imbalance regarding access to knowledge and evidence collection. Equal

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pay claims rely on access to a wealth of factual evidence regarding the pay, duties, skills and responsibilities of the comparator. All of the information necessary to succeed in an equal pay claim will be within the employer's grasp, putting the claimant at a significant disadvantage. Recent large-scale equal pay claims against supermarkets evidence the necessity, but also the complexity, of disclosure orders in equal pay cases. In this article, we consider how freedom of information (FOI) law, and with it data protection law, may provide access or barriers to information necessary to establish equal pay claims. Whilst looking at this framework, we consider potential problems that the proposed 'Right to Know' – a suggestion modelled on FOI and intended to grant access to a comparator's pay information – may encounter.

First, we consider the structure of equal pay law in the UK and some of the longstanding criticisms of the framework. We use the ongoing supermarket claims as evidence of the increasing complexity and protracted nature of these claims, especially for situations where there is occupational segregation. The progressively challenging nature of equal pay is exacerbated by the inequality of access to information experienced by the claimant, as they may require access to not only specific pay scales or pay information, but potentially also the names of their specific comparators, who they may only know as a class or group of individuals.

Second, we consider what current and prospective tools exist in the UK to increase pay transparency and reduce the information gap for equal pay claimants. We note the considerable role of disclosure orders in the scheme of equal pay law, and the encouraging acknowledgement from the employment tribunals of information-access disparity when considering whether to make an order. We also note the potential issues with applications for disclosure orders. Particularly, their ability to protract and complicate already lengthy and technical equal pay proceedings.

Third, we set out the framework of freedom of information and highlight how information access rights can be used to unearth and challenge pay inequality. Within this discussion, we note not only the weaknesses within the FOI system itself, but also the inherent tension between FOI law and data protection regulation. An employer's data protection obligations can act as a shield against requests for pay information, which can significantly hamper the ability for FOI to act as a tool for pay transparency.

Finally, we provide key lessons for the potential implementation of the 'Right to Know' that can be taken from the FOI framework. We note how there may be a similar tension between the regulation of data protection and the 'Right to Know' legislation, and how particular exceptions to data

protection obligations might circumvent this. Most importantly, we discuss how the data protection tension may hamper the achievement of the faster and more efficient disclosure of information under the 'Right to Know', if the employer's obligations in this field are not considered during drafting and implementation.

## 2. EQUAL PAY IN THE UK: THE INDIVIDUAL ENFORCEMENT AND COMPARATOR MODEL, OCCUPATIONAL SEGREGATION AND ACCESS TO INFORMATION

The principle of equal pay between men and women has existed in UK legislation since 1970,[1] requiring employers to give the same remuneration (and in general, the same working terms) to men and women doing broadly similar work, work rated as equivalent by a job evaluation scheme or work of equal value.[2] Two fundamental factors of equal pay law in the UK are the subject of long-standing criticism: the individual enforcement (or 'complaints-led' model), and the comparator-assessment model. Broadly, criticism revolves around the fact that the equal pay obligation on employers is not the subject of general oversight, but instead it is up to individual employees to enforce the law when an employer fails to realise equality of pay.[3] Moreover, unlike other areas of discrimination, equal pay requires the claimant (usually a woman)[4] to name a specific comparator or group of comparators with whom she is claiming she is treated less favourably than.[5] The complaints-led nature of equal pay in the UK has been criticised for the burden it places on claimants, in an area of law fraught with technical considerations and lengthy court processes.[6]

These criticisms become increasingly valid as the law on equal pay grows in complexity. The type of comparisons that can give rise to a claim of unequal pay has broadened, bringing greater benefits and challenges to the legal enforcement of pay parity. By far, the inclusion of the EU concept of equal

[1] Equal Pay Act 1970.

[2] Equality Act 2010, s.65(1).

[3] S. Fredman, 'Reforming Equal Pay Laws' (2008) 37 *ILJ* 193, 207.

[4] Ibid. 196.

[5] Equality Act 2010, s.64(1)(a); unless the claimant can rely on Section 71 of the Act and use a hypothetical comparator under the general sex discrimination provisions. Section 70 prevents reliance on the provisions on general sex discrimination for the purposes of rectifying unequal pay, unless the equality clause imposed cannot take effect in a pay disparity dispute due to the lack of a comparator.

[6] See (prior to the passing of the 2010 Act) Fredman 'Reforming Equal Pay Laws' (2008) 37 *ILJ* 193–218; see also *IDS Emp. L. Brief* (2010) 900, 9–27.

pay for work of 'equal value' is the most 'radical in its potential to pierce the stereotypes attached to "women's work".'[7] Like work – meaning work that is the same or broadly similar[8] – and work rated as equivalent under a job evaluation scheme undertaken by the employer[9] are 'matters of relatively observable fact'.[10] They provide an avenue for redress in reasonably straightforward cases[11] where the working situation of two individuals is directly comparable, and thus inequality of pay is most likely to be linked to sex. Equal work of equal value is considered where the work undertaken by the claimant, and that undertaken by her comparator, are neither similar nor rated as equivalent but the claimant's work is 'equal to [the comparator's] work in terms of the demands made on [the claimant] by reference to factors such as effort, skill and decision-making'.[12] Therefore, equal value challenges both overt pay discrimination, and pay inequality that stems from occupational segregation. The equal value avenue has the most potential to rectify inequality of pay between the sexes, but also the potential to complicate and prolong equal pay proceedings. The more subjective factors for comparison make it difficult for courts and tribunals to consider 'work of equal value',[13] and for the complainant to choose a comparator.

A useful example of the increasing complexity in this area of law is the ongoing, large-scale challenges to pay parity faced by supermarkets.[14] In these

[7] See S. Fredman, 'Inching Forward: Preliminary Victory for Equal Value at Tesco and Asda' (2022) 51 *ILJ* 166, 173.

[8] Equality Act 2010 s.65(2)(a).

[9] Equality Act 2010 s.65(4).

[10] I. Smith, A. Baker and Owen Warnock, *Smith & Wood's Employment Law*, 14th edn (Oxford: Oxford University Press, 2018), 305.

[11] Although we do not dispute the complexity that can arise in the undertaking and scrutiny of job evaluation schemes, a thorough examination of this is outside the scope of this article.

[12] Equality Act 2010 s.65(6)(b).

[13] Thus, a tribunal can appoint an independent expert who is skilled in value comparisons, to compile a report on the matter: Equality Act 2010, s131.

[14] D. McGuigan, 'Co-op Workers Succeed in First Stage of Equal Pay Battle', *HR Magazine*, 2022, available at <https://www.hrmagazine.co.uk/content/other/co-op-workers-succeed-in-first-stage-of-equal-pay-battle> (27 April 2022, Date accessed); *Asda Stores Ltd v Brierley* [2021] 3 WLUK 428; K. Prescott 'Asda Workers Win Key Appeal in Equal Pay Fight', *BBC*, 31 January 2022, available at <https://www.bbc.com/news/business-56534988> (27 April 2022, Date accessed); S. Neville, 'Morrisons Workers Win Key Legal Battle in Equal Pay Fight', *Independent*, 28 September 2021, available at <https://www.independent.co.uk/business/morrisons-workers-win-key-legal-battle-in-equal-pay-fight-b1928480.html> (27 April 2022, Date accessed); S. Butler, 'Sainsbury's Faces Equal Pay Battle With Female Shop Workers', *Guardian*, 9 July 2015, available at <https://www.theguardian.com/business/2015/jul/09/sainsburys-faces-equal-pay-battle-with-female-shop-floor-workers> (27 April 2022, Date accessed); K. Ahmed, 'Tesco Faces Record £4bn Equal Pay Claim', *BBC News*, 7 February 2018, available at <https://www.bbc.com/news/business-42968342> (27 April 2022, Date accessed).

claims, supermarket workers (mostly women) are claiming pay parity with distribution centre (mostly male) workers. Supermarkets had assumed, and continue to argue, that these roles are not comparable, a presumption which is thus far failing under judicial scrutiny.[15] Although whether the roles do constitute work of equal value is yet to be fleshed out, the matter of whether a comparison of the two can be undertaken for equal pay purposes has been settled, but not without a protracted legal battle up to the Supreme Court.

Section 79 of the Equality Act requires the claimant's comparator to be working for the same employer or an associated employer, either at the same establishment as the claimant[16] or at another establishment with common terms to the claimant.[17] Employers are associated if '(a) one is a company of which the other (directly or indirectly) has control, or (b) both are companies of which a third person (directly or indirectly) has control.'[18] In essence, the concept of associated employers allows a 'limited lifting the corporate veil' to ensure that certain employment obligations are not being evaded or undermined by the use of corporate structures.[19] For instance, in equal pay law, it removes the possibility of an employer ensuring that their workforce cannot demonstrate that they fulfil the 'same employment' requirement, by segregating their workforce under different (but related) companies, or separate locations. Whilst this is a useful legal concept for the protection of a few statutory employment rights, it is somewhat imperfect.[20] By regulating the matter of associated employers through determining 'control', the concept is broadened in some instances and limited in others.[21] Moreover, it is not unrealistic to imagine that the use of very complex corporate structures could prevent two employers being considered associated, and thus allow the evasion of specific employment rights.[22] The issue of associated employers also adds a layer of complexity into certain litigation

[15] The Supreme Court in *Asda Stores Ltd v Brierley* (discussed below), and (pre-Brexit) CJEU in C-624/19 *K v Tesco* [2021] ECLI:EU:C:2021:429 has ruled that distribution centre workers can be a comparator for supermarket workers in the UK.

[16] Equality Act 2010 s.79(3).

[17] Equality Act 2010 s.79(4).

[18] Equality Act 2010 s.79(9).

[19] See Z. Adams, C. Barnard, S. Deakin and S. Fraser Butlin, *Deakin and Morris' Labour Law*, 7th edn (Oxford: Hart Publishing, 2021) 2.55.

[20] Ibid.

