Information Commissioner's Office

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **3 October 2017**

Public Authority: **Greater London Authority**
Address: **City Hall**
More London Riverside
London SE1 2AA

Decision (including any steps ordered)

1. The complainant submitted a request to the Greater London Authority (GLA) for copies of all emails sent to, from or cc'ed to a specific private email address. The complainant believed that the email address belonged to the Mayor of London, Boris Johnson. The GLA refused to confirm or deny whether it held information falling within the scope of the request on the basis of section 40(5) of FOIA. The Commissioner has concluded that the GLA is entitled to rely on this exemption as a basis to refuse to confirm or deny whether it holds information falling within the scope of the request.

Request and response

2. The complainant submitted the following request to the GLA on 15 September 2016:

   'Please release all emails held on the City Hall servers to or from the address [email address redacted], including where that address is cc-ed.'

3. The GLA responded to the request on 12 October 2016 and refused to confirm or deny whether it held any information falling within the scope of the request on the basis of section 40(5) of FOIA by virtue of section 40(5)(b)(i).

4. The complainant contacted the GLA on 18 October 2016 in order to ask for an internal review of this response.

5. The GLA responded on 23 November 2016 and explained that it remained of the view that section 40(5) was applicable to this request and maintained its position of refusing to confirm or deny whether it held the requested information. However, the GLA provided some further reasoning to support its position.

Scope of the case

6. The complainant contacted the Commissioner on 5 January 2017 in order to complain about the way his request for information had been handled.

7. In relation to this complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.

8. As explained above, the GLA is seeking to rely on section 40(5) to refuse to confirm or deny whether it holds information falling within the scope of the request. Therefore, this notice only considers whether the GLA is entitled, on the basis of this exemption, to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.

9. It is relevant at this point in the notice to explain that the complainant believed that the email address cited in his request was a personal and private email address (ie a non GLA email address) belonging to the former Mayor of London, Boris Johnson.

Reasons for decision

Section 40 – personal data

10. Section 40(5)(b)(i) of FOIA states that a public authority is not obliged to confirm nor deny under section 1(1)(a) of FOIA whether third party personal data is held if, or to the extent that:

    'the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded'.

11. In the circumstances of this case, the GLA is relying on the first part of section 40(5)(b)(i), ie that complying with section 1(1)(a) would breach the date protection principles, specifically the first principle.

12. Therefore, for the GLA to be correct in relying on section 40(5)(b)(i) to neither confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:

    - Confirming or denying whether information is held would reveal the personal data of a third party; and
    - That to confirm or deny whether information is held would contravene one of the data protection principles.

Would the confirmation or denial that information was held reveal the personal data of a third party?

The GLA's position

13. The GLA noted that Schedule 1(1) of the Data Protection Act (DPA) provides the following definition of personal data:

    '"personal data" means data which relate to a living individual who can be identified—
    a. from those data, or
    b. from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual'

14. Consequently, the GLA explained that the two main elements of personal data are that the information must 'relate to' a living individual, and that individual must be identifiable. Furthermore information will "relate to" an individual if it is:

    - about them;
    - linked to them;
    - has some biographical significance for them;
    - is used to inform decisions affecting them;
    - has them as its main focus; or
    - impacts on them in any way.

15. The GLA noted that the complainant has asserted that the email address cited in his request is the personal email of address of Boris Johnson but that the complainant has not provided any information to substantiate that claim. The GLA argued that it was perfectly plausible that the email address in question could be someone else's email account. For

example, an email address joebloggs@email.com might suggest it is owned by someone called Joe Bloggs, but that may well not be the case.

16. The GLA argued that if the owner of the email address is identifiable by the address itself – ie Joe Bloggs – then the email address alone constitutes personal data by meeting the first limb of the definition of personal data under section 1(1) of the DPA –'personal data' means data which relate to a living individual who can be identified from those data. The GLA suggested that the same was also true if the complainant held other information which could link an otherwise anonymous email address with the individual that owns that email account.

