

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 23 October 2020

**Public Authority:** Tamworth Borough Council  
**Address:** Marmion House  
Lichfield Street  
Tamworth  
B79 7BZ

#### Decision (including any steps ordered)

---

1. The complainant has requested details from Tamworth Borough Council ("the Council") regarding the details of meetings and people who conducted a previous internal review. The Council stated that it did not hold all of the information within the scope of the complainant's request but it provided some of the information that it did hold. It also withheld part of the held information and relied on section 40 of the FOIA to do so.
2. The Commissioner's decision is that she is satisfied that the Council only holds some of the information within the scope of the request and that the Council has correctly relied upon section 40(2) to withhold the information it has done.
3. The Commissioner therefore does not require any further steps to be taken.

## Request and response

---

4. On 18 September 2019, the complainant wrote to the public authority and requested information in the following terms:

*"Dear Council,  
I would be grateful if you could assist me by providing me with information that I may need to rely on during an impending First-tier Tribunal (General Regulatory Chamber) hearing.*

*On 15 August 2018, [employee name and job title] provided me with your Internal Review decisions in relation to my ongoing information request FOI5129 (that became EIR3452).  
I've attached a copy of your Internal Review Decisions document for your reference.*

*Could you please furnish me with all the information you hold from 25 May 2018 in relation to your Internal Review that you provided your decisions to me on 15 August 2018?*

*For every meeting that took place in relation to this Internal Review, could you please provide this information as set out below:*

-

- *Date of meeting*
- *Time of meeting*
- *Copy of meeting agenda*
- *Location of meeting*
- *Link to meeting details on Tamworth Borough Council's Website*
- *Meeting attendance record and/or list of attendees (including names)*
- *Minutes or records of discussions*

*For each listed meeting attendee, could you please provide information about them as set out below: -*

- *Name*
- *Job title*
- *Details of their employer or who they were representing or working on behalf of*
- *Copy of their electronic and/or non-electronic calendar entries that show the meeting*
- *Notes, submissions, reports, details of any other type of document they created or submitted in relation to the meeting*

- *Details of any FOIA/EIR training course this person has completed (course title, course provider, course examining body, date course started, proof of course completion date, etc)*

*For every communication you hold in relation to your Internal Review that you provided your decisions to me on 15 August 2018, could you please provide this information as set out below: -*

- *Date and time of communication*
- *Type of communication (i.e. email, fax, telephone call, letter, etc)*
- *List of persons involved in the communication along with their Job Title and employer*
- *Copies of the communication*

*Could you please furnish me with any other type of information you hold in relation to your Internal Review that you provided your decisions to me on 15 August 2018, in your preferred format?*

*On 26 November 2018, [employee name and job title] provided me with your Internal Review decisions in relation to my ongoing information request EIR3452 (that was FOI5129). I've attached a copy of your Internal Review Decisions document for your reference.*

*Could you please furnish me with all the information you hold from 10 October 2018 in relation to your Internal Review that you provided your decisions to me on 26 November 2018?*

*For every meeting that took place in relation to this Internal Review, could you please provide this information as set out below:*

-

- *Date of meeting*
- *Time of meeting*
- *Copy of meeting agenda*
- *Location of meeting*
- *Link to meeting details on Tamworth Borough Council's Website*
- *Meeting attendance record and/or list of attendees (including names)*
- *Minutes or records of discussions*

*For each listed meeting attendee, could you please provide information about them as set out below: -*

- *Name*
- *Job title*
- *Details of their employer or who they were representing or working on behalf of*
- *Copy of their electronic and/or non-electronic calendar entries that show the meeting*
- *Notes, submissions, reports, details of any other type of document they created or submitted in relation to the meeting*
- *Details of any FOIA/EIR training course this person has completed (course title, course provider, course examining body, date course started, proof of course completion date, etc)*

*For every communication you hold in relation to your Internal Review that you provided your decisions to me on 26 November 2018, could you please provide this information as set out below: -*