[21] Ibid. For instance, the authors consider *Poparm Ltd v Weekes* [1984] IRLR 388where the majorities of two companies were owned by a single person and his wife, and the same person and his brothers, respectively. The companies were not associated employers, because no person or same group of people could control both companies.

[22] Ibid.

areas, making the resolution of disputes lengthier and costlier. This has been an issue in equal pay claims, where employers have contested whether comparators are working for an associated employer on the basis that they do not share 'common terms'.

The variety and complexity of pay (and corporate) structures that can exist make it difficult to know in advance whether a claimant meets the requirement of being employed by an associated employer,[23] as it is unclear whether particular pay structures are legal or not until they are litigated,[24] which can take years.[25] The scope of comparability between workers who are physically separate or work for separate corporate personalities is especially important in cases concerning equal value and occupational segregation, as the segregation precludes any direct comparison through the avenue of like work *and* is likely to mean that the comparators do not work in the same place as the claimant or under the same corporate personality. Thus, the only way to allow equal pay scrutiny of occupational segregation in certain cases is for the claimant and their comparator to be on 'common terms'. In *North v Dumfries and Galloway Council,*[26] Lady Hale noted that the threshold for meeting the 'same employer' obligation in comparator choice should not serve as a shield for employers who utilise occupational segregation.[27] The Court has established a simple manner of determining whether the threshold of the same employer is met. The tribunal is not required to conduct a term-by-term comparison of the work terms, which would essentially constitute the core of an equal pay claim at the preliminary (comparator choice) stage.[28] Instead, it should consider whether, if the separate site of work were physically located at the same premises as the claimant, the terms and conditions of employees within would remain the same.[29] Despite this being a relatively settled matter,[30] the large supermarket claims

[23] Other than very straightforward instances of individuals being employed in the same capacity, and the same place, which is less likely than the kind of systematic pay discrimination that evolves from segregated work allocation.

[24] Fredman (n 7).

[25] See Fredman (n 7), 166-173 on *North v Dumfries and Galloway Council* [2013] UKSC 45, which took seven years to conclude.

[26] *North v Dumfries and Galloway Council* [2013] UKSC 45.

[27] *North v Dumfries and Galloway Council,* at [34].

[28] Fredman (n 7), 169-170.

[29] See *North v Dumfries and Galloway Council,* [30]-[33].

[30] See *Leverton v Clwyd County Council* [1989] ICR 33, [1989] IRLR 28; *British Coal Corporation v Smith and others* [1996] IRLR 404*, North v Dumfries and Galloway Council.*

have involved lengthy proceedings through the Court structure (including the CJEU[31]) to determine if supermarket workers' pay can be compared to that of distribution centre workers via the 'common terms' avenue. This highlights (as noted by Fredman) 'both the tenacity of employers and the murkiness of the statutory wording'.[32] It may be hopeful that UK law has now firmly established that cross-site comparison is possible, as the *Asda* case found that the store employees and distribution centre employees could have 'common terms'. Still, it is clear that the preliminary matters in equal pay cases remain complex, especially where occupational segregation is concerned and that employers are willing to pursue disputes on these matters all the way up the Court structure.

Another historical criticism of equal pay law, that is the focus of this article, is that the named comparator model is especially difficult given the inequality of access to knowledge/evidence.[33] The employee's lack of requisite knowledge affects equality law throughout the claim process. Firstly, the claimant needs to be aware of their right to equal pay in the first instance, in order to bring a claim and utilise the individual enforcement model. Whilst individuals may be aware that they should be paid the same as a member of the opposite sex doing exactly the same job, their awareness of their right to equal pay for equal value may be limited. Cases of more covert pay disparity, such as occupational segregation, may therefore go widely unchallenged. Even when individuals are aware of their right to equal pay for equal value, their access to the evidence needed to establish their claim might be limited, as the employer holds all information regarding the pay, duties, job descriptions and work terms of the comparator. Whilst this has always been a problem for equal pay claims, the nature of factual evidence is becoming more complex with the rise of equal value claims, as the potential comparators may not even be visible or accessible to the claimant.

The relationship between pay transparency and the efficiency of equal pay as a legal tool is clear, 'unless a woman knows that a man who is doing equal work to her is being paid more, she cannot know whether she is being paid equally.'[34] To choose a comparator, the claimant requires access to knowledge relating to the pay and business structure of their employer.

[31] See *K v Tesco Stores* (n 15).
[32] Fredman (n 7), 167.
[33] Fredman (n 6), 206–7.
[34] HC vol. 682 (2020) Column 910 – Stella Creasy MP introducing the EPIC bill to Parliament at its first reading.

Later, in the equal value assessment, they will need access to the particulars of their comparator's employment, ie regarding their remuneration, but also the level of skill, effort and decision-making that is undertaken in their role. The access to information gap is a cause that has recently been taken up by the Fawcett Society, who have suggested a reform to equal pay law that would allow potential claimants better direct access to pay information of individuals they suspect to be a comparator.[35] Access to information about potential comparators is not only necessary for establishing that there is work of equal value, but also for *naming* the comparators and determining the scope of the claim. In the following section, we consider the current and prospective tools available to alleviate the difficulties faced by claimants attempting to collect the vital data for their claim, and assess the role that disclosure has played in equal-value claims.

## 3. ATTEMPTS TO RECTIFY ISSUES OF TRANSPARENCY AND EVIDENCE IN UNEQUAL PAY DISPUTES

At present, the Equality Act goes as far as to prevent an employer contractually prohibiting employees from discussing pay in relation to the existence of discrimination.[36] It does not require employers to make evidence of this available, unless an ongoing equal pay claim is established.[37] The onus is therefore on potential claimants to ask their male colleagues about potential pay disparity. These claimants may not be able to identify the 'right' colleagues to ask, or may be unable to ask. Even when an individual does take steps to ask, there may be no guarantee that the information is accurate without corroboration from their employer, which they are unlikely to get unless the employer is legally obligated. Access to knowledge/evidence is therefore an imperative part of the individual enforcement model of equal pay. Certain steps have already been taken to tackle the issue of pay transparency, both inside and outside the distinct provisions of equal pay law.

[35] See Fawcett Society Introduction of the EPIC Bill, available at <https://www.fawcettsociety.org.uk/news/50-yrs-since-equal-pay-act-fawcett-launches-bill-to-modernise-law> (27 April 2022, Date accessed).

[36] Equality Act 2010, s77. This does not include general prohibitions on pay discussion: See IDS Employment Law Brief: 'Equality Act 2010: the Future of Fairness?' (2010) *IDS Emp. L. Brief* 900, 9–27.

[37] i.e. via a disclosure order application, discussed in more detail below.

### A. Pay Transparency Reporting Obligations

Since 2017, private and voluntary sector employers with 250 employees[38] or more have been required to publish yearly gender pay gap reports.[39] The pay gap reporting Regulations require employers to publish (for example) the difference between the average hourly rate of pay paid to male and female employees;[40] the difference between the average bonus paid to male and female employees;[41] the proportions of male and of female employees who receive bonuses;[42] and the relative proportions of male and female employees in each quartile pay band of the workforce.[43]

Pay transparency reporting is important for recognising and defining the scope of the gender pay gap in the UK. Nonetheless, these reports are not particularly useful for plugging the knowledge gaps that constitute an obstacle to establishing an equal pay claim. For instance, they do not give enough information for potential claimants to identify that they have been subject to pay discrimination with specific comparators. It should be noted that this is not the goal of pay reporting, and that the reporting requirement does not even contain the duty to rectify unequal pay that is unearthed.[44] However, there is some link between pay gap transparency and equal pay. The public availability of this information may inform individuals if their current employer has a large gender pay gap, and could lead them to consider their own pay situation or equal pay proceedings. The reporting also means that employers with reporting obligations should be collecting data and should be aware of the breakdown of pay allocation, which leaves less room for them to argue during legal proceedings around pay that the disclosure of documents would be too onerous or disproportionate. The reporting system is therefore important for highlighting gender pay gaps, and

[38] A limit that the Fawcett Society has suggested lowering to 100, see J. Hand and V. Hooton, *Gender Pay Gap - time for a change?*, *SLSA Blog*, 2022, available at <http://slsablog.co.uk/blog/blog-posts/gender-pay-gap-time-for-a-change/> (13 August 2022).

[39] The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017.

[40] Ibid. s.2(a) and (b).

[41] Ibid. s.2(c) and (d).

[42] Ibid, s.2(e).

[43] Ibid, s.2(f).

[44] See Fredman (n 7) on the difference between the UK reporting requirements and the proposed EU reporting requirements in COM(2021) 93 final Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.

ensuring there is a baseline of data collection for many employers, but does not go very far to provide evidence to potential equal pay claimants.

### B. Prospective Rights and the 'Right to Know'/Fawcett Bill

Stella Creasy MP, supported by the Fawcett society, introduced the Equal Pay Implementation and Claims (EPIC) Bill that would give women the 'Right to Know'.[45] This would create a legal right to pay data of a potential male comparator, without a claimant having to go through the time, expense and stress of the court process to gain this information.[46] As we discuss below, the route to a disclosure order for this information can be lengthy, expensive and constitute a significant hindrance to the advancement of an equal pay claim. A 'Right to Know' would remove this obstacle to the enforcement of equal pay, if done correctly.

Baroness Prosser introduced the Equal Pay Bill[47] in January 2020,[48] but the bill fell at the end of the parliamentary session and will need to be re-introduced. The bill proposes to insert an s.77A into the Equality Act 2010, giving employees who suspect a colleague of being a comparator the right to the following information:

> (a) where B [the suspected comparator] is an individual, B's gross annual basic pay and hours worked in respect of such pay;
>
> (b) where B is a group of workers performing the work in question, a list in rank order for each worker in that group of their gross annual basic pay and hours worked in respect of such pay;

The right would also extend to information regarding other benefits, i.e. bonuses, overtime, performance-related pay,[49] and information about any terms that exist in the comparator's contract that do not exist in the claimant's contract.[50] Under the suggested regime, should an employer (or ex-employer) receive a request, they would have 20 working days in which to respond, providing the information.[51] Should the employer fail to

[45] HC vol. 682 (2020); the EU Commission has also suggested implementing a 'Right to Know' in EU law (ibid), see also James Hand and Victoria Hooton (n.38).