17. Alternatively, if the GLA holds any information that would link an email address with its owner – ie other information that links joebloggs@email.com with a former employee or an identifiable member of the public – the email address constitutes personal data under the second limb of the definition of personal data – '*"personal data" means data which relate to a living individual who can be identified from those data a. and other information which is in the possession of…the data controller.'*

18. Consequently, the GLA explained that in either case the email address relates to an individual and constitutes personal data of the owner.

19. The GLA emphasized that the specific (private and personal) email address which the complainant cited in his request had no bearing on its decision to invoke the neither confirm nor deny (NCND) provision under section 40(5) of FOIA; rather its response would have been the same if the complainant had provided the email address joe.bloggs@email.com

20. Indeed, the GLA noted that the email address cited by the complainant could be owned by anyone and is not necessarily that of the former Mayor of London; there is nothing connecting the email account to the former Mayor other than the resemblance of his name in the email address itself. For that reason, the GLA explained that it had not treated this request as being any different from a request that might ask for how many times it had corresponded with any other member of the public.

The complainant's position

21. The complainant explained that it was his understanding that the email address cited in the request was the private email address of Boris Johnson. He explained that he could not provide further details to explain his understanding that this was the case without disclosing information that may compromise the confidentiality of his journalistic source. The complainant argued that this should not be held against him given the high protection for the confidentiality of sources recognised under ECHR article 10. The complainant suggested that the GLA is likely to know whether or not his assertion in respect of this email address was correct.

22. The complainant explained that he did not accept that the email address cited in his request is, in itself, sufficiently unambiguous to amount to personal data. The complainant suggested that if the email address is personal data, it must be because the second limb of the definition in the DPA is satisfied, ie that the data subject can be identified from those data – the email address – and information which is the possession of, or is likely to come into the possession of, the data controller.

23. The complainant argued that as the GLA so confidently asserted that the email address is personal data then in his view it was highly likely that the GLA knew the identity of the user of the email address.

The Commissioner's position

24. In the Commissioner's opinion truly anonymised data are not personal data and thus can be disclosed without reference to the DPA.

25. The Commissioner does not accept that where a public authority holds information to identify living individuals from the anonymised data, that this turns the anonymised data into personal data. This approach obviously deviates from that set out by the GLA above. The Commissioner draws support for her approach from the House of Lords' judgment in the case of the Common Services Agency v Scottish Information Commissioner [2008] UKHL 47. However, if a member of the general public could, on the balance of probabilities, identify individuals by cross-referencing the anonymised data with information already in the public domain, then the information is personal data.

26. Whether this 'cross-referencing' is possible is a question of fact based on the circumstances of the specific case. If identification is possible the information is still personal data and the data protection principles do need to be considered when deciding whether disclosure is appropriate. However, where the anonymised data cannot be linked to an individual using the additional available information then the information will, in the Commissioner's opinion, have been truly anonymised and can be considered for disclosure without any reference to the DPA principles.

27. Applying this approach to this present case requires the Commissioner to consider whether the public, or indeed a member of the public, could identify on the balance of probabilities the identity of the individual based upon the email address cited in the request and any other information available to them. This is because if the public, or a member of the public could do so, then if the GLA confirmed whether it held any emails sent to/from or cc'd to the address (if indeed it did) then it would constitute the disclosure of personal data about that individual. In other words, it would reveal that the individual in question had exchanged emails with the GLA and moreover it would confirm, via FOIA, their private email address.

28. In the circumstances of this case there are two possible scenarios: i) the email address quoted by the complainant does **not** belong to the former Mayor, or ii) the email address quoted by the complainant **is** a private email belonging to the former Mayor, Boris Johnson.

29. In respect of this first scenario, the Commissioner does not accept that using this email address the public, or a member of the public, would be able to link this email address to a particular individual. In other words the Commissioner agrees with the complainant that, assuming the email address does not belong to the former Mayor Boris Johnson, then it is sufficiently ambiguous that on the balance of probabilities the public or a member of the public would not be able to use the email address and/or other information to link that address to a particular person. Consequently, if the email address does not belong to the former Mayor, in the Commissioner's view the GLA could confirm whether it holds any information falling within the scope of the request without any personal data being disclosed.