- *Date and time of communication*
- *Type of communication (i.e. email, fax, telephone call, letter, etc)*
- *List of persons involved in the communication along with their Job Title and employer*
- *Copies of the communication*

*Could you please furnish me with any other type of information you hold in relation to your Internal Review that you provided your decisions to me on 26 November 2018, in your preferred format?"*

5. The public authority responded on 16 October 2019. It stated that it did not hold some of the information, but provided some of the information it did hold. However, it cited section 40 of the FOIA to withhold some of the information inside the scope of the complainant's request.
6. Following an internal review the public authority wrote to the complainant on 15 November 2019. It stated that it upheld its original position.

## **Scope of the case**

---

7. The complainant contacted the Commissioner on 16 December 2019 to complain about the way his request for information had been handled.
8. Within the complainant's contact to the Commissioner to confirm the scope of the case, he asked the following:

*"Could you please consider if TBC should deny the public it serves the ability to view and scrutinise amounts of public money it spends on FOIA/EIR training for its employees?"*

*Could you please consider if TBC have sufficient grounds to redact this email or provide me with a copy of the email in its original condition, before it was redacted?"*

9. The complainant's main concern about the Council's handling of the request is about its refusal to provide some of the information that it holds, and not about the fact that the Council may not hold some of the information within the scope of the request.
10. The issues that the complainant has raised in his grounds of complaint clearly extend beyond the relatively narrow scope of his request, however the Commissioner will consider these arguments, in so far as they are relevant, when considering any legitimate interests in disclosure.
11. The Commissioner sent her initial enquiries to the Council in relation to its application of section 40(2) of the FOIA. In response to these, the Council advised that the withheld information may also be covered by section 41, as well as section 40(2) of the FOIA.
12. The Commissioner considers the scope of her investigation to be to establish whether the public authority has identified all the information it holds within the scope of the request and whether it is entitled to withhold the remainder of the requested information under section 40(2) of the FOIA. If the Commissioner does find that the Council was entitled to withhold all of the remaining information under section 40(2), she will not assess the Council's application of section 41 of the FOIA.

## **Reasons for decision**

---

### **Section 1 - Held/Not Held**

13. Section 1(1) of the FOIA states that:

*Any person making a request for information to a public authority is entitled –*

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

14. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, she will consider any reason why it is inherently likely or unlikely that information is not held.
15. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
16. In this case, the Council has provided some information within the scope of the request, advised that it does not hold some of the information and withheld the rest.
17. The information it says it does not hold are diary entries and meeting minutes relating to the meetings the complainant referred to in his request.
18. The Commissioner made enquiries with the Council regarding the meeting minutes and diary entries and it explained that the diary entries had been deleted in line with Council retention policies. The Council also explained that it was not required to take minutes for the specific meetings that were requested, it does not routinely take minutes of these type of meetings and the attendees of the meeting were certain that no meeting minutes were taken.
19. The Commissioner cannot make a judgement on whether the information ought to be held, only on whether, on the balance of probabilities, it is, as a matter of fact, held.
20. The Commissioner is satisfied with the Council's searches and explanations in this case and finds that the Council holds no further information within the scope of the complainant's request.

#### **Section 40 - personal information**

21. 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.

22. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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').
23. 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.
24. 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?***

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

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

26. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
27. 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.
28. 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.
29. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects.
30. The names and job titles of the data subjects quite obviously are pieces of information that both relate to and identify those concerned. Also, the complainant has asked for "*Details of any FOIA/EIR training course this person has completed (course title, course provider, course examining body, date course started, proof of course completion date, etc)*". Given

---

<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA



the way this request is worded, it is obvious that it will be personal information. By way of a reminder, the complainant asked for a profile of each meeting attendee including their name, their meeting notes, their calendar entries, job title and employer. All of these in the form of a profile certainly both identifies and related to the individuals who attended the meetings concerns and is undoubtedly their personal data.

31. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
32. 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.
33. The most relevant DP principle in this case is principle (a).