[46] Ibid, column 911.

[47] Equal Pay Bill [HL] (HL Bill 65).

[48] Equal Pay Bill [HL] HL vol. 801 Column 1337.

[49] Proposed s.77A(c), Equal Pay Bill.

[50] Proposed s.77A(d), Equal Pay Bill.

[51] Proposed s.77A(6), Equal Pay Bill.

respond, or only partially respond, then the employee would have to make use of the court process to gain a disclosure order if they want access to the information. This would mean starting equal pay proceedings (as discussed below), but the proposed changes to the Equality Act would mean that if the claimant does this, the employer might be liable for any costs associated with the application for the order.[52]

So far, there is no information on how the request for pay data would need to be made, nor on how the response from the employer should be formatted. Should the bill pass, the Secretary of State will have to flesh out these details, when drafting Regulations to allow access to information.[53] It is likely that the system would work similarly to sending and receiving a data subject access request under the UK General Data Protection Regulation, or freedom of information request under the Freedom of Information Act 2000.[54] As we will discuss in more detail later in this work, the setting up of the Right would have to grapple with the possibility of a conflict with data protection law. Whilst streamlining the process of evidence collection would be a welcomed addition to equal pay law, this should not be done in a way that can be deflected by an employer's data protection obligations.

At present, the only way to get information about the pay of a potential comparator (unless, of course, the employer is forthcoming with this) is through a disclosure order. We will show in the next section why this is a complex and protracted process, even when the tribunal recognises the need to put the parties in an equal pay claim on equal footing. The benefit of the disclosure process is that it cannot be evaded by data protection law, as it falls under an exemption from the employer's data protection obligations as per s3(2) of Schedule 11 of the Data Protection Act 2018, because it is the disclosure of information by court order.

Since the entire point of the 'Right to Know' would be to remove the need to start legal proceedings and gain a court order, it is unclear how the right could interact with data protection law, or whether it would fall under an exemption. There is some leeway regarding prospective legal rights, which may create an exemption from data protection law for the right:

[52] Proposed s.77C(1), Equal Pay Bill.

[53] Proposed s.77A(3), Equal Pay Bill.

[54] Addleshaw Goddard LLP 'Commentary on New Equal Pay Bill', 2020, available at <https://www.addleshawgoddard.com/en/insights/insights-briefings/2020/employment/employment-up-to-date-january-2020/equal-pay-new-equal-pay-bill/> accessed on 26 October 2022.

3(3) The listed provisions do not apply to personal data where disclosure of the data—

(a) is necessary for the purpose of, or in connection with, legal proceedings (including prospective legal proceedings),
(b) is necessary for the purpose of obtaining legal advice, or
(c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights

The 'Right to Know' would be inherently linked to the right to equal pay, and enforcement of that right, so it could fall under this exception. However, at this stage, it is impossible to know how access to the information would be granted. Therefore, it is important to establish how disclosure orders work, what existing data access rights may be used in lieu of such orders, and how they interact with the data protection framework.

## C. Disclosure Orders in Equal Pay Claims

Disclosure orders are currently the strongest avenue of support for equal pay claimants seeking to gain access to information held by their employer that is necessary to advance their claim under the Equality Act. Disclosure orders may oblige employers to release evidence pertaining to, for instance,[55] job titles and roles of comparators, their employment contracts and their pay information.[56] A tribunal is permitted to make a disclosure order for any documents that are 'necessary for fairly disposing of the proceedings.'[57] This power can only be used once equal pay proceedings have begun. Claimants cannot, for instance, undertake 'fishing expeditions' and ask for the disclosure of documents that would let them *find* and *start* an equal pay claim.

The proceedings of the ongoing equal pay claim against Tesco provide insights into the role of disclosure in equal pay claims, particularly Tesco's appeal to the Employment Appeal Tribunal (EAT) against an extensive

[55] For cases where the claimant is unaware of who the comparator may be. In cases where the claimant is aware of specific comparators and only faces difficulties providing a specific name, the Tribunal should follow Rule 4(b)(i) of the Equal Value Rules of Procedure in Schedule 3 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

[56] IDS Employment Law Brief 'Equal pay/practice and procedure: EAT upholds extensive order for disclosure in mass equal pay claim' (2021) *IDS Emp. L. Brief* 1136, 17–20.

[57] Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 Para 31; interpreted in *Canadian Imperial Bank of Commerce v Beck* [2009] IRLR 740 CA.

disclosure order.[58] The claimants in the proceedings, mostly women workers from Tesco stores, had been able to give very little information on their comparators during the initial stages of the claim. They highlighted that they intended to compare their work (of equal value) with that of employees in the distribution centres, but that the pleading of like work, work rated as equivalent, or the naming specific comparators could not be done until information had been provided by Tesco during the course of proceedings.[59] Tesco released documentation relating to job titles, descriptions, and training of warehouse operatives.[60] The employment tribunal became the arena for a dispute regarding any further disclosure of documents that would actually aid the advancement of the equal pay claim by allowing the employees to choose specific comparators.

Although the outcome of the claim was ultimately positive for the employees, with the disclosure order being made and upheld, the procedure highlights how disclosure order applications are a lengthy and potentially expensive process for claimants to go through during their pay disputes. Given the complexity of other preliminary issues (ie 'common terms' as noted above, and the equal value assessment itself), it is understandable why calls for a reform of the law relating to access to information have been made.

### (i) The Disclosure Order

In the proceedings against Tesco, the claimants requested access to the pay information of comparators in the distribution centres, descriptions of their job role and any potential 'material factors' that Tesco might rely on to justify the difference in pay. Tesco argued that this information would be outside the scope of what is relevant for the identification of comparators and that it would be onerous to collect and hand over.[61] Tesco also submitted at the preliminary hearing that the request for information was a 'fishing expedition' because the claimants had not yet established a prima facie case if they could not give the particulars of their comparator.

An order was made for the disclosure of the job roles of hourly paid staff at distribution centres, annual pay statements agreed between Tesco and

[58] *Tesco Stores Ltd v Element* [2021] 1 WLUK 474.
[59] IDS Brief (n 56); *Tesco Stores Ltd v Element,* (n 58)[4]-[6].
[60] *Tesco Stores Ltd v Element,* (n 58)[12].
[61] Ibid. [13].

the relevant trade union(s) of the distribution centre staff, a copy of all contracts relating to each distribution centre with a listed range of activities and a gender breakdown of all hourly paid roles.[62] This was upheld by the EAT during Tesco's appeal. Several key issues – for the purposes of this article – arose in the proceedings. Firstly, the tribunal and appeal tribunal paid careful attention to the existence of the information gap between employee and employers when considering the procedural rules for the granting of disclosure orders, which is very encouraging. Secondly, the rules and principles of disclosure discussed seemed tricky to pin down with certainty, which is less encouraging. Finally, the tribunal appeared to place much weight on the fact that the case was one of mass litigation, which potentially dilutes the potency of disclosure order applications for smaller cases.

### (ii) The Consideration of the 'Information Gap' in Equal Pay Claims

The tribunal at the preliminary hearing, and the EAT, took care to note the power imbalance between Tesco and the claimants, relating to access to evidence. It was reiterated during the preliminary hearing that the role of the Tribunal is to 'ensure that the parties are on an equal footing'[63] and therefore it was kept in mind that 'the claimants do not have access to this information. The respondent does have access to it and should be able to provide it, I would hope, relatively quickly.'[64] Since Tesco did not provide any reason why it would be particularly difficult to provide the documents ordered, and they would be required to collect some of the data due to their gender pay gap information obligations, the Tribunal did not find it disproportionate to ask for the information to be given to the claimant. The EAT also re-stated the overriding objective of the tribunal in making the order: ensuring that the parties are on equal footing, alongside other objectives laid out by the Employment Tribunal Regulations.[65] The objective of ensuring the parties are on equal footing is especially important in equal pay cases, given the nature of the information that can be necessary to establish the particulars of the claim.

[62] Ibid. [18].
[63] Ibid. (Citing the original tribunal), [20].
[64] Ibid. (Citing the original tribunal), [20].
[65] Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 Rule 2; *Tesco Stores Ltd v Element* (n 58), [27].

During its discussion of whether to grant the order, the EAT paid particular regard to the nature of equal pay claims, noting that the threshold for how well-established the prima facie claim should be should not be unduly high in mass litigation for equal pay, because:

> the claimant might be one of many in a predominantly female section of her employer's organisation who considers that her work could well be equal to that of at least some, or all, of the higher-paid male employees in a predominantly male section. Such a claimant may have very little or no information about potential comparators, what they do and precisely how much they are paid. […] The difficulties with obtaining information increase as the scale of the claims and the number of potential comparisons grows. […] Certainly, it would be highly unlikely, at the initial stages of a mass Equal Pay claim, to identify any specific comparators either by name or otherwise.[66]

The EAT noted that it was not suggesting that the rules of disclosure are particularly lax in equal pay claims, but simply that the tribunal has to bear in mind the power imbalance and difficulties faced by claimants in accessing information, the deprivation of which directly interferes with enforcement of their rights.[67] Thus, a claim which is brought in broad terms is not necessarily a 'fishing expedition', and it is questionable whether there is a need to demonstrate a *prima facie* case, but if there is such a threshold to be met then it only requires a case to not be manifestly unreasonable.[68]

This is encouraging from the perspective of the increasingly complex nature of equal pay claims. Although the preliminary matters (such as comparator choices) may be difficult to establish, claimants are not expected to do so without access to the requisite information. However, some aspects of the decision are less reassuring. The principles underpinning the granting of disclosure orders do not seem to have been fully clarified, and the tribunal seemed to be swayed heavily by the mass litigation element.