30. In respect of the second scenario, if the email address did belong to Boris Johnson, as the complainant has suggested, then in the Commissioner's view confirmation as to whether the GLA held information falling within the scope of the request would on the balance of probabilities result in the disclosure of personal data. That is to say, it would confirm to the complainant that the email address quoted in his email belonged to Boris Johnson and that the GLA held emails on its servers sent to or from this email address. Moreover, the wording and the context of the request would lead a member of the public to conclude that this was a personal email address of the former Mayor.

31. As the above indicates, in the Commissioner's opinion, confirmation as to whether or not the information is held would only result in disclosure of personal data if the email address did in fact belong to Boris Johnson. For the avoidance of doubt, the Commissioner has not, as part of her investigation established whether this in fact the case. However, when considering the potential disclosure of personal data under FOIA the Commissioner considers it appropriate to take a cautious approach to

the consideration of any potential exemptions. In the circumstances of this case, and taking into account the complainant's assertions that this is indeed an email address used by the former Mayor, the Commissioner has concluded that on the balance of probabilities confirmation as to whether or not the GLA holds information would be likely to result in the disclosure of personal data. That is to say, compliance with section 1(1)(a) would be likely to result of the disclosure of Boris Johnson's personal data by firstly revealing to the public the details of his private email address and secondly by potentially confirming that the GLA held information sent to or from this email address.

32. The first criterion set out at paragraph 12 is met.

Would confirmation or denial as to whether information is held contravene one of the data protection principles?

33. The Commissioner must therefore consider whether confirmation or denial as to whether in information is held would contravene one of the data protection principles. In light of findings above, in considering this question she has assumed that the email address in question does belong to the former Mayor, Boris Johnson.

34. In support of its application of section 40(5)(b)(i), the GLA argued that to confirm or deny whether it held information falling within the scope of request would contravene the first data protection principle.

35. The first data protection principle states that:

    1. Personal data must be processed fairly and lawfully; and
    2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

36. The most relevant condition in relation to this request is the sixth condition which states that:

    'The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject'

37. In deciding whether complying with section 1(1)(a) would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:

    - what the public authority may have told them about what would happen to their personal data;
    - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
    - the nature or content of the information itself (if held);
    - the circumstances in which the personal data was obtained;
    - particular circumstances of the case, e.g. established custom or practice within the public authority; and
    - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.

- The consequences of confirming whether information is held, i.e. what damage or distress would the individual suffer if the information was disclosed or confirmation as to whether or not information was held? In consideration of this factor the Commissioner may take into account:

    - whether information of the nature requested is already in the public domain;
    - if so the source of such a confirmation; and even if the information has previously been in the public domain does the passage of time mean that confirmation now could still cause damage or distress?

38. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to confirm whether or not the information is held if it can be argued that there is a more compelling public interest in disclosure. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.

The GLA's position

39. The GLA argued that if it were to provide any confirmation or denial that it held emails relating to *any* specific email address, it would be issuing a public statement indicating an individual had corresponded with the GLA. It argued that issuing such a statement would be unfair to that individual – regardless of whether or not they are the former Mayor of London. This is because in GLA's view individuals who enter into general correspondence with the GLA, or with its staff, would not expect that confirmation under FOIA (or otherwise) would be given by the GLA that such correspondence existed.

40. The GLA explained that it had considered the public interest issues relevant to this case. It acknowledged that there must be a balance between the rights and freedoms of the data subject and the legitimate interests of the public. However, it explained that in its view there were no public interest considerations that would favour the GLA breaching the first data protection principle to either confirm or deny whether it held email correspondence with a particular private email address held by an individual. The GLA emphasised that in its view there is no unambiguous connection between the actual owner of the email address and the former Mayor. Consequently, it argued that it was not necessary to address the points made the complainant (details below) about the reasonable expectations of employees in terms of disclosure of their personal data; how the seniority of staff affects that decision; or where the balance of the public interest might be in respect of such data. In relation to complainant's suggestion (again, see below) that GLA staff might send GLA information to a private email account, the GLA provided the complainant with a copy of its guidance to staff in respect of the implications of doing so. In summary, the guidance explained that such information would still be captured by information requests submitted under FOIA and the Environmental Information Regulations.