***Would disclosure contravene principle (a)?***

34. 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".*

35. 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.
36. 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***

37. 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"<sup>2</sup>.*

---

<sup>2</sup> 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".*



38. 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.
39. 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*

40. 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.
41. In this particular case, the complainant has asked the Commissioner to consider *"if the Council should deny the public it serves the ability to view and scrutinise amounts of public money it spends on FOIA/EIR training for its employees."* Therefore it would be appropriate to consider this as one of the legitimate interests for releasing the information.
42. However, the request he made would not achieve this as it contains no mention of the money spent on providing FOIA/EIR training. It only concerns the training of people who had been involved with one particular internal review response, being his own.
43. Stemming from this, however, the Commissioner understands that having adequately trained staff leads to the Council being better able to
- 

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".*

uphold information rights; which would be seen as another legitimate interest for releasing the information.

44. 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.

*Is disclosure necessary?*

45. '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.

46. Within the Council's response to the Commissioner's enquiries, it said:

*"The Council acknowledges the legitimate interest of accountability for this case; it is considered however the responsibility of the Council as an employer to satisfy itself that staff are appropriately trained. Therefore, the Council does not consider that any legitimate interest in that information makes the disclosure of that information necessary as any legitimate interest in understanding the competence of the organisation is met by the Council internally. The legitimate interest is therefore met in this way.*

*Additionally, the Council submits that disclosure of the training records and other information requested does not of itself provide transparency or accountability as it takes no account of the experience of the individual, of mentoring schemes, internal training schemes or such-like which also contribute to the training of individuals. Therefore the Council does not consider that disclosure is necessary (or indeed helpful) in furtherance of that legitimate interest."*

47. The Commissioner accepts this as it is in line with her previous decision notices<sup>3</sup>. The Commissioner has previously found that even if a person is

---

<sup>3</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617161/fs50887618.pdf> <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617027/fs50842250.pdf>

not identifiable, releasing information about qualifications and training is not usually necessary as there are less intrusive means of achieving the legitimate interests.

48. In this case, given the way the request was worded, it is clear that the information would both identify and relate to the people involved. For this reason, it adds to the argument that there are less intrusive means of ensuring staff are properly trained.
49. The Commissioner is also aware that should anyone, but in this case the complainant, believe an incorrect decision has been made because of a lack of training or for any other reason, a requestor has several layers of appeal rights. Firstly, a requestor could ask for an internal review. If the internal review did not produce a satisfactory outcome, they could complain to the Commissioner and appeal any decision she made to the First Tier Tribunal ("FTT") which the Commissioner understands he has done.
50. The Council additionally stated:

*"Furthermore, the complainant in this case advised in their request dated 18th September 2019 the following:*

*"I would be grateful if you could assist me by providing me with information that I may need to rely on during an impending First-tier Tribunal (General Regulatory Chamber) hearing".*

*The hearing decision has been provided to the parties and the Complainant's complaint was not upheld. The case has been concluded and therefore it is considered the disclosure is not necessary for the purpose for which it was requested. Further, it is not considered that release of the data would have had any impact on the outcome of the case as the Information Tribunal decides the matter afresh and so any errors in process or law due to any shortcomings in training (if any) are remedied by the Tribunal. In the circumstances, the stated interest which the complainant had in the material no longer exists."*

51. The Commissioner realises that the request was made before the FTT had made its ruling. However, this supports the argument in point 49. The complainant has followed the less intrusive way of achieving his legitimate interest to make sure any decisions made at the start of the process were correct.
52. The Commissioner is satisfied in this case that there are less intrusive means of achieving the legitimate aims identified. Therefore, she finds

that disclosure of the requested information is not necessary and thus she does not need to consider the balancing test.

53. The Commissioner therefore considers that there is no Article 6 basis for processing and so disclosure of the information would not be lawful.
54. 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.
55. As the Council was correct to withhold the information under section 40(2), she will not consider the Council's application of section 41 in relation to this request.

## Right of appeal

---

56. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

57. 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.
58. 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** .....

**Phillip Angell**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**