### (iii) The Principles behind Disclosure Orders in Equal Pay Claims

In the Tesco litigation, the EAT summarised that a tribunal has the discretion to order disclosure, in light of the overriding objectives mentioned above, of any documents which 'are relied on by a party, or are likely to

[66] *Tesco Stores Ltd v Element* (n 58), at [63].
[67] Ibid. [65].
[68] Ibid. [69]-[84].

support or be adverse to a party's case.'[69] These are the documents that are necessary for the fair disposal of proceedings, and documents relating to job role and pay could clearly fall under this in equal pay disclosure applications.

The representation for Tesco argued that there should have been no disclosure order, as the claimant had not yet established a prima facie case. Instead, the application for an order was a mere 'fishing expedition'. Tesco relied heavily upon the finding in *Leverton v Clwyd County Council*,[70] that employees cannot use discovery to *make* a case.[71] In *Leverton*, the claimant (a nursery nurse working for the council) applied for a disclosure order for the pay information of male clerical staff who also worked for the council. No specific members of staff were named, but the claimant relied upon a document where the council had accepted a pay disparity between nurses and clerical staff.[72] The Council argued against the making of an order, because only 10% of clerical staff were male and there was nothing to suggest the male members of that group were paid more than the claimant.[73] Although the *Leverton* claimant's relatively weak pleadings were accepted as having established proceedings, and the disclosure order was made, Tesco relied upon the fact that the Tribunal held that a prima facie case is required, and disclosure orders could not be used to discover evidence to make out a case.[74]

The basis for Tesco's argumentation that the claimants had failed to make a case was that they were considering every male distribution centre employee as a comparator, and did not specify with which employee they were doing comparable work.[75] This was 'absurd', because it would include comparing store-based employees with distribution centre managers, which would not give rise to an equal pay claim. Tesco argued that applications to disclosure information for that the best comparator can be found are fishing expeditions,[76] so an order should not be granted in such instances.

[69] Ibid. [28]; Alongside disclosure requests, the EAT summarised that requests for information also require similar considerations, in that the granting of a request for information will depend on the necessity and proportionality of doing so, and that requests amounting to a fishing expedition would not be granted see [29]-[36].

[70] *Leverton v Clwyd County Council* [1985] IRLR 197.

[71] *Tesco* (n 58), [39]-[40]; *Leverton*, ibid [11].

[72] See *Tesco* (n 58), [39].

[73] Ibid.

[74] *Leverton* (n 70), [11].

[75] *Tesco* (n 58), [42].

[76] Ibid. [42].

Essentially, Tesco was arguing that a claimant would have to show that they have the particulars of their claim fleshed out, ie be able to show named comparators and identify how the work is of equal value, before a disclosure order can be made. To accept such an evidentiary threshold would have a drastic consequence on the ability of claimants to enforce their right to equal pay, something which the EAT noted and rejected.[77]

The EAT found that there clearly was an equal pay claim in process,[78] as the pleadings had been submitted (albeit in broad terms), so there was no 'fishing expedition'.[79] For the EAT, it was clear that the claimant was not trying to find a claim, but trying to narrow down an existing one. Concerning the argument that there was no *prima facie* case made out, the EAT refused to accept that there is an evidentiary threshold for this beyond 'reasonable prospects of success'. Specifically, only in cases where there is manifestly no case to be heard could the *prima facie* case threshold prevent the tribunal from making a disclosure order, such as the example given by Tesco, of a store worker trying to draw comparison with a manager.[80]

The EAT's findings on this matter are promising, as they make clear that the threshold for obtaining a disclosure order is not prohibitively high. That does not, however, mean that the disclosure order system itself is not a problematic part of the equal pay framework. There are questions left unanswered by the EAT's discussion around disclosure, which leaves the door open for any complexity or uncertainty to elongate future equal pay claims requiring an application for discovery. The main uncertainty revolves around the principles on fishing expeditions, and the potential evidentiary requirements of the *prima facie* case.

The EAT dealt with the matter of a potential fishing expedition relatively quickly, by pointing to the fact that the claimant had formulated a claim and thus was not trying to establish one through disclosure. Yet the discussion highlights that the rule on fishing expeditions is not as clear-cut as the outcome suggests. Disclosure is obviously not permitted where a claimant has not gotten so far as to identify a potential comparator (or group of comparators) or unequal pay basis. They are not allowed to request information for 'a complaint […] of which they know nothing or which has not yet been pleaded.'[81] The EAT accepted that this rule extends to where the

[77] Ibid. [76].
[78] Ibid. [70].
[79] Ibid. [73].
[80] Ibid. [84].
[81] Ibid. [70]; White Book 2022 18.1.13.

would-be-claimant knows 'something', rather than just 'nothing', ie when a claimant asks for disclosure of documents that would cover more than the claim they have already pleaded, highlighting that they are gathering evidence for another (or a broader) claim than the one currently established. The EAT did not accept that there was authority 'for the proposition that in *any* case where the requester knows something of the case to be pleaded but has not yet done so, a request for information amounts to "fishing".'[82] Whilst the EAT made it quite clear that cases where the 'essential ingredients of the claim' have been pleaded are not fishing expeditions, there is some room for employers to argue over the matter of a potential fishing expedition where the request for information is fairly broad and the claimant knows 'something' but has not particularised their claim. The parameters of 'knowing nothing', 'knowing something' and having an established claim are not yet clear.

Even more explicitly, the EAT could not decipher whether there is a requirement to show a *prima facie* case when applying for disclosure.[83] The EAT found there is no authority suggesting there is an evidentiary burden that the pleadings must meet before a disclosure order can be made.[84] Instead, so long as the documents requested are of a relevant nature, the decision revolves around whether disclosure is necessary for fair disposal of proceedings. Disclosure is likely to be necessary unless the claim is one with no reasonable prospect of success, ie one that is purely speculative. Again, room is left for future cases to argue that there is a threshold, as the EAT could not establish whether there is no threshold or just a low one. Even if there is no threshold for the *prima facie* case, there will be room for employers to argue that the claim has no reasonable prospects of success.

Whilst the outcome of the Tesco disclosure case is not prohibitive, in that it permits orders even where the pleadings of the case are non-specific (or even relatively weak[85]), the uncertainty remaining about the key factors to consider in disclosure cases creates opportunities for future cases to be prolonged by appeals on these matters. The lengthy process of employers challenging these orders, alongside other preliminary issues, is a way for them to halt the progress of equal pay claims. The original order for disclosure in the Tesco case is dated November 2018,[86] with the EAT decision

[82] *Tesco* (n 58), [71].
[83] Ibid. [85].
[84] Ibid. [82].
[85] See, for instance, the discussion on *Leverton,* Ibid. at [85].
[86] Ibid. [93].

considered here being handed down in January 2021. Such delays could be the end of an equal pay claim, given the expense and stress that comes with these cases. This is especially true for cases of equal value that are not part of a large-scale litigation, but involve fewer claimants shouldering a larger portion of the financial burden that equal pay claims bring. It is not actually clear how well a smaller group of claimants would fare under the disclosure order framework, as the EAT in *Tesco* appeared swayed by the background of mass litigation.

### (iv) The Focus on Mass Litigation

When considering the necessity and proportionality of granting the disclosure order, the EAT hints that whether the case is one of mass litigation is something to take into consideration, with mass litigation seeming to heighten the threshold for what could be argued as disproportionate for the employer:

> I accept [that disclosure] should not make for an unduly onerous exercise on the part of the respondent. But this is *mass equal pay litigation*.[87] Some of the difficulties which the respondent has relate directly to the way in which it might collect any such information.[88]

Also, in the discussion of the *prima facie* case, the EAT found that it is not 'unusual' for the pleadings to be broad 'in mass Equal Pay litigation'.[89] Thus, it would not expect to see specific comparators named in 'the initial stages of a mass Equal Pay claim.'[90] It is therefore not clear how non-mass litigation would be treated. It may be inferred that in smaller claims there is the potential for disclosure to be too onerous to demand, or that there is a higher burden on the claimant to have specific pleadings and a particular comparator. This would raise the bar for a successful equal pay claim quite significantly, and reduce the ability for disclosure orders to make a real difference in equal pay claims.

In light of the length of current (and potential future) battles for information, alongside the uncertainty of whether a disclosure order will be made, it

[87] Emphasis added.
[88] *Tesco* (n. 58), [18].
[89] Ibid. [63].
[90] Ibid. [63].

is evident why there have been calls for reform regarding access to evidence in equal pay claims. In the absence of reforms regarding the 'Right to Know' at this current stage, we will consider whether the FOI framework in the UK might provide a faster and simpler avenue for the provision of evidence for claimants in equal pay cases. Assessing how pay-related information can be accessed under the FOI framework also allows us to consider any potential pitfalls of the proposed 'Right to Know'.

## 4. FREEDOM OF INFORMATION OR THE 'RIGHT TO KNOW' AS AN ALTERNATIVE TO DISCLOSURE ORDERS? POTENTIAL TENSION WITH DATA PROTECTION LAW

FOI is a catch-all term used to refer to the presumptive right of individuals to access information held by public authorities.[91] The emergence of legislation giving effect to FOI rights is a relatively new phenomenon. Approximately thirty years ago only a handful of nations had laws that guaranteed rights to public sector information, but by the turn of the century upwards of sixty countries had created bespoke legislation for this purpose.[92] A significant driver of this shift is thought to be problems stemming from the so-called 'third wave' of transitions to democracy, a term used to refer to the global spread of free and fair elections starting in the 1970s. For example, though since the 1970s leaders of Western states have usually been democratically elected, some have continued to behave dictatorially, often acting without public consultation or scrutiny.[93] As noted elsewhere, democracy is based on the consent of the citizens of a state, and that consent turns on governments informing citizens about their activities and recognising their right to participate. Without information regarding government policies and activities this participation becomes impossible.[94] Against this background we have witnessed a growing global recognition that providing information to the public is a basic, but critical, prerequisite for political and democratic accountability.[95]

[91] P. Birkinshaw, *Freedom of Information: The Law, the Practice, the Ideal*, 4th edn (Cambridge: Cambridge University Press, 2010) 29.

