

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 June 2022

Public Authority: Birmingham City Council
Address: Council House
Victoria Square
Birmingham
B1 1BB

Decision (including any steps ordered)

19. The complainant has requested information about an investigation. Birmingham City Council ('the Council') has released some of the requested information and has withheld other information under section 40(2) and section 41(1) of FOIA which concern personal data and information provided in confidence respectively.
20. The Commissioner's decision is as follows:
- The Council is entitled to withhold information from the requested terms of reference document under section 40(1) and section 40(2) of FOIA. This information is the complainant's and other people's personal data and disclosing it would not be lawful. The Council is also entitled to withhold the interview statements under section 41(1) of FOIA as this information was provided to the Council in confidence.
 - The Council breached section 10(1) and section 17(1) of FOIA as it did not comply with section 1(1) or issue an adequate refusal notice within the required timescale.
21. The Commissioner does not require the Council to take any remedial steps to ensure compliance with the legislation.

Request and response

22. On 29 June 2020 the complainant had submitted a request for information to the Council in the following terms:

“In accordance with the Freedom of Information Act, please provide all recorded information (includes printed documents, reports, computer files, letters, emails, photographs, and sound or video recordings), relating to the [redacted] complaint, as specified below:

The investigation’s terms of reference which was used by [redacted] to undertake [redacted] impartial Investigation of the [redacted] complaint.

The final and full version of the Investigation report and its associated evidential documents.

Confirmation of the date the impartial investigation report was submitted to [redacted].

The final and unedited version of statements of all persons interviewed by [redacted], as listed below:

- [Names redacted]

The total content of the [redacted] and previously [redacted] information file, as from January 2011; ensuring all correspondence, recordings sent to external organisations or agencies and associated responses are also included, such as (but not limited to) other local authorities and the Care Quality Commission.

Copies of all finance or otherwise audit reports associated with [redacted] and previously [redacted] from January 2011.

All recorded Information relating to communications between the listed people concerning the [redacted] Complaint; including individual investigation meeting invitations and responses.

- [Names redacted]
- Any other persons

Elected Members

- [Names redacted]

I would prefer to receive the requested information by email but will accept all or some of the requested information by post, if considered more convenient.

If my request is denied in whole or in part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all non-exempt material. I reserve the right to appeal your decision to withhold any information or to charge excessive fees.

I would be grateful if you could confirm in writing that you have received this request. I look forward to your response to my information request prior to the 1st August 2020."

23. On 17 July 2021 the Council refused this request under section 12(1) of FOIA as it considered the time it would take to comply with it would exceed the appropriate limit.
24. On 26 August 2020 the complainant submitted a refined request in the following terms:

"Request

Previously requested investigation terms of reference, interview statements and supporting documentation of which the report relies .

Information Request

- The investigation's terms of reference which was used by [redacted] to undertake [redacted] impartial Investigation of the [redacted] complaint.
- The final and full version of the Investigation report and its associated evidential documents.
- Confirmation of the date the impartial investigation report was submitted to BCC.
- The final and unedited version of statements of all persons interviewed by [redacted], as listed below:
 - o [Names redacted]
 - o Any other Interviewed persons
 - Elected Members
 - o [Names redacted]"

25. Correspondence between the complainant and the Council followed. As part of correspondence to the complainant dated 22 December 2020, which was a response to their wider concerns, the Council disclosed the investigation's final report.
26. The Council then provided a response to the request under FOIA on 16 April 2021.
27. The Council withheld the requested interview statements under section 41(1) of FOIA.
28. With regard to what it said was the requested "supporting documents", the Council advised it was relying on section 12(1) of FOIA to refuse this element because the cost associated with complying with it would exceed the appropriate limit.
29. Apparently under the data protection legislation, rather than FOIA, the Council disclosed the requested 'terms of reference' document which included information it considered to be the complainant's own personal data. The Council redacted other people's personal data from that document and said it would not be putting the document into the public domain.
30. The complainant requested an internal review on 12 May 2021 which focussed on the Council's response to the request for the terms of reference document and interview statements.
31. The Council provided an internal review on 4 June 2021. With regard to the terms of reference document, the Council said it had, in fact, disclosed this under FOIA but "the decision to leave [the complainant's] name in the documents was done under section 15 of the Data Protection Act." The Council upheld its reliance on section 41(1) and section 12(1).

