Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **24 June 2019**

Public Authority: **Worcestershire County Council**
Address: **County Hall**
Spetchley Road
Worcester WR5 2NP

Decision (including any steps ordered)

1. The complainant has requested information regarding an investigation report. Worcestershire County Council provided a redacted version of the information on the basis of the exemption at section 40(2) – personal data.

2. The Commissioner's decision is that Worcestershire County Council correctly applied section 40(2) to the withheld information. She also finds that the council breached section 10(1) of FOIA by failing to respond to the request within the statutory time limit.

3. The Commissioner requires no steps to be taken by the council.

Request and response

4. On 12 July 2018, the complainant wrote to Worcestershire County Council ('the council') and requested information in the following terms :

   Extracted from a letter regarding an ongoing situation at a school:

   "I understand that your report has been made available and would respectfully request a copy be sent to us."

5. The council responded on 6 November 2018, asking for clarification:

   "[Councillor] *has asked me to contact you to follow up your queries to him about changes to the Governing Body of [School]. I understand that you wanted some written information. It would be helpful if you could let me or [Assistant Director], the Assistant Director for Education and Skills, know what information you would like so that we can respond in the most helpful way."*

6. The complainant responded on the same day and advised he had already spoken to [Assistant Director] and clarified the request to be:

   "[1] *The school warning notice sent by yourself to [school]*

   [2] *The report that [Investigation Lead] (I was one of the Governors interviewed) produced at [Assistant Director] request borne out of a letter [Assistant Director] sent to [School] Governing body on the 22nd May where he stated that Babcock* [Babcock Prime – provider of education consultancy services] *had made several concerns had been raised (*sic*) about Governance at [School] and importantly his need to investigate the conduct of individual Governors."*

7. The council responded on 8 November 2019 in terms of [1] and provided the school warning notice. In terms of [2] it provided a redacted version of the requested report ('the Investigation Report').

8. The complainant responded on 8 November 2018 requesting a full version of the Investigation Report, stating that the redactions were preventing a holistic view of the report to be established.

9. The council responded on the 9 November 2018 stating that the council would not be providing a full version of the report and advised that it would further respond regarding the basis of the redactions.

10. To this end, the council wrote to the complainant on 9 November 2018 and advised that the redactions were made on the basis of section 40(2) – personal data.

11. Following the initial complaint, the Information Commissioner wrote to the council on 29 November 2018 and asked it to consider the complainants correspondence of 8 November 2018 as a request for an internal review. The council did not provide an internal review.

Scope of the case

12. The complainant contacted the Commissioner on 12 November 2019 to complain about the way his request for information had been handled. Specifically, the timeliness of the response, and regarding [2], the extent of redactions and the basis cited by the council for withholding information.

13. The Commissioner considers the scope of this case is to establish whether the council has correctly engaged the exemption at section 40(2) – personal data. Furthermore she will consider whether it has incurred any procedural breaches of the FOIA.

Reasons for decision

Section 40 personal information

14. 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.

15. 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').

16. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection

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

Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.

17. 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?

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

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

19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

20. 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.

21. 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.

22. The council advised that the redacted information details the actions and views of the individuals who were interviewed as part of the investigation. It maintains that the information could *"be reasonably attributed to them when combined with other information available including the published list of governors in place at the school."* One other item of information could be linked to a pupil.

23. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the actions and views of the individuals interviewed for the investigation. She is satisfied that this information, in conjunction with other information available would identify the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

24. 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.

25. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

26. 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".*

27. 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.

28. 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.

29. 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].

30. 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:-

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[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*".

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*".

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.

31. 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

32. 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.

33. 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.

34. The council identified that there is a legitimate interest in *"the Council demonstrating our accountability and transparency in our activities as a public authority and how we use our powers of intervention in our maintained schools"* however it did not feel this extended to the disclosure of the information that identified individuals in the Investigation Report.

35. The complainant states that there is a public interest in the performance and actions of individuals in the role of public office. That the information should be made available so that the public are provided with information to hold those in public office to account. He stated that the redactions make it is difficult to understand the extent and substance of the evidence obtained to underpin the conclusions of the Investigation Report.

Is disclosure necessary?

36. '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.

37. The Commissioner observes that that the redacted version of the report provides details of the investigation scope, the independent investigators, the process followed, the evidence collected, the identification of the interviewees by role, the key findings, and recommendations. She agrees that it meets the legitimate interest of accountability and transparency as identified by the council.

38. The complainant's stated legitimate interest however extends further to the transparency of the evidence obtained to underpin the conclusions of the Investigation report, that being the redacted actions and views identified by interviewees.

39. The Commissioner agrees that disclosure would be necessary to meet the legitimate interest specified by the complainant. She has therefore continued to conduct and consider the balancing test.

40. However the Commissioner finds that disclosure of the single item of information that identifies a specific pupil would not be necessary to meet the legitimate interests specified for disclosure, as such she has not included this in the balancing test. As the disclosure of the student's information is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

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

41. 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.

42. 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.

43. 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.

44. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

45. The council has explained that the information relates to the individuals in their public life and the actions carried out whilst in those roles.

46. The council has not felt it constructive to seek consent to the disclosure of the personal data with any of the individuals concerned. The individuals are linked and identifiable as a discreet group, so it would not be possible to identify consent from single parties.

47. The council advised that disclosure "*could cause unnecessary damage and distress to the individuals who were interviewed and can be identified from the information as their reputation, and the overarching reputation of the governing body then in place would be brought into disrepute.*"

48. Furthermore the council explained that individuals would not expect that the information they provided as part of the investigation would be shared into the wider public domain. It stated *"If this was not the case then individuals may be reluctant to become school governors, or fully participate in such investigations in the future jeopardising the ability to produce accurate detailed investigation reports."*

49. The complainant has specifically identified a legitimate interest that relates to the performance and actions of individuals in the role of public office. The Commissioner considers that although school governors are effectively volunteers, the role is still a public one. The disclosure of personal information about them as being an intrusion into their privacy, may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life.

50. However the Commissioner is persuaded that the adverse consequences the council has claimed on the individuals concerned are significant. Furthermore she appreciates that the ramifications of disclosure may deter individuals from taking on this role in the future.

51. The Commissioner also considers that in releasing the redacted version of the Investigation Report, the council has met the legitimate interests of transparency and accountability to a significant degree. She does not consider that the further legitimate interest met by releasing the redacted information warrants the potential consequences that have been identified for the individuals concerned.

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 decision that disclosure would be unlawful, the Commissioner concludes that she does not need to consider whether disclosure would be fair or transparent.

Section 10(1) of the FOIA – Time for compliance with request

54. Section 10 (1) of the FOIA states that a public authority must respond to a request promptly and "*no later than the twentieth working day following receipt*".

55. The complainant made the request for information on 12 July 2018. The council gave a response on 9 November 2018 which is nearly 4 months later. The Commissioner therefore finds that the council has breached section 10(1) of the FOIA by failing to respond to the request within 20 working days. However, as the response was issued no steps are required.

Other matters

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56. The Commissioner notes that the council did not respond to the request for an internal review in respect of this request contrary to the FOIA section 45 Code of Practice.

57. However, the Commissioner considers that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.

58. In this case, the request for an internal review was made on 8 November 2018 and no response was issued.

59. The Commissioner finds this concerning and asks the council to ensure that future requests for internal reviews are handled appropriately and in accordance with her guidance.

Right of appeal

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

61. 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.

62. 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 .....

Ben Tomes
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