[92] J. M. Ackerman and I. E. Sandoval-Ballesteros, 'The Global Expansion of Freedom of Information Laws' (2006) 58 *Administrative Law Review* 86.

[93] S. P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Oklahoma: University of Oklahoma Press, 1991).

[94] D. Banisar, 'Freedom of Information Around the World 2006: A Global Survey of Access to Government Information Laws' (2006) *Privacy International* 6.

[95] J. M. Ackerman, 'Social Accountability in the Public Sector: A Conceptual Discussion' (2005) Social Development Papers: Participation and Civic Engagement Paper No. 82.

FOI laws are, therefore, primarily concerned with ensuring transparency. Most examples of FOI legislation worldwide aim to reduce the opacity of government operations and state this as their primary purpose. They tend to provide individuals with rights of access to information and/or documents held by public authorities without requiring a demonstration of any legal interest or standing.[96] Under such legislation, information is usually presumed to be accessible unless declared exempt, and requesters are not ordinarily obliged to provide reasons for their requests.

## A. The Freedom of Information Act 2000

In the UK, legal rules pertaining to FOI are primarily set out in the eponymous Freedom of Information Act 2000 (FOIA).[97] This section explains the main tenets of the legislation.

### (i) The Right to Information

Section 1(1) of the FOIA establishes a general right of access to information held by public authorities:

> Any person making a request for information to a public authority is entitled—
> (a) To be informed in writing by the public authority whether it holds information of the description specified in the request, and
> (b) If that is the case, to have the information communicated to him.[98]

The effect of this provision is clear and requires little elaboration. It entitles individuals to make requests for information to a public authority and, as a general matter, if the public authority possesses the requested information it must communicate it to the requesting individual.

### (ii) Public Authorities

To ensure maximum coverage, Schedule 1 of the FOIA provides a very wide definition of 'public authorities'. In contrast to other notable pieces of UK

[96] Banisar (n 94).

[97] The Act covers information held by public authorities in England, Wales, and Northern Ireland, and UK-wide public authorities based in Scotland. Information held by Scottish public authorities is covered by Scotland's own Freedom of Information (Scotland) Act 2002.

[98] Section 1(1)(a)-(b) Freedom of Information Act 2000.

legislation, which treat the term with ambiguity, the FOIA contains a detailed list of the institutions that fall within its ambit.[99] This list includes, but is not limited to, central government departments and agencies, local authorities, National Health Service bodies, schools, colleges, universities, the police and armed forces, regulators, publicly owned companies and the British Broadcasting Corporation.[100] Although this definition is broad, it clearly will not encompass all employers in the UK. FOI, therefore, suffers the fundamental weakness of a very strict limit on which employers may have information sought via this route. The 'Right to Know' would therefore be an equaliser between employees of public authorities and those of private employers.

### (iii) Procedure

FOI requests must be made in writing, identify the applicant, and clearly specify the information sought.[101] Upon receipt of a request the recipient public authority must inform the applicant in writing whether it holds the requested information. If the public authority holds the requested information it must communicate the information to the applicant in a permanent form, or another form that is acceptable to the applicant.[102] This must occur within twenty days of the date of request.[103] Post-disclosure, the FOIA does not impose any obligations or restrictions of information regarding future uses of the information. To this end, recipients of information received following a successful FOI request are, assuming no other common law or statutory restrictions apply, free to use it in whatever way they please and

[99] For example, section 6 of the Human Rights Act 1998 specifies that in addition to any court or tribunal 'any person certain of whose functions are functions of a public nature' will be public authorities for the purpose of the Act. It has been left to the courts to make their own determinations regarding which bodies, organisations, or people constitute public authorities in this context. See: *Aston Cantlow Parochial Church Council v Wallbank* [2003] UKHL 37 and *YL v Birmingham City Council* [2007] UKHL 27.

[100] The FOIA also makes provision for organisations to be added to the above list, and provides for another category of public authority, namely bodies that are not included on the main list, but which are designated as public authorities by the Secretary of State because they are exercising 'functions of a public nature', or 'providing under a contract made with a public authority any service whose provision is a function of that authority'. See: Section 5 FOIA.

[101] Section 8 FOIA 2000.

[102] Section 11 FOIA 2000.

[103] This period can, however, be extended to up to sixty days in some circumstances. See: Section 10 FOIA 2000.

share it with whomever they please.[104] In essence, therefore, the FOIA operates on a 'release and forget' model of disclosure, under which disclosure to one individual could potentially amount, in effect, to disclosure to the entire world.[105]

The FOI procedure seems to be the blueprint for the 'Right to Know' procedure, which shall operate, if it comes into force, in a much similar way. The 'Right to Know' would therefore not only be a part of equality law, but also the law on data access in the UK. It is important to consider the difficulties faced when requesting data under the FOIA, to understand how the 'Right to Know' would work in practice and what kind of issues may be faced by those requesting access to pay data.

### (iv) Exemptions

The right to information set out in the FOIA is not absolute. Part II of the FOIA sets out a lengthy list of exemptions that limit the types of information to which section 1(1) is applicable.[106] Notable examples of exempt information types include information obtained in confidence,[107] information relating to defence,[108] information that would prejudice international relations,[109] and information that constitutes personal data ('the personal data exemption').[110] The personal data exemption represents a major focus of this paper and is returned to and explored in greater detail below.

[104] Other areas of law may indirectly prohibit certain uses of information following a successful FOI request. For example, as per Section 171 of the Data Protection Act 2018, a person who intentionally or recklessly uses information obtained via a FOI request to re-identify 'de-identified data' without authorisation will be guilty of a criminal offence.

[105] On the challenges inherent in FOIA's 'release and forget' disclosure model, see: H. Pearce and S. Stalla-Bourdillon, 'Rethinking the "release and forget" ethos of the Freedom of Information Act 2000: Why developments in the field of anonymisation necessitate the development of a new approach to disclosing data' (2019) 10 *European Journal of Law and Technology*.

[106] The FOIA 2000 has been heavily criticised for its extensive range of exemptions, with critics arguing that too much discretion is left in the hands of public officials, thereby undermining the purposes for which it was enacted. See: R. Austin, 'The Freedom of Information Act 2000 - A Sheep in Wolf's Clothing?' in J. Jowell and D. Oliver (eds), *The Changing Constitution* (Oxford: OUP, 2007); P. Sikka, 'Using Freedom of Information Laws to Frustrate Accountability: Two Case Studies of UK Banking Frauds' (2017) 41 *Accounting Forum* 300–17.

[107] Section 41 FOIA 2000.

[108] Section 26 FOIA 2000.

[109] Section 27 FOIA 2000.

[110] Section 40 FOIA 2000.

### (v) Enforcement

The FOIA is enforced by the Information Commissioner (IC).[111] Complaints regarding the handling of FOI requests can be made to the IC who will then make a statement of compliance or non-compliance with the FOIA in the form of a decision notice that is binding on both the requester and the recipient public authority.[112] Decision notices can be appealed to a tribunal, which may uphold an appeal where a decision notice is deemed not to be in accordance with the law.[113] There is a right of appeal from the tribunal, on a point of law only, to the High Court.[114]

## B. The FOIA in the Context of Pay Transparency and Equality

As set out above, most examples of FOI legislation worldwide are primarily concerned with ensuring transparency for the sake of political accountability. The FOIA is no different in this regard. However, the FOIA has increasingly assumed an important ancillary purpose: facilitating important secondary uses of public sector information. In recent years, for example, information obtained via FOI requests has significantly contributed to the development of new medical treatments,[115] improving public services[116] and enabling social activism.[117] In the context of equal pay, observers have noted how FOI requests made under the FOIA may be a useful way of obtaining information relating to public authority salary levels and pay structures.[118] This is not a mere paper possibility. For example, in *Dicker v Information Commissioner*, the UK Information Tribunal ordered disclosure of the exact

[111] The Information Commissioner's Office (ICO) is a non-departmental body and the UK's independent regulatory office responsible for matters relating to privacy and data protection.

[112] Section 50 FOIA 2000.

[113] Section 58(1) FOIA 2000.

[114] Section 59 FOIA 2000.

[115] A. Fowler, 'The UK Freedom of Information Act (2000) in Healthcare Research: A Systematic Review' (2013) 3 *BMJ* 1–7.

[116] B. Meredith, 'Data Protection and Freedom of Information: The Law is Only a Catalyst for Changing Culture in the NHS' (2005) 330 *BMJ* 490–1.

[117] J. Beyer, 'The Emergence of the Freedom of Information Movement: Anonymous, Wikileaks, the Pirate Party. And Iceland' (2014) 19 *Journal of Computer-Mediated Communication* 141–54.

[118] H. Johnson, 'Freedom of Information Versus Data Protection' (2013) 18 *Communications Law* 97–100.

salary of the CEO of NHS Surrey after the applicant's initial FOI request had been declined.[119]

Using FOI requests to obtain information relating to salary levels and pay structures has several possible benefits over the disclosure order application process, depending on the claimant's employer, the information required by the claimant and the stage of the equal pay proceedings. In both *Leverton* and the *Tesco* litigation, the claimants sought not only information on the pay structures and employment contracts of potential comparators, but the specific names of those comparators. Later in proceedings, claimants also need access to information regarding the job role: as the skill, effort and decision-making that is required of the comparator will be what is compared to the claimant's current role. Disclosure orders can require the release of this type of information, but only with a legal battle.