Scope of the case

32. The complainant first contacted the Commissioner on 10 May 2021 to complain about the way their request for information had been handled.
33. The Commissioner has noted the way the complainant has framed their request of 26 August 2020. The request begins by summarising the previous request of 29 June 2020. It was that request that included a request for "supporting documents" which the Council refused under section 12 of FOIA. The refined request of 26 August 2020 does not include a request for "supporting documents". The request under

consideration here is for the investigation terms of reference, the final report, a date and the investigation interview statements.

34. In response to the request of 26 August 2020, the Council has provided the first three elements of the request, with the names of third persons redacted from the disclosed terms of reference document.
35. The Commissioner's investigation has therefore focussed on whether the Council is entitled to withhold the names of third persons from the terms of reference document under section 40(2) of FOIA. He has also considered whether the Council is entitled to rely on section 41(1) to refuse to disclose the interview statements. Finally, he has considered the timeliness of the Council's response to the request and the adequacy of its refusal.

Reasons for decision

Section 40 – personal information

36. The Council disclosed the terms of reference document the complainant requested. It noted that it had left the complainant's name in this document, but considered that, as it is their personal data, it was obliged by data protection legislation to leave it visible. The Council said it had redacted the personal data of third persons under FOIA. The Council's handling of this document was muddled, in the Commissioner's view. The Council should have made it clear it was either handling the whole document under the data protection legislation or was handling it under FOIA. It should then have responded as appropriate. The Commissioner will assume the Council handled the whole document under FOIA. It is important to remember that disclosure under FOIA is disclosure to the world at large and so it is important that the public authority selects the correct access regime when it responds to a request.
37. Section 40(1) of FOIA provides that information is exempt from disclosure if it is the personal data of the requester. In this case, the complainant's own personal data in the terms of reference document (ie their name) is exempt information under section 40(1).
38. Section 40(2) 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.

39. 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').
40. 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.
41. Second, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

"any information relating to an identified or identifiable living individual".
43. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
44. 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.
45. 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.
46. In this case, the information being withheld is a mix of the names, job titles, gender pronouns and contact details of a range of individuals involved in a particular investigation.
47. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that this information both relates to and identifies the individuals concerned. This

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

information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

48. 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.
49. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

50. 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".

51. 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.
52. 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

53. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
54. 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.

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".

55. 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
56. 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

57. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

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".

58. The Commissioner has considered the circumstances around the request, and he appreciates that the complainant would have a personal interest in the withheld information. It is a valid interest for the complainant to have. There is also a wider, legitimate interest in the Council demonstrating it is open and transparent.

Is disclosure necessary?

59. '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.
60. Disclosing the names of individuals involved in the specific investigation would be necessary for the complainant to have the level of detail they are seeking, about that investigation.

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

61. It is necessary to balance the legitimate interests in disclosure against the data subjects' 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.
62. 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 individuals
63. 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.

64. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
65. The Commissioner considers that individuals involved in particular investigation and who are named in that investigation would have the reasonable expectation that their personal data would not be disclosed to the world at large as the result of a FOIA request. Disclosing that information would therefore be likely to cause them distress. The Council has disclosed the majority of the information the complainant has requested and the wider public interest in the Council being open and transparent has therefore been met to an adequate degree, in the Commissioner's view. And the redacted information, while of interest to the complainant, has no wider public interest. Moreover, it **may** be possible for the complainant to access the terms of reference document in its entirety through another route.
66. 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 disclosing the information would not be lawful.
67. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
68. The Commissioner has therefore decided that the Council was entitled to withhold the remaining information in the terms of reference document under section 40(2) of FOIA, by way of section 40(3A)(a).

Section 41 – information provided in confidence

69. Section 41(1) provides that information is exempt if, under subsection (a) the public authority obtained it from any other person and, under subsection (b), disclosure would constitute a breach of confidence actionable by that person or any other person. This exemption is absolute and therefore not subject to a public interest test, as such.
70. The Council has withheld, under this exemption, notes of interviews conducted as part of an investigation. It has provided this information to the Commissioner.

a) Did MHRA obtain the information from another person?