The complainant's position

41. The complainant provided the Commissioner with detailed submissions to support his view that the GLA could confirm whether it held information without breaching the DPA. In his submissions, the complainant explained the grounds for supporting this conclusion differed depending on whether the email address did belong to Boris Johnson or whether it belonged to a different individual. As the Commissioner has concluded that the first limb of the two stage test cited at paragraph 12 is met if one assumes that the email does belong to Boris Johnson, for the purposes of this notice she has simply set out the part of the complainant's submissions which are relevant to such an outcome. That is to say, the Commissioner has not set out the parts of the complainant's submissions which consider whether the DPA would be

breached assuming the owner of the email address was not Boris Johnson.

42. The complainant argued that confirmation as to whether the GLA held information falling within the scope of his request would, he argued, only involve the most minimal processing of personal data and this should be factored into determining whether the first data protection principle would be breached.

43. He argued that if it is assumed that the email address did belong to Boris Johnson, then there was no question that confirmation as to whether the GLA held information would amount to unfair processing for the following reasons:

44. Elected officials, in particular senior politicians such as Boris Johnson, are in a different position from ordinary members of the public when it comes to assessing the fairness of processing of their personal data. The complainant argued that they are properly open to greater scrutiny, they have reduced expectations of privacy, and their interests as data subjects are not paramount. That is so when the data relate to their public lives, and also where there are elements of the private lives entwined with the data, disclosure can still be made under FOIA with breaching the DPA.[1].

45. The complainant argued that the confirmation by GLA that it holds emails from/to or cc'ed to the email address, if indeed it does, will raise questions in the minds of members of the public as to whether Mr Johnson has been using a private email address for official business. The complainant argued that such questions would be entirely legitimate and there would be no unfairness to Mr Johnson if such questions were asked. He emphasised that there is a very strong public interest in knowing whether a senior elected politician has conducted official business using a private, rather than an official email address, thereby making such communications less accessible and harder for the public to scrutinise. The complainant noted that the Commissioner herself had expressed serious concern about the use of private emails addresses by politicians for the conduct of official business.[2]

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[1] In support of this point the complainant cited the Information Tribunal decision The Corporate Officer of the House of Commons v Information Commissioner and Norman Baker MP (EA/2006/15 &16) which involved requests for MPs' expenses.

[2] The complainant cited a decision notice involving a request sent to the Department for Education https://ico.org.uk/media/action-weve-taken/decision-notices/2012/712854/fs_50422276.pdf

46. Furthermore, the complainant argued that without the GLA confirming whether it held information falling within the scope of his request, he had no prospect of seeing the emails (if held), even though their contents may be of substantial public interest.

47. Finally, the complainant suggested that section 40(5)(b)(i) was a qualified exemption and therefore subject to the public interest test. Consequently, he argued that even if there was some unfairness in the GLA confirming whether or not it held information, such unfairness is minimal and technical such that the public interest is maintaining section 40(5) is easily outweighed by the public interest in allowing the public to know what information the GLA holds.

The Commissioner's position

48. As noted above, the Commissioner has approached her consideration of the second criterion on the basis that the email address cited in the complainant's request does belong to Boris Johnson.

49. In the Commissioner's view, a key issue, and indeed a determinative one, in considering whether complying with section 1(1)(a) would breach the first data protection principle requires one to remember that confirmation that information was held by the GLA (if indeed that is the case) would have two obvious consequences. Firstly, it would reveal that the GLA held emails sent to or from a private email address used by Boris Johnson and secondly, it would reveal to the public the details of a private email address used by Boris Johnson.

50. With regards to the consequences of the GLA complying with section 1(1)(a) of FOIA, the Commissioner does not consider that it would cause any particular damage or distress to Boris Johnson if it was confirmed that the GLA held emails on its servers sent to or from a private email address that belonged to him. The thrust of the complainant's submissions suggest that such an email address was perhaps used in an attempt to conduct GLA business away from the scrutiny of FOIA legislation. However, there could be a number of reasons why the GLA might hold emails falling within the scope of the request. The existence of such emails does not, in the Commissioner's view, automatically equate to Boris Johnson using a non-work email address in order to conduct GLA business nor indeed doing so in an attempt to avoid the provisions of FOIA. Consequently, in the Commissioner's opinion no negative inference should be taken should it in fact be the case that the GLA holds emails falling within the scope of the request. It follows that in the Commissioner's opinion any possible distress or damage caused to Boris Johnson by confirming that such emails may be held would be minimal.

