

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 October 2019

Public Authority: London Borough of Lambeth
Address: 1 Brixton Hill
Brixton
London
SW2 1RW

Decision (including any steps ordered)

1. The complainant submitted a request to the London Borough of Lambeth (the Council) seeking information about the investigation into Sir Craig Tunstall, formerly executive head teacher of the Gipsy Hill Federation. The Council confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of section 40(2) (personal data) of FOIA.
2. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of section 40(2) of FOIA.
3. She does not require any steps to be taken.

Request and response

4. The complainant submitted a request to the Council on 24 October 2018 seeking the following information:

'The outcome of the investigation into Sir Craig Tunstall, formerly executive headteacher of the Gipsy Hill federation, launched in 2017

I would prefer to receive this information electronically please. If the decision is made to withhold some of this information using exemptions in the Act, I would be grateful if you could please inform me of that fact and cite the exemptions used.¹

5. The Council responded on 21 November 2018 and confirmed that it held information falling within the scope of the request but it refused to disclose this because it considered it to be exempt from disclosure on the basis of section 40(2) (personal data) FOIA.
6. The complainant contacted the Council on 3 January 2019 in order to ask it to conduct an internal review of this response.
7. The Council informed him of the outcome of the review on 23 January 2019; the review upheld the application of section 40(2).

Scope of the case

8. The complainant contacted the Commissioner on 18 February 2019 in order to complain about the Council's handling of his request. The complainant argued that the Council should have, at least, provided him with a redacted version of the information falling within the scope of his request. He also argued that there was a public interest in the disclosure of the information and the complainant's submissions to support this position are considered in more detail below.

Reasons for decision

Section 40 personal information

9. Section 40(2) of 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.
10. In this case the relevant condition is contained in section 40(3A)(a)². This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the

¹ See this press story for further information <https://schoolsweek.co.uk/lambeth-council-remains-tight-lipped-over-tunstall-investigation/>

² As amended by Schedule 19 Paragraph 58(3) DPA.

processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').

11. 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 FOIA cannot apply.
12. 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?

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

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

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. 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.
16. 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.
17. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates primarily to Sir Craig Tunstall but also to a number of other individuals. She is satisfied that this information both relates to and identifies these individuals. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
18. In reaching this finding the Commissioner has considered whether any of the information could be disclosed in a redacted form on the basis that parts of the withheld information do not constitute personal data and thus could not be exempt from disclosure on the basis of section 40(2) of FOIA. In considering this point, the Commissioner acknowledges that whilst some of the information is not directly personal data, disclosure of such information as a whole would still provide personal data about the individuals concerned. The Commissioner considers that such an approach is in line with that set out in her guidance 'What is personal data?' and in particular the her

position that data which identifies an individual, even without a name associated with it, may be personal data if an organisation is processing it to learn or record something about that individual, or where the processing has an impact on that individual.³

19. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
20. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

21. 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'.

22. 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.
23. 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.
24. 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'⁴.

³ <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/what-is-personal-data/what-is-the-meaning-of-relates-to/>

⁴ 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

25. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under 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.
26. 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

27. In considering any legitimate interest(s) in the disclosure of the requested information under 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.
28. 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.
29. The Council acknowledged that there is a legitimate interest in disclosing the withheld information because of the position of responsibility that Sir Craig Tunstall held as CEO of the Gipsy Hill Federation and the large amounts of public money involved.
30. For similar reasons the complainant argued that there was also clear interest in the disclosure of the withheld information. He noted the press interest that Sir Craig Tunstall's suspension had attracted.⁵ The complainant also noted the disparity between the transparency of investigations run by the government into academies and the position adopted by local authorities into council-maintained schools (this

(dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

⁵ For example <https://www.thesun.co.uk/news/3513510/britains-best-paid-primary-head-teacher-sir-craig-tunstall-being-probed-over-fraud-allegations/>

request concerns the latter). The complainant explained that the government has an investigation publication policy which states '*The EFA [Education Funding Agency] will publish in all but the most exceptional circumstances*'⁶ and in his experience this included cases where personal data was involved, with such information either being published or in some cases redacted. However, the complainant emphasised that in contrast the Council had not disclosed any information falling within the scope of his request.

31. For the reasons identified by both parties, the Commissioner is satisfied that there is a clear legitimate interest in the disclosure of the withheld information.

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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
33. The Council explained that in its view disclosure was not necessary at the point that the request was submitted due to the impact on the data subjects. However, in the Commissioner's opinion disclosure of the withheld information is necessary to meet the legitimate aims identified above.

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

34. 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 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.
35. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;

⁶ <https://www.gov.uk/government/publications/efa-investigation-publishing-policy/efa-investigation-publishing-policy>

- 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.
36. 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.
37. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
38. The Council provided the Commissioner with detailed submissions to support its view that the legitimate interests in disclosing the information were significantly outweighed by the legitimate interests of Sir Craig Tunstall and the other data subjects named in the withheld information. These submissions made reference to the withheld information itself and the wider circumstances surrounding the investigation into Sir Craig Tunstall and therefore the Commissioner is limited with regard to what details she can include in this decision notice. However, by way of a summary of the Council's position it explained that Sir Craig Tunstall would have no expectation that the withheld information would be disclosed, although some press reports had included details of this case such reporting did not extend to the level of detail included in the withheld information, and that disclosure of the withheld information risked causing Sir Craig Tunstall significant harm and distress.
39. The complainant's submissions to support his view that there is a greater legitimate interest in disclosure are set out above at paragraph 30.
40. The Commissioner recognises that the investigation into Sir Craig Tunstall has attracted considerable public attention, not least it would appear because of significant salary that he received. The Commissioner also recognises that despite such interest the Council has not released any details of the investigation. Moreover, given the sums of money involved and the seriousness of the allegations as reported in the press stories surrounding Sir Craig Tunstall, the Commissioner considers there to be a clear and weighty legitimate public interest in disclosure of the withheld information in order to inform the public about the nature of the investigation and the current position (as at the time of the request) in respect of Sir Craig Tunstall. This legitimate interest should not be underestimated.

41. However, having had the benefit of examining the withheld information, and of course the Council's detailed submissions, the Commissioner is satisfied that at the time of the request the greater legitimate interest was in protecting Sir Craig Tunstall's interests. In reaching this conclusion the Commissioner has been particularly persuaded firstly by the fact that Sir Craig Tunstall would have had a clear and reasonable expectation that the withheld information would not be disclosed and secondly the consequences on him of doing so.
42. In reaching this decision the Commissioner has carefully considered whether some of the withheld information could be disclosed. However, given the circumstances of the request and the content of the withheld information she is satisfied that for all of the information in scope there is an insufficient legitimate interest to outweigh the data subject's 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.
43. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
44. The Commissioner has therefore decided that the Council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

45. 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

46. 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.

47. 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
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