Conversely, unless an exemption applies, FOI can offer an equally broad access to information without an onerous tribunal process. There is no restriction on the types of information that can be requested under the FOIA, and obtaining information via an FOI request is also likely to be considerably less resource and time-intensive than seeking a disclosure order from the employment tribunal. Obtaining an order requires an applicant to have already started equal pay proceedings, and the litigation process may be a costly and drawn-out affair potentially lasting many months or even years. FOI requests made under the FOIA, on the other hand, do not require an applicant to demonstrate any sort of standing or even provide reasons for their request, do not (initially, at least) require any litigation and in the majority of cases be resolved within a month of their submission. As one author suggests, FOI requests can be a useful tool for 'casting light on the often murky area of whether proper equal pay measures apply.'[120] A major benefit for potential equal pay claimants is that FOI access can be pure 'fishing expeditions'. Should they suspect unequal pay, they can request access to pay data via FOI and potentially use the type of information unearthed to start legal proceedings. Depending on the level of data received, they potentially may not need a disclosure order, or would at least have the evidence to show that there is a reasonable prospect of success when applying for an order. There is, however, a potential complication. Though the FOIA represents a promising avenue for obtaining information that would otherwise prove challenging to access via the disclosure order application route, attempts to

[119] *Dicker v Information Commissioner*, Appeal No EA/2012/0250, 29 April 2013.
[120] Johnson (n 118).

gain access to public sector salary information may potentially be impeded, or defeated entirely, by rules set out in the UK's data protection framework.

## C. Data Protection Law

Against the background of advancements in information technology that have occurred since the late Nineteenth Century, data protection law has emerged as a distinct field of legal practice.[121] This development has predominantly occurred at a European level, notably in the context of the Council of Europe and, more recently, in the context of the European Union.[122] The main purpose of data protection legislation is to secure and protect individuals' fundamental rights and freedoms in relation to the processing of their personal data, and to provide protection from harms and abuses stemming from errant uses of personal data. More than 130 countries worldwide have now enacted a form of data protection legislation, with most examples of which outline numerous principles and substantive requirements that must be observed by individuals and organisations handling personal data, as well as specific rights for individuals and arrangements for institutional oversight and enforcement.[123]

### (i) The UK GDPR and Data Protection Act 2018

The UK's main legislative rules pertaining to data protection are primarily set out in the United Kingdom General Data Protection Regulation (UK GDPR) and the Data Protection Act 2018 (DPA).[124] This section explains the main tenets of UK data protection law.

### (ii) Personal Data and the Processing Thereof

The main feature of the UK GDPR is the way in which it subjects the 'processing' of 'personal data' to a range of substantive rules and requirements. Personal data is defined as:

[121] I. Brown and C. T. Marsden, *Regulating Code: Good Governance and Better Regulation in the Information Age* (Cambridge, MA: MIT Press, 2013) 47.

[122] O. Lynskey, *The Foundations of EU Data Protection Law* (Oxford: OUP, 2015).

[123] See United Nations Conference on Trade and Development (UNCTAD) 'Data Protection and Privacy Legislation Worldwide', <https://unctad.org/page/data-protection-and-privacy-legislation-worldwide/> accessed on 26 October 2022.

[124] The UK government has recently signalled its intentions to reform aspects of the UK data protection framework. A Data Protection and Digital Information Bill, which if enacted will amend aspects of the UK GDPR and Data Protection Act 2018, was introduced in the House of Commons on 18th July 2018. At the time of writing, the Bill is currently awaiting its second reading.

> …any information relating to an identified or identifiable natural person ('data subject')…[125]

Processing is defined as:

> …any operation or set of operations which is performed on personal data…such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.[126]

The definitions of both personal data and processing are expansive. Personal data includes any information that relates to an identifiable living person (ie a person who can be distinguished from others via the linkage to information of some kind).[127] Information will 'relate to' an individual when it has a biographical nexus to the individual;[128] or is 'obviously about' the individual;[129] or if it used (or is likely to be used) to evaluate the individual, treat them in a certain way or influence their behaviour, or is used in a way that is likely to impact their rights and interests.[130] Accordingly, information types which have no obvious relationship with individuals can be potentially personal in some circumstances.[131] 'Processing' encompasses almost any imaginable uses of such information.

### (iii) Processing of Personal Data in the Context of Employment

Though the intersection of equality law, freedom of information law and data protection law in the context of equal pay has not hitherto been discussed in detail in the literature, the processing of personal data in the context of an individual's employment has been acknowledged over many decades as raising numerous sensitive issues, not least to due to inevitable

[125] Article 4(1) UK GDPR.

[126] Article 4(2) UK GDPR.

[127] See: 'Guide to the General Data Protection Regulation' (ICO, 1 January 2021). Available at: <https://ico.org.uk/media/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr-1-1.pdf> accessed on 26 October 2022.

[128] *Durant v Financial Services Authority* [2003] EWCA Civ 1746.

[129] *Edem v IC & Financial Services Authority* [2014] EWCA Civ 92, C-141/12 –*YS and Others* EU:C:2014:2081, *Secretary of State for the Home Department v TLU* [2018] All ER (D) 85 (Jun).

[130] C-434/16 *Nowak* [2017] EU:C:2017:994.

[131] For instance, in *Breyer* the CJEU held that Internet Protocol addresses could constitute personal data in some circumstances. C-582/14 *Breyer* [2016] EU:C:2016:930.

balances in power inherent in employer/employee relationships.[132] In this regard, it is worth noting that, despite not comprising part of the UK GDPR itself, Article 88 of the EU GDPR (on which the UK GDPR is based) sets out particular provisions relating to the processing of personal data undertaken in the context of an individual's employment. These provisions are specifically intended to protect individuals' rights and freedoms, and safeguard their dignity and interests, in circumstances where their personal data are processed by their employer.

### (iv) Data Controllers and Data Processors

A data controller is a natural or legal person, public authority, agency or other body, that alone or jointly in common with others determines the purposes, means and manner in which personal data are processed.[133] A data processor, on the other hand, is a natural or legal person, public authority, agency or other body, that processes personal data on behalf of the data controller, but is neither an employee of the data controller nor determines the purposes, means and manner of the processing.[134] The majority of the UK GDPR's substantive provisions apply to data controllers, not data processors.[135]

### (v) The Data Protection Principles

Any processing of personal data must observe six substantive data protection principles. These are set out in Article 5(1) of the UK GDPR:

> Personal data shall be:

[132] See, for example: Article 29 Data Protection Working Party (2001) Opinion 8/2001 on the processing of personal data in the employment context; and Council of Europe Committee of Ministers Recommendations 'on the protection of personal data used for employment purposes' (1989) Recommendation No. R (89) 2 available at <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680500b15> (13 August 2022, Date accessed); and the later Recommendation 'on the processing of personal data in the context of employment' (2015) CM/Rec(2015) 5, which specifically mentions (in Part I, Section 8) the need to protect the personal data of employees from disclosure beyond what is necessary, i.e. to fulfil the employer's legal obligations. Available at <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c3f7a> (13 August 2022, Date accessed).

[133] Article 4(7) UK GDPR.

[134] Article 4(8) UK GDPR.

[135] Article 24 UK GDPR.

(a) processed lawfully, fairly and in a transparent manner…('lawfulness, fairness and transparency');
(b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes…('purpose limitation');
(c) adequate, relevant and limited to what is necessary in relation to the purposes for which are processed ('data minimisation');
(d) accurate and, where necessary, kept up to date…('accuracy');
(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed…('storage limitation');
(f) processed in a manner that ensures appropriate security of the personal data…('integrity and confidentiality')

### (vi) Conditions for Lawful Processing of Personal Data

In addition to having to observe the data protection principles, Article 6 of the UK GDPR establishes that the processing of personal data will only be lawful if (at least) one of the six preconditions listed below is satisfied:

(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
(b) processing is necessary for the performance of a contract…;
(c) processing is necessary for compliance with a legal obligation to which the controller is subject;
(d) processing is necessary in order to protect the vital interests of the data subject…;
(e) processing is necessary for the performance of a task carried out in the public interest…;
(f) processing is necessary for the purposes of legitimate interests pursued by the controller or a third party…"

Processing of 'special category' personal data (ie personal data revealing racial or ethnic origins, political opinions, religious or philosophical beliefs or trade union membership, genetic and biometric data processed for the purposes of identifying a natural person, and data concerning a natural person's health, sex life or sexual orientation)[136] is regulated more strictly, and must satisfy a special legal basis for processing under Article 9 of the UK GDPR if it is to be lawful, as well as an ordinary basis under Article 6.

[136] Article 9(1) UK GDPR.

### (vii) Rights of the Data Subject

Chapter 3 of the UK GDPR establishes a range of rights to which data subjects are entitled. These include a right to be provided with the identity and contact details of a data controller in possession of their personal data, and an explanation of the purposes for which the data are being processed[137]; a right to access their personal data[138]; a right to the erasure of personal data[139]; a right to restrict the processing of personal data[140]; and a right to object to the processing of personal data.[141]

### (viii) Enforcement

As with the FOIA, the IC is responsible for overseeing the enforcement of the GDPR and DPA. The IC, via the DPA, has the power to issue enforcement notices and penalty notices to data controllers who are deemed to have failed to meet their data protection obligations.[142] Data controllers who receive these notices may appeal the IC's decision to a tribunal.[143]

## 5. LEGAL TENSION BETWEEN FOI AND DATA PROTECTION

FOI and DP are often mentioned in the same breath as one another. However, whilst both establish legal rules regarding the handling of information and data their starting points and rationale are different.[144] As we have seen, FOI legislation is generally concerned with transparency and the disclosure of public sector information. DP law, on the other hand, is concerned with the protection of fundamental rights in the context of personal data processing activities. Nevertheless, despite these differences overlaps in their areas of application are on the rise. FOI legislation is increasingly used for the purposes of acquiring public sector information for important secondary purposes. Often, however, data sought via FOI requests will

[137] Articles 13 and 14 UK GDPR.
[138] Article 15 UK GDPR.
[139] Article 17 UK GDPR.
[140] Article 18 UK GDPR.
[141] Article 21 UK GDPR.
[142] Sections 149 and 155 DPA 2018.
[143] Section 163 DPA 2018.
[144] P. Ticher, *Data Protection vs. Freedom of Information* (Ely, UK: IT Governance Publishing, 2008).

either constitute or contain individuals' personal data. This will particularly be the case in the context of requests for information pertaining to equal (or unequal) pay, as FOI requests concerning granular and specific names, employment contract and salary information of specific public sector employees will obviously and necessarily involve individuals' personal data (ie because information regarding the salary of a person holding a particular public office will necessarily 'relate to' that person).

