

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 December 2017

Public Authority: London Borough of Lambeth
Address: PO Box 734
Winchester
SO23 5DG

Decision (including any steps ordered)

1. The complainant requested information about the number of communications made in respect of welfare concerns relating to a particular individual. The London Borough of Lambeth (LBL) initially refused the request citing section 40(5) and section 41. During the course of the investigation it withdrew its reliance on section 41.
2. The Commissioner's decision is that LBL is not entitled to rely on section 40(5) to refuse to confirm or deny whether it holds information falling within the scope of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Respond to the request for information in accordance with FOIA section 1(1)(a).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 2 June 2017, the complainant wrote to LBL and requested information in the following terms:

"In accordance with the Freedom of Information Act, please provide details of the number of communications made whether email, telephone call or using online portals, whether named or anonymous, made to Lambeth Authority social services in relation to welfare concerns made in respect of the late [name and address of individual], between period 1 January 2008 and 6 March 2016".

6. LBL responded on 3 July 2017. It relied on the exemption at section 40(5) to neither confirm nor deny holding the requested information and also relied on section 41 explaining that disclosure would constitute a breach of confidence.
7. The complainant requested an internal review on 3 July 2017 setting out that as the named individual was deceased, the Data Protection Act (DPA) did not apply to him and that the requested information did not ask for details of individuals. Following an internal review, LBL wrote to the complainant on 1 August 2017 and upheld its position in respect of both exemptions.

Scope of the case

8. The complainant contacted the Commissioner on 1 August 2017 to complain about the way his request for information had been handled.

9. The Commissioner notes that in its initial response, LBL set out that in addition to section 40(5), it considered the requested information to be exempt in accordance with section 41. It's initial response set out the following:

"In addition to the above, we have also considered that disclosure would constitute a breach of confidence due to the way the information was provided to us".

10. The Commissioner considers that having set out its reliance on section 40(5) to neither confirm nor deny whether it holds the requested information, LBL's statement in respect of the application of section 41 entirely undermines its reliance on section 40(5) in this case as LBL

itself has effectively confirmed that it holds information falling within the scope of the request.

11. During the course of the investigation the Commissioner set out her concerns about the application of section 40(5) in conjunction with the application of section 41. LBL subsequently withdrew its reliance on section 41 explaining that it would rely only on section 40(5).
12. Whilst the Commissioner finds it unusual that a public authority would wish to maintain its reliance on an exemption which has been undermined by the authority itself, she considers that the scope of her investigation is to consider whether LBL was correct to rely on section 40(5) to refuse the request.
13. It is important to note here that the right of access provided by FOIA, is set out in section 1(1) which is separated into two parts: section 1(1)(a) gives an applicant the right to know whether a public authority holds the requested information and section 1(1)(b) gives the applicant with the right to be provided with the requested information, if held. Both rights are subject to the application of exemptions.
14. In cases where a public authority relies on section 40(5) to refuse to confirm or deny whether it holds information falling within the scope of the request, the Commissioner will only consider whether the public authority is entitled, on the basis of section 40(5), to refuse to confirm or deny whether it holds the requested information. The Commissioner will not go on to consider whether the requested information, if held, should be disclosed.

Reasons for decision

15. Section 40(5) of FOIA sets out the conditions under which a public authority can give a "neither confirm nor deny" response where the information requested is, or would be if held, personal data. It includes provisions relating to both personal data about the requester and personal data about other people.
16. If the information would constitute personal data relating to someone other than the requester, then the public authority does not have to confirm or deny whether it holds it if one of the conditions in section 40(5)(b)(i) is met. Section 40(5)(b)(i) sets out that the duty to confirm or deny does not arise in relation to the requested information if, or to the extent that, either confirming or denying to a member of the public that the requested information is held would contravene any of the data protection principles or section 10 of the DPA. In the circumstances of

this case, LBL is relying on the first part of section 40(5)(b)(i), ie that complying with section 1(1)(a) would breach one of the data protection principles.

17. In order for section 40(5)(b)(i) to be engaged, two criteria have to be met: first, that confirming or denying whether the information is held would in itself reveal the personal data of a third party and second, that confirmation or denial as to whether the 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?

18. The DPA categorises personal data as data that relates to a living individual from which that individual can be identified.
19. In its submission, LBL has conflated the two criteria relevant to section 40(5) and for ease of reference the Commissioner has set out all of the arguments here although her initial, and ultimately only consideration, will relate to the criterion detailed above.
20. LBL set out that if held, the requested information would belong to the individuals who have contacted LBL. It has set out that all of the information would constitute personal data. It has stated that whilst it does not consider the requested information itself, if held, to be sensitive, LBL considers that, if held, it would relate to sensitive information about the health of the individual named in the request.
21. LBL has explained that if it were to confirm or deny that information were held, individuals connected with the named individual would be able to "*make assumptions*" about other individuals using other information that the named individual's family/friends would have access to.
22. It is LBL's position that confirming that information is or is not held would breach the first data protection principle as it would be unfair to disclose information which, if held, would allow those who have contacted LBL to be identified.
23. It has further set out its position that the requested information, if held, would relate to private rather than public life of the individuals concerned and that it considers there is no reasonable expectation that the public authority would disclose information allowing individuals to be identified as any contact made to the authority about an individual's welfare should be considered to be given in confidence.