71. The Council has confirmed that the withheld information was obtained from other people, namely those interviewed in the course of the investigation. The Commissioner has reviewed the information and is satisfied the Council obtained this information from other people.

b) Would disclosure constitute a breach of confidence actionable by that person or another person?

72. In considering whether disclosing the information constitutes an actionable breach of confidence the Commissioner considers the following:
- whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.
73. **Necessary quality of confidence:** The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. He is satisfied that the information in this case has that quality. The allegations that the Council's investigation was considering were serious. In addition the withheld information is not accessible outside the Council and is known only to a limited number of people within the Council.
74. **Circumstances imparting an obligation of confidence:** This limb is concerned with the circumstances in which the confider of information passed the information on. The confider may have attached specific conditions to any subsequent use or disclosure of the information (for example in the form a contractual term or the wording of a letter). Alternatively, the confider may not have set any explicit conditions but the restrictions on use are obvious or implicit from the circumstances (for example information a client confides to their counsellor).
75. The Commissioner considers that the individuals who were interviewed as part of the Council's investigation would have had the reasonable expectation that the information they were providing would not be disclosed to the world at large in response to a request under FOIA. In the Commissioner's view it would have been reasonable for those individuals to assume that the Council would treat the information confidentially. As such, the Commissioner is satisfied the individuals provided the Council with the information in circumstances importing an obligation of confidence.
76. **Detriment to the confider:** The First-tier Tribunal (Information Rights) in *Bluck v ICO and Epsom and St Helier University Hospital Trust* refers to the fact that "...if disclosure would be contrary to an individual's reasonable expectation of maintaining confidentiality in respect of his or her private information...", this exemption can apply. The Commissioner has accepted that disclosing the information in question in this case

would be contrary to the reasonable expectations of the individuals who were interviewed. Disclosure would therefore cause detriment to those individuals.

Is there a public interest defence for disclosure?

77. As noted, section 41 is an absolute exemption and not subject to the public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under FOIA). British courts have historically recognised the importance of maintaining a duty of confidence so it follows that strong public interest grounds would be required to outweigh such a duty.
78. The Commissioner recognises that there is a public interest in public authorities being open and transparent. He notes that the Council has provided the complainant with the remainder of the information they have requested.
79. The Commissioner appreciates that information is of interest to the complainant in this case but considers it has minimal wider, public interest. He is mindful of the wider public interest in preserving the principle of confidentiality and the need to protect the relationship of trust between confider and confidant. In this case, there is strong public interest in people feeling confident to participate in an investigation associated with allegations another party may have made, so that the investigation is thorough and fair. They will be more prepared to do this if they are satisfied that the Council will treat the information they provide confidentially.
80. The Commissioner has considered all the circumstances of this case and the nature of the information being withheld under section 41(1). He has concluded that there is stronger public interest in maintaining the obligation of confidence than in disclosing the information. Therefore, the Commissioner finds that the condition under section 41(1)(b) is also met and that the Council is entitled to withhold some of the requested information under section 41(1) of FOIA.

Section 10 - time for compliance

81. Under section 1(1) of FOIA, anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b) to have the information communicated to them if it is held and is not exempt information.

82. Under section 10(1) of FOIA, a public authority must comply with section 1(1) promptly and within 10 working days following the date of receipt of the request.
83. In this case, the complainant submitted their request to the Council on 26 August 2020. The Council provided a response under FOIA on 16 April 2021, when it disclosed the terms of reference document (with redactions under section 40) The Council therefore did not comply with section 10(1) with regard to this element of the request.

Section 17 - refusing a request

84. Under section 17(1) of FOIA, a public authority which, in relation to any request for information, is to any extent relying on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which (a) states that fact (b) specifies the exemption in question, and (c) states (if that would not otherwise be apparent) why the exemption applies.
85. As noted, the Council did not provide a response under FOIA until 16 April 2021. In this response, the Council refused to disclose exempt information under section 40 and 41. (It erroneously also refused to comply with an element of the request under section 12.) The Council's refusal therefore did not meet the timescale required. Nor did the refusal clearly state, as it should have done, that the Council was withholding the complainant's personal data under section 40(1) of FOIA. The Commissioner therefore finds that the Council's refusal did not meet the requirements of section 17(1) of FOIA.

Right of appeal

86. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

87. 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.
88. 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

Cressida Woodall
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