Public authorities, as data controllers, increasingly find themselves in situations where their FOI and DP obligations conflict. On one hand, under the FOIA public authorities are obliged to guarantee the widest possible access to the information they hold. On the other hand, under the UK GDPR and DPA 2018 public authorities are obliged to provide high levels of protection to individuals' personal data for which they are responsible. In many instances providing the required levels of data protection will require the prohibition or restriction of certain types of data processing, including disclosure. The two areas of law, therefore, are in conflict with one another and pull public authorities in opposite directions. As noted elsewhere, the culture of DP law is one of caution, where non-disclosure is the presumed default, whereas the spirit of FOI is diametrically opposed to such a culture.[145] In essence, what this represents is a growing tension between FOI and DP.

As set out above, the FOIA has specific provisions for dealing with situations regarding FOI requests concerning information constituting or containing individuals' personal data, the applicability of which will depend on the identity of the applicant. In the case of an applicant's request pertaining to their own personal data, Section 40(1) FOIA specifies that this information is absolutely exempt from disclosure. Such requests must be made under the regime set out in Chapter 3 of the UK GDPR, rather than under the FOIA framework.

Sections 40(2) and 40(3) deal with situations in which an applicant requests access to information constituting or containing the personal data of other individuals and, as noted elsewhere, it is one of the most common exemptions to be appealed before the Information Commissioner and the Tribunal.[146] Here it is specified that any such information is exempt from

[145] G. Laurie and R. Gertz, 'When Worlds Collide: What Are the Obligations of the NHS at the Interface Between Data Protection and Freedom of Information Regimes?' (2006) 10 *Edinburgh Law Review* 151–5.

[146] M. Turle, 'Freedom of Information and Data Protection Law - A Conflict or Reconciliation?' (2007) 23 *Computer Law & Security Review* 514–22.

requests made under Section 1(1) FOIA if its disclosure would contravene any of the data protection principles set out in Article 5 UK GDPR and Chapter 2 DPA 2018. In other words, if a FOI request concerns the personal data or a person other than the applicant, public authorities are only required to uphold such requests (ie disclose the requested information) if doing so would not breach any of the data protection principles. Thus, public sector employees attempting to gain access to pay information via this route will need to contend with data protection law, something that is not an obstacle in the traditional disclosure order route. Moreover, should the 'Right to Know' come into effect without any explicit handling of the data protection issue, a similar tension would arise between an employer's obligations under the pay transparency legislation, and their data protection obligations regarding the personal data of their employees (the suspected comparators).

The most obviously applicable principle in this context is the principle of lawfulness, fairness and transparency, set out in Art.5(1)(a) UK GDPR, which holds that any processing of personal data must be lawful and fair. Upon receipt of an FOI request pertaining to another person's personal data public authorities are, therefore, required to answer two questions:

1) Would the disclosure of the requested data be lawful? and
2) Would the disclosure of the requested data be fair to the individual to whom the data relates?

If the answer to either of these questions is no, then the requested information will be exempt from disclosure, and the FOI request must be rejected. Regarding the first question, assessing whether disclosure of personal data in response to an FOI request will be lawful will require consultation with the substantive provisions of the UK GDPR and DPA 2018, and associated ICO guidance. As set out above, for any processing of personal data (including disclosure pursuant to an FOI request) to be lawful one of the legitimising grounds contained in Art.6(1) UK GDPR must apply.

Though most of the legitimising grounds contained in Art.6(1) are unlikely to be relevant to situations involving possible disclosures of personal data under the FOIA (eg it is unlikely that disclosure of personal data under the FOIA would be necessary for the performance of a contract) some will be applicable. Notably, as the FOIA has the notions of transparency, accountability and the re-use of public sector information at its core, Art.6(1)(e) UK GDPR is likely to be particularly relevant. As set out above, Art.6(1)(e) UK GDPR holds that the processing of personal data will be lawful when it is necessary for the performance of a task carried out in the public

interest. As noted by the ICO, transparency and accountability are notions in which there is a strong public interest:

> The public interest can cover a wide range of values and principles relating to the public good, or what is in the best interests of society. Thus, for example, there is a public interest in transparency and accountability, to promote public understanding and to safeguard democratic processes…[147]

With this being the case, it seems likely that disclosure of personal data relating to public sector salaries and pay scales for the sake of unearthing and rectifying gender pay disparity would constitute a task in the 'public interest'. Thus, there is at least one promising route to evading employer data protection obligations being used as a shield against pay transparency requests, in respect to the legality of the disclosure. It is not unheard of for large, public body employers to be the subject of equal pay claims,[148] so FOI could be a useful tool for discovering potential equal pay claims, or gaining access to information that can advance equal pay claims.

Alternatively, Art.6(1)(f) UK GDPR, which holds that processing will be lawful when it is necessary for the purposes of 'legitimate interests' pursued by the data controller or by a third party, is also relevant. In its guidance on the GDPR the ICO advises that the notion of 'legitimate interests' is broad, and encompasses commercial interests, individual interests, as well as broader societal interests.[149] The ICO further specifically advises that the legitimate interests ground for processing can also be relied upon to lawfully disclose personal data to third parties so long as disclosure is for a legitimate purpose (eg investigating pay gaps/salary inequality in public sector organisations). Though Art.6(1)(f) prima facie prohibits public authorities from invoking legitimate interests as a basis for any processing of personal data undertaken 'in the performance of their tasks',[150] section 40(8) of the

[147] ICO 'The public interest test: Freedom of Information Act' (2017), available at <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/the-public-interest-test/> accessed on 26 October 2022.

[148] For instance, local government has often been the subject of equal pay claims, see Robinson 'Equal Pay in Local Government: What Has Been Achieved?' (2017) 138 *Emp. Law Bulletin* 2;as has the NHS in *Armstrong v Newcastle upon Tyne NHS Hospital Trust* [2005] EWCA Civ 1608 [2005] 12 WLUK 725; and HMRC in *McNeil v Revenue and Customs Commissioners* [2018] 2 WLUK 626 [2018] ICR. 1529.

[149] Guide to the General Data Protection Regulation (ICO 2021) 81.

[150] Article 6(1)(f) UK GDPR states: 'Point (f) of the first paragraph shall not apply to processing carried out by public authorities in the performance of their tasks'. An explanation for this restriction is provided in Recital 47, which states: 'Given that it is for the legislator to provide by law the legal basis for public authorities to process personal data, that legal basis should not apply to the processing by public authorities in the performance of their tasks.'

FOIA (inserted by the DPA 2018) disqualifies this restriction in the context of disclosing personal data in response to FOI requests.[151] The upshot of this is that there are at least two possible legitimising grounds through which public authorities disclosing personal data under the FOIA can be rendered lawful.[152]

Making determinations in respect of the second question (ie whether disclosure of personal data under the FOIA would be fair) is more complicated. Fairness is a notoriously nebulous concept, and will be understood differently from person to person and from context to context. Against this background, the ICO has advised that several factors should be used to determine whether the disclosure of personal data under the FOIA would be fair. Specifically, it has been suggested that the fairness of such disclosures will hinge on the possible impact they would have on any affected individuals, and whether affected individuals have a reasonable expectation that their personal data will not be disclosed.[153] To this end, public authorities are effectively required to undertake a risk-based balancing exercise, in which the interests of persons affected by the prospective disclosure of the requested information must be weighed against the interests of the public, and only disclose the information if the latter outweigh the former.

A review of relevant jurisprudence on this balancing exercise reveals several examples of notable instances in which the application of this balancing exercise has resulted in the disclosure of personal data relating to public sector salaries, thereby showcasing the potential of FOI requests to increase pay transparency and advance equal pay claims. For instance, as mentioned above, in *Dicker*, the Information Tribunal ordered disclosure of the precise salary of an NHS CEO after concluding that the public interest in the disclosure of this information outweighed the interests of the CEO in the information not being publicly revealed. In particular, the Tribunal highlighted how prominent public servants discharging significant responsibilities must expect to have their performance scrutinised, and therefore in the circumstances, the CEO had no reasonable expectation of data regarding his salary to be exempt from disclosure, and that disclosure of information pertaining to one's salary would be far less likely to result in harmful consequences than would disclosure of information

[151] See: Paragraphs 58 and 307 of Schedule 19 DPA 2018.

[152] C. McCluskey, 'How Will the GDPR Affect FOI Law?' (2017) 13 *Freedom of Information*.

[153] ICO. 'Requests for Personal Data About Public Authority Employees' (2020), available at <https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf> accessed on 26 October 2022.

pertaining to other aspects of one's personhood, such as that relating to their family life and health. Similarly, in *South Lanarkshire Council v Scottish Information Commissioner* the Supreme Court (SC) upheld a decision of the Inner House, Court of Session, which had ordered the release of information regarding the banding of council employees' salaries and gradings following an FOI request.[154] The request was made by a journalist who wanted to find out how many of the council's employees in particular posts were situated in particular salary bands on pay scales, and was motivated by a desire to discover whether these pay scales favoured roles that were traditionally held by men. On the facts of the case, the SC unanimously held that there was a strong public interest in the aims behind the request and that the disclosure of the requested information was necessary for its completion.