24. LBL also set out that disclosure of the requested information, if held, could also breach the second data protection principle which states that personal data shall be obtained only for one or more specified lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.
25. It is LBL's position that individuals contacting the authority would have done so in order to report concerns about the named individual and the information would be processed for that specific purpose.
26. LBL further set out its reliance on the sixth data protection principle, noting that it states that personal data shall be processed in accordance with the rights of data subjects under the DPA.
27. It goes on to assert that one of the rights of data subjects is to prevent processing which may cause damage or distress and that this is set out in Section 10 DPA. LBL's position is that disclosure of the requested information, a figure, would be likely to cause distress to the individuals and accordingly that disclosure of the information would breach the sixth principle.
28. LBL has gone on to set out to the Commissioner that the complainant may have a legitimate interest in wishing to know how it acted with regards to the named individual but asserts that FOIA is not the appropriate route.
29. With regard to the making of assumptions by individuals connected to the named person, the Commissioner considers this to be largely irrelevant because confirmation or denial as to whether the requested information is held or not is linked to whether it reveals personal data about an individual and is not about whether assumptions would be made by those who have access to other information because of their connections. Assumptions may always be made irrespective of available information and in this case the Commissioner considers that neither confirming nor denying whether the information is held could equally lead to assumptions being made. She does not consider this to be a persuasive or relevant argument in terms of section 40(5).
30. What is key for a public authority relying on section 40(5) however is demonstrating that either confirming or denying whether the information is held could be put together with other information in the public domain which could then lead to identification of an individual. LBL has not advanced any arguments to demonstrate that confirmation or denial as to whether the information is held could be put together with information in the public domain which could lead to identification.

31. The Commissioner notes LBL's position that the requested information, if held, would relate to sensitive information about the named person's health. Again, the Commissioner considers this to be irrelevant as the named individual is deceased and therefore the DPA does not apply to his personal information.
32. In relation to LBL's assertion that any contact made to the authority about an individual's welfare should be considered to be given in confidence, the Commissioner considers that this argument may be relevant where a public authority sought to rely on section 41 but in this case reliance on section 41 has been withdrawn, and the argument is not relevant to the consideration of section 40(5).
33. As to the reasonable expectations of any individuals concerned, the Commissioner agrees, as a general principle, that in the event that anyone contacts a public authority expressing concerns about a third party, they would have a reasonable expectation that they would not be identified, even where that identification would be possible purely by confirming or denying whether the information is held. However, the Commissioner does not consider that LBL has proffered any arguments to support its position that confirming or denying whether information is held, would disclose the identity of any individual.

The Commissioner's position

34. It is the Commissioner's view that truly anonymised data are not personal data and can accordingly be disclosed without reference to the DPA.
35. The Commissioner further considers that the fact that a public authority may hold information which identifies living individuals from anonymised data does not turn the anonymised data into personal data.
36. However, it is her position that where 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 anonymised data is personal data.
37. In this case therefore, the Commissioner must consider whether confirming or denying whether the information is held would reveal the personal data of any third party; it is her conclusion that LBL has failed to put forward any arguments to support its reliance on section 40(5) and of course has undermined its own position in respect of section 40(5) from the outset. It is her position therefore that LBL is not entitled to rely on section 40(5) and should now comply with the duty set out at section 1(1)(a) FOIA.

38. Given that the first criterion in relation to section 40(5)(b)(i) is met, the Commissioner has not gone on to consider the second criterion.

Other matters

39. The Commissioner has liaised with LBL in order to achieve informal resolution in this case which is always her preferred outcome. She is somewhat concerned that in the particular circumstances of this case, LBL has, despite the content of its initial response and internal review, and despite the Commissioner having set out the likely outcome of a decision notice, maintained its position and forced a decision notice which could realistically only reach one conclusion.
40. Whilst the Commissioner accepts that this case is fairly unique, she would remind LBL to carefully consider its position when applying more than one exemption to a request and to consider whether its internal review process should consider not only if the exemptions are appropriate in the context of the request but if they are appropriate in the context of any other exemptions cited.

Right of appeal

41. 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 7395836

Email: GRC@hmcts.gsi.gov.uk

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

42. 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.
43. 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

Jonathan Slee

Senior case officer

Information Commissioner's Office

Wycliffe House

Water Lane

Wilmslow

Cheshire

SK9 5AF