

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 August 2022

Public Authority: Rotherham Metropolitan Borough Council
Address: Riverside House
Main Street
Rotherham
S60 1AE

Decision (including any steps ordered)

1. The complainant requested from Rotherham Council ("the council") unredacted copies of attachments to emails related to a previous case he took to the First-tier Tribunal. The documents were disclosed, however the council made redactions to exclude the identities and contact details of some individuals under Section 40(2) of FOIA.
2. The Commissioner's decision is that the council was correct to apply section 40(2) to withhold the information from disclosure.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 4 February 2021, the complainant wrote to the council and requested information in the following terms:

 "This Right of Access – Freedom of Information Act Request is for a copy of all the attachments from the emails in this attached document."
5. The council responded on 3 March 2021. It provided copies of the requested attachments, however it redacted areas of the documents on the grounds that it was personal data. It applied section 40(2). It sent a revised version of the documents to the complainant on 15 April 2021, however the redactions under section 40(2) remained in place.
6. Following an internal review, the council wrote to the complainant on 26 May 2021. It maintained its position that the redactions under section 40(2) were appropriate.

Scope of the case

7. The complainant contacted the Commissioner on 18 August 2021 to complain about the way his request for information had been handled.
8. He argues that the council was not correct to apply section 40(2) to redact the information from the documents which it disclosed to him.
9. The scope of this case is therefore whether the council was correct to withhold the information it has redacted from the relevant documents under section 40(2) of FOIA.

Reasons for decision

Section 40 personal information

10. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

11. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then section 40 of the FOIA cannot apply.
13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

"any information relating to an identified or identifiable living individual".

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.
17. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
18. The Commissioner notes that the redactions have been made to the identities of council officers, a private individual, and to the details of an expert who provided an opinion on the leaflet. The redactions include the names and identities of the individuals, the contact details of the individuals, the comments of some of the individuals, and some details of the actions of individuals which can be associated directly to them.

¹ As amended by Schedule 19 Paragraph 58(3) DPA

19. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects. The names of the data subjects are obviously information that both relates to and identifies those concerned. Details of their comments and actions are also relatable to them as individuals, and therefore provide biographical detail about their actions and comments. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
20. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
21. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

22. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

23. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair, and transparent.
24. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

25. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"*².

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

26. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
27. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

28. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
29. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
30. The legitimate interest in this case is to create greater transparency on how a decision not to distribute leaflets purchased by the council came to be made by the council. The council purchased 1500 copies of a leaflet which the complainant and an associate had published, but it subsequently chose not to distribute these. The complainant received some explanation as to why it chose not to distribute these, however he argues that he remains unclear exactly why the council made that decision.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

31. The complainant also said that he believes that obtaining unredacted copies of the documents will be important to an Upper Tribunal case relating to an application of contempt of court against the council, referred to it from the First tier Tribunal.

Is disclosure necessary?

32. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
33. The Commissioner notes that the only redactions in the documents which were disclosed were to the sections containing personal data. The legitimate aim of the complainant is to create greater transparency on the issue of the leaflet, and on the decision making of the council, and to further the evidence available for the contempt of court case.
34. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified. The council has already taken steps to disclose the majority of the information and to be transparent about its actions.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

35. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
36. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.

37. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
38. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
 - a) Council officers
39. The council highlighted to the Commissioner that it has redacted the personal data of officers below head of Head of Service level and, in the majority of cases, in non-front facing roles where the redactions would have no impact upon transparency. It argued that the information has been minimally redacted.
40. The council noted that some individuals names had been left unredacted in some sections, where they were required to ensure transparency. However, it said that the same individuals names may have been redacted in other sections in order to protect their rights under the DPA.
41. It said that officer names have been redacted where it considers that there is no public value in their disclosure. It considered that it does not see this strictly as personal data, but feel officers below Head of Service should be afforded some anonymity when such disclosure is not necessary. The Commissioner questions the statement that the information is not personal data. A name will, almost by definition, identify an individual and be personal data relating to them. The Commissioner presumes that the council is referring to the fact that, as council officers acting in an official capacity, there will be some degree of expectation that their names may need be disclosed in some circumstances. This will be dependant upon the situation and the nature of their role, however the council does not see that this specific set of circumstances warrants the disclosure of their personal data. This is, in effect, how the balancing test is intended to be carried out.
42. The Commissioner highlights that disclosures under FOIA are considered to be to the whole world, rather than just the recipient of the information. The council is under a duty to consider the effect of such disclosure on the individuals, and whether this is justified in the context of the request and the circumstances of the case.
43. The council argues that its policy is not to disclose information of this nature generally, and that the individuals would therefore not expect that their details would be disclosed in response to an FOI request. It

noted the potential for the complainant to contact individuals directly should contact details be disclosed, although it highlighted that the complainant has an agreed method of contact in place.

44. The Commissioner notes that the vast majority of the information has been disclosed within the documents, and it is easy for individuals reading these to understand what, and why, things have occurred. The council has explained its reasoning to the complainant. Given the nature of the roles of the majority of the individuals, identifying them by name within the documents is not required in order to increase transparency, and it would be likely to be concerning to those individuals. As such, the Commissioner considers that they would not have an expectation that their personal data would be disclosed to the whole world in response to a FOIA request.
 - b) private citizens
45. The council clarified that it has redacted personal data relating to private individuals, including the expert which the council referred to before making its decision not to distribute the leaflets, and another individual.
46. The Commissioner considers that the private individuals would also not expect that their details might be disclosed by the council to the whole world in response to an FOI request.
47. One individual is not associated with the council or the experts opinion, however the Commissioner has seen no evidence that they would be content with the disclosure of their personal information. As a private citizen, a disclosure of their actions would create little further transparency over the wider issues. They could also be identified from other information in the public domain or already known to the requestor.
48. In the case of the expert, the redactions also exclude details of their employer. The Commissioner presumes that this in order that the identity of the expert cannot be narrowed down to a small number of people (and therefore potentially disclose the identity of the individual from other information already in the public domain). The council did not state this argument specifically, however the Commissioner recognises that this is a potential risk in the circumstances of this case.
49. The Commissioner recognises that there is a stronger case that someone who has significant qualifications and experience in their field, and who provides advice to a public authority, albeit informally, should expect that details about them and the advice may subsequently be disclosed in order that a public authority can be transparent about its decision making. However, in this case, the reasons for not distributing

the leaflet have been made clear. It is only the identity of the expert, and that of their employer, which has been redacted.

50. The council said that, from the outset, the expert witness gave their opinion with the understanding that their details would be held in confidence. This was also agreed with their employer. It also argued that the expert works in a very sensitive environment and would not wish to raise the potential for future harassment should their identity be disclosed. The expert has since been asked if they would consent to the disclosure of their identity and said that they did not.
51. The Commissioner recognises that there is a stronger case for the identity of the expert to be disclosed so that their experience and qualifications in the field may be ascertained in order to highlight and support the quality of the advice they have provided. However, given the circumstances in which the information was provided by the expert in this case, the Commissioner's decision is that the legitimate interests of the public do not outweigh the expert's right to privacy.

Conclusions

52. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the *data subjects' fundamental rights and freedoms*. *The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.*
53. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that there is no need to go on to separately consider whether disclosure would be fair or transparent.

Right of appeal

54. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

55. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
56. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Ian Walley
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