A potentially significant complication that may arise in the context of using FOI requests for accessing pay-related data, however, is the fact that there is no guarantee that the above-mentioned balancing exercises will always be concluded in a way that is favourable to the requester of information. In the *McGonagle* case, for instance, the Information Tribunal held that civil servants with non-public facing roles had a reasonable expectation that their personal data would not be disclosed to the public, and thus was exempt from disclosure under the FOIA.[155] An apparent implication of this decision, therefore, is that whilst in some cases there may be an overriding public interest in the disclosure of salary information pertaining to certain public sector employees (eg as in *Dicker*), it must not be presumed that this will be the case in respect to salary information pertaining to all public sector employees. Subsequent ICO decision notices have evinced a similar logic, with the IC occasionally blocking the release of personal data on the basis disclosure may cause a disproportionate amount of distress to the individuals to whom the data relate, despite acknowledging the existence of notable public interest in the data being disclosed.[156] This would appear to

[154] *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55.

[155] *Joe McGonagle v Information Commissioner and Ministry of Defence* (EA/2011/0104).

[156] See: ICO Decision Notice FS50401773 (2012) which concerned a FOI request made to the UK Border Agency (UKBA) for copies of guidance for customs officers on the criteria for stopping and searching vehicles. The documents contained the names of junior officials working for the UKBA. The Home Office refused to disclose this information on the basis of Section 40(2) FOIA, and stated that the publication of similar information had led to UKBA officials being subjected to harassment and other harmful behaviours. The IC accepted that the nature of the information requested could lead to individuals being targeted and that disclosure of the information could lead to the causing of distress. Accordingly, it was deemed that disclosure would be unfair in the circumstances.

correlate with the public perception of financial information and information processed in the context of an individual's employment which, whilst not special category data as per Article 9 of the UK GDPR, is still generally regarded as being of a highly sensitive nature.[157] In this regard, the importance and significance of public opinion cannot be understated. As the operation of the personal data exemption is inherently risk-based (ie because disclosure will only be permitted if any negative impact borne by affected individuals is outweighed by an overriding public interest), public perceptions as to the possible impact, harms and levels of distress likely to arise from disclosures of financial information will be critical to public sector organisations in determining whether the personal data exemption applies to FOI requests regarding their pay scales and salaries. This will inevitably add an extra layer of complexity to their decision-making processes.

In any event, when and whether the personal data exemption will apply to FOI requests pertaining to public sector salaries and pay scales will depend on the contextual peculiarities of individual case. As suggested elsewhere, this will frequently be a resource-intensive and complicated undertaking, and for this reason the personal data exemption will often be extremely difficult to apply in practice.[158] A detailed examination of all relevant case law and decision notices involving the personal data exemption is beyond the scope of this paper, but instances considered above alone provide a useful illustrative example of how conflicting FOI and DP rules can complicate and impede attempts to obtain information relevant for equal pay claims via FOI requests.

## 6. ACCESS TO INFORMATION AND DATA PROTECTION: KEY LESSONS FOR THE 'RIGHT TO KNOW'

To summarise, FOI may prove a useful tool for employees of public authorities who wish to gain access to evidence of a pay disparity in their place of employment. As there are no prima facie limits on the types of information that can be accessed, this may even be used as a fishing expedition to start an equal pay claim, or to gain access to information necessary to defend an equal pay claim. The nature of information requested by equal pay claimants

[157] K. McCullagh, 'Data Sensitivity: Proposals for Resolving the Conundrum' (2007) 2 *Journal of International Commercial Law and Technology* 190–201. See also: G. Milne et al., 'Information Sensitivity Typology: Mapping the Degree and Type of Risk Consumers Perceive in Personal Data Sharing' (2017) 51 *The Journal of Consumer Affairs* 133–61.

[158] Turle (n 146).

may fall foul of the qualification that a disclosure would need to be fair to comply with the employer's data protection obligations. Giving the name, salary, job description and employment contract of an individual may go beyond what is fair even if there is a legitimate interest in unearthing pay disparity in public bodies. If the FOI route does not act as a complete alternative to a disclosure order, it may at least provide enough information to apply for a disclosure order, akin to the information that created the 'prima facie' case in *Leverton* and *Tesco* regarding pay disparity between two roles.

The 'Right to Know' would enlarge the scope of access to information relating to pay data to all employees, regardless of whether they work in the public or private sector. This would be a welcome change. The right would also have the benefit of a speedier, less litigious route to accessing evidence of pay disparity that works similarly to FOI, as opposed to the traditional disclosure order route. The difficulty faced in the implementation of the right will be in deciding how to evade any potential conflict with data protection law. Disclosure orders do this naturally, as they are very clearly an exception to data protection obligations. Avoiding a court process, and thus a specific legal order, therefore potentially brings data protection in the scope of legal argumentation against the provision of data regarding a comparator.

As noted earlier, the 'Right to Know' would be inherently linked to equal pay proceedings (unlike general FOI, which is not linked to any legal enforcement), which may bring it under the scope of the exemption from data protection obligations in Schedule 11 of the Data Protection Act. This may be based on the right forming part of prospective legal proceedings,[159] being necessary for the purpose of obtaining legal advice,[160] or necessary for the purpose of establishing, exercising or defending legal rights.[161]

The most ideal scenario would be for the fulfilment of the data access request to be seen as establishing a right of the requester (the 'Right to Know'), which would be a straightforward exemption that would be less open to interpretation and dispute. The data access under the proposed 'Right to Know' might also be seen as necessary for the purposes of obtaining legal advice, but this could be a tenuous suggestion because the requester needs to have a suspected comparator in mind and therefore may already be in the process of obtaining legal advice. Given that the knowledge of a potential comparator could form the basis of an application for a disclosure

[159] Data Protection Act 2018, Schedule 11 s.3(3)(d).
[160] Data Protection Act 2018, Schedule 11 s.3(3)(e).
[161] Data Protection Act 2018, Schedule 11 s.3(3)(f).

order, the pay data of the suspected comparator is probably not *necessary* for the obtaining of legal advice, but merely desirable. Should the right be linked to current or prospective legal proceedings, this may raise similar arguments to the current disclosure procedures. There may be calls for the requester to show that legal proceedings have started, ie that they have a prima facie case established relating to their suspected comparator, which may be something that ends up the subject of legal dispute. If this would occur, the right to access would be no swifter under the new legislation than it is under the procedural rules of the employment tribunal.

Should the right not fall under any of these exemptions, then it presumably would have the same conflict with data protection law that FOI requests have. As such, the disclosure of relevant information would have to comply with the substantive data protection principles, and would only be permissible if it would be 'lawful' and 'fair' to disclose the name, pay, employment contract and duties of a suitable comparator. As the right to 'Right to Know' would have a clear basis in law, the 'lawful' criterion would unlikely prove problematic. The 'fair' criterion, however, may prove to be more difficult. The 'Right to Know' itself would likely eliminate any expectation by employed individuals that their pay data would not be disclosed. However, the necessary disclosure of their name, job role and salary may not always be easy to justify as 'fair' if it could be demonstrated that disclosure of this information would cause a disproportionate level of distress for those affected. Whilst in the majority of circumstances the public interest in disclosure would perhaps likely outweigh the interests of any named individuals in not having their salary information disclosed (eg because, as noted above, information pertaining to an individual's salary will usually be of a far less sensitive nature than information relating to their health or sexuality, and therefore disclosure will usually be potentially less harmful), this is likely to prove contentious. As noted above, the FOIA's 'personal data exemption' is already regularly one of the most common exemptions to be appealed before the Information Commissioner and the Tribunal. It is not difficult to see an analogous spate of litigation arising in the context of attempts to utilise the 'Right to Know', the result of which could impede the achievement of the Right's purpose (ie greater transparency and speeding up litigation in equal pay cases). It would be best if the 'Right to Know' legislation, should it ever be passed, would handle the data protection matter explicitly to avoid the potential negative effects of tension between the two frameworks.

One final issue worth considering is whether disclosures of information containing individualised pay and employment conditions under the 'Right to Know' should be structured, and operate, similarly to the 'release and forget' model of disclosure used by the FOIA in relation to FOI requests. As set out above, the FOIA procedure seems to be the blueprint for the 'Right to Know' procedure, and operates on the basis that once information is disclosed to a requesting individual, that individual is free to use that information however they wish, and share it with whoever they wish. However, given the perceived high sensitivity of information relating to individuals' employment information, the appropriateness of disclosure on an unrestricted 'release and forget' basis is perhaps questionable. Though it would not be without numerous challenges, it might be preferable for disclosures of information made pursuant to any 'Right to Know' requests to be made subject to purpose limitation and sharing controls, for example by way of data licences.[162] This would ensure limits on the sharing of any data that employees utilising the 'Right to Know' would receive, so that it would be likely that they would only utilise that data for the purposes of creating and evidencing an equal pay claim, which would remain in line with the purposes underlying the 'proposed "Right to Know".'

## 7. CONCLUSION

With the subject of equal pay claims growing in complexity, access to relevant information has never been more important for claimants wishing to enforce their right to pay parity. Equal work of equal value, and challenges to occupational segregation, can make a meaningful difference to inequality of pay between the sexes and the traditional devaluing of 'women's work'. For these types of challenges to be successful, and therefore effective, claimants need to be equipped with a wealth of necessary information. Current provisions on information access are relatively encouraging, but applications for disclosure orders can significantly slow down the equal pay claim process. Employers pursuing legal disputes over other complex preliminary

[162] On the possibility of licensing public sector data disclosures, see: H. Pearce, 'The (UK) Freedom of Information Act's Disclosure Process is Broken: Where Do We Go from Here?' (2020) 29 *Information & Communications Technology Law* 354–90; H. Pearce, 'A Proposal for a New Risk-based Licensing Approach to Disclosing Anonymised Data under the (UK) Freedom of Information Act 2000' (2021) 30 *Information & Communications Technology Law* 108–39.

matters, during the early stages of a claim, compound this problem. This article has considered the FOIA and the proposed 'Right to Know' as viable alternatives to disclosure orders, and highlighted how data protection law remains an obstacle to the use of information-access rights to enforce pay equality, due to the potential for a disclosure to be seen as unfair from a data protection perspective. Any drafting and implementation of a right to access information regarding a suspected comparator will need to address this, so that drawn-out litigation regarding disclosure does not simply move from the procedural rules of the tribunal, to data protection law.