51. However, in the Commissioner's view revealing to the public a private email address used by Boris Johnson would be likely to result in a significant invasion of privacy and be likely to cause him damage or distress given that it would allow the public to send him unsolicited emails.

52. With regard to Mr Johnson's expectations, the Commissioner agrees with the complainant that the more senior and high profile staff are, the greater the expectation they should have that their personal data may be disclosed under FOIA. Furthermore, in light of the GLA's guidance on the use of private email addresses, the Commissioner accepts that the GLA employees, and indeed elected officials who use the GLA's IT systems, should expect that official information that they send via personal email addresses will nevertheless be subject to FOIA.

53. However, in the Commissioner's opinion such expectations do not mean that staff, even senior staff, nor indeed elected officials of the GLA should expect that their personal email addresses would be disclosed under FOIA.

54. Consequently, in the Commissioner's opinion confirmation as to whether the GLA holds information falling within the scope of this request would be unfair based both upon the consequences of disclosure and the expectations of Mr Johnson. However, the Commissioner stresses that this is because complying with section 1(1)(a) in respect of this specific request would potentially involve the disclosure Boris Johnson's private email address under FOIA and it is the disclosure of this email address which is unfair. On the contrary the Commissioner does not believe that it would be unfair simply for GLA to confirm whether it held emails sent to/from a private email address used by Boris Johnson, if the request was phrased in such a way to ensure that the email address itself was not revealed.

55. In terms of the sixth condition, the Commissioner is sympathetic to the arguments advanced by the complainant in respect of the use of private email addresses. However, for the reasons set out above, in the Commissioner's view simply because the GLA may hold information falling within the scope of this request does not necessarily mean that the former Mayor was using his private email address in an attempt to conduct GLA business via emails which would not be caught by FOIA. Moreover, given that the potential negative consequences of disclosure for Boris Johnson if his private email address was made public, allied to his reasonable and significant expectations that such information would not be disclosed by the GLA under FOIA, assuming it is held of course, leads the Commissioner to conclude that the legitimate interests in confirming whether or not information is held do not outweigh Boris Johnson's legitimate interests.

56. The Commissioner recognises that complainant has argued that if the GLA do not comply with section 1(1)(a) in respect of this request then he has no prospect of seeing the emails (if held) even though their contents would be of substantial public interest. The Commissioner would make two points in response to this line of argument. Firstly, as the Commissioner's guidance on the principle of NCND explains '*The decision to neither confirm nor deny is separate from a decision not to disclose information and needs to be taken entirely on its own merits.'* [3] Secondly, as the Commissioner's analysis above makes clear, section 40(5) is engaged in respect of this specific request because it includes a private email address allegedly belonging to Boris Johnson. If the GLA received a request that sought the same or very similar information, but that request did not include the details of the actual private email address allegedly belonging to Boris Johnson, then the Commissioner believes that the considerations as to whether compliance with section 1(1)(a) would be breach of the DPA would be markedly different.

57. Finally, the Commissioner notes that the complainant has argued that section 40(5)(b)(i) of FOIA is a qualified exemption and therefore subject to the public interest test contained at section 2 of FOIA. However, in the Commissioner's view section 40(5)(b)(i) is qualified, if complying with section 1(1)(a) would contravene a notice issued under section 10 of the DPA. If section 40(5)(b)(i) is being relied on because compliance with section 1(1)(a) of FOIA would breach one of principles of the DPA then the exemption is absolute.[4]

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[3] https://ico.org.uk/media/for-organisations/documents/1166/when_to_refuse_to_confirm_or_deny_section_1_foia.pdf, page 3

[4] This is position is confirmed the Commissioner's guidance 'Neither confirm nor deny in relation to personal data'.

Information Commissioner's Office

Right of appeal

58. 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: 0300 1234504
    Fax: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

59. 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.

60. 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 ………………………………………………

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF