

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** **8 September 2022**

**Public Authority:** **Rotherham Metropolitan Borough Council**

**Address:** **Riverside House  
Main Street  
Rotherham  
S60 1AE**

#### **Decision (including any steps ordered)**

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1. The complainant requested information from Rotherham Metropolitan Borough Council ("the Council") relating to the Council's response to a previous request that they made in 2015.
2. The Council withheld the identity of an external expert, citing the personal information exemption under section 40(2) of FOIA. In relation to the other information requested, the Council stated it did not hold any further information beyond that which it had disclosed in response to previous requests.
3. The Commissioner's decision is that the Council is entitled to withhold the name of the external expert contacted by the Council under section 40(2) of FOIA. He is also satisfied that the Council does not hold any further information within scope of the request beyond what it disclosed in response to previous requests.
4. The Commissioner does not require the Council to take any steps.

## Background

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5. In 2014 the Independent Inquiry into Child Sexual Exploitation in Rotherham, also known as the Jay report, estimated that approximately 1400 children were sexually exploited in Rotherham during the period of 1997 to 2013.
6. In 2015 the Council reversed a decision it had previously made to distribute 1,500 copies of a booklet called Voices of Despair, Voices of Hope, a collection of child sexual exploitation survivors' stories.
7. The complainant has made a number of requests for information relating to the reversal of the decision.
8. Jean Imray, who is named in the request, is a senior social worker who carried out an independent investigation in 2014 which was commissioned following the findings of the Jay report. This investigation consisted of a review of 15 case files held by Children's Social Care relating to the children described in the pen pictures A-O in the Jay report. In 2015 she was appointed Interim Deputy Strategic Director of the Children and Young People's Services Directorate at the Council.

## Request and response

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9. On 23 March 2021, the complainant wrote to the Council and requested information in the following terms (numbering added for clarity of reference):

"This Right Of Access Request - Freedom Of Information Act Request is for

  1. a copy of all the communications that led to and followed on from the comments made in red and added to the email I sent on 26.10.15 at 10.24 am.
  2. It is also essential that the identity of any person Jean Imray contacted (Rape Crisis is mentioned) is identified as part of this request.

Please note the comments made in red in this piece of information that RMBC sent to me on 16.3.21:..."
10. A screenshot of the email including the Council's comments in red that the request refers to was included with the request. The email, which the complaint sent to the Council in 2015, related to information that the complainant believed to be outstanding from an FOI request that

they had made in 2015. The comments in red referred to are the Council's internal comments on the complainant's email. These comments were, subsequently, disclosed following an FOI request in 2021.

11. The Council responded on 19 April 2021. It stated that it was treating the request as a subject access request under the UK General Data Protection Regulation (UK GDPR) as its response would involve disclosing the complainant's personal data and that it would not be appropriate to do so under FOIA.
12. Regarding part 1 of the request it stated that it did not hold any further information beyond that which it had disclosed in response to previous requests. Regarding the identity of an external expert, from whom the Council had taken advice on matters related to child sexual exploitation, which fell within part 2 of the request, it stated it was withholding this information on the basis that it was the personal data of the external expert. The Council stated, "such third-party data is neither disclosable under Right of Access nor under Freedom of Information" and cited the personal information exemption under section 40(2) as the relevant exemption under FOIA.
13. Following an internal review the Council wrote to the complainant on 27 July 2021. It upheld its original position.

### **Scope of the case**

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14. The complainant contacted the Commissioner on 22 July 2021 to complain about the way their request for information had been handled.
15. The Commissioner considers FOIA rather than the UK GDPR to be the correct access regime under which to consider this request. He has considered this case as a complaint under section 50 of FOIA.
16. The following analysis considers whether the Council is correct to say that:
  - in relation to the first part of the request, it does not hold any further information beyond that which it has disclosed in response to previous requests,
  - in relation to part two of the request, that it is entitled to rely on the personal information exemption under section 40(2) of FOIA as a basis for refusing to provide the withheld information.

## Reasons for decision

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### Section 1 – General right of access to information

17. Section 1(1) of 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.”

18. Section 1(1) requires that any person making a request for information to a public authority must be informed in writing by the public authority whether it holds information relevant to the request, and if so, to have that information communicated to them. This is subject to any exclusions or exemptions that may apply.

19. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.

20. In other words, in order to determine such complaints, the ICO must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).

21. In this case the Commissioner has considered whether on the balance of probabilities the Council holds additional information which falls within the scope of the request beyond that which it has disclosed in response to previous requests.

#### The Complainant's position

22. The complainant believes that the Council holds further information within the scope of the request, beyond that which it has disclosed in response to previous requests.

#### The Council's position

23. The Council has explained that it previously provided information to the complainant in response to requests submitted between 2015 and 2021.

24. It maintains that it does not hold any further information within the scope of the request, beyond that which it has disclosed in response to the previous requests.
25. The Council believes that it has carried out appropriate searches likely to retrieve any further relevant information. It states that it has carried out network searches and corporate-wide email searches and that relevant officers have undertaken searches of their own systems. Searches were based on the email on which the red comments were made.
26. The Council's position is therefore that it does not hold any further information within the scope of the request.

#### The Commissioner's conclusion

27. The Commissioner's remit in this case is to establish whether, on the balance of probabilities, the Council holds further information within the scope of the request, beyond that which it has disclosed in response to previous requests.
28. During the course of his investigation the Commissioner also considered the information in scope of the request that the Council disclosed in response to previous requests.
29. He is satisfied by the Council's explanations as to how it has carried out searches for any further information. His decision is that, on the balance of probabilities, the Council does not hold further information that is relevant to the complainant's request.
30. He does not require the Council to take any steps.

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

31. 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.
32. 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

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

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

33. 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.
34. Secondly, 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?**

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

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

36. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
37. 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 or an online identifier, or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
38. 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.
39. In part 2 of the request, the complainant stated that "It is also essential that the identity of any person Jean Imray contacted (Rape Crisis is mentioned) is identified as part of this request."
40. The withheld information is the identity of an external expert from whom the Council had taken advice on matters related to child sexual exploitation, specifically about whether it should distribute a collection of survivors' stories.
41. In the circumstances of this case, the Commissioner is satisfied that the information both relates to and identifies the external expert. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
42. 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.

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

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

44. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

45. In the case of a 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.

46. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the UK GDPR**

47. 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>.

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<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”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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”.

48. In considering the application of Article 6(1)(f) of the UK 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.
49. 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

50. 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.
51. The Commissioner accepts that there is a legitimate interest in fully understanding the Council's reversal of its decision to distribute the collection of survivors' stories, including the identity of the expert, and therefore this criterion is met.

#### Is disclosure necessary?

52. '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.
53. The Council argues that disclosure of the identity of the external expert is not necessary to meet the legitimate public interest in transparency



regarding the Council's reversal of its decision to distribute the collection. It considers that it is sufficient that it has disclosed the opinion of the expert and why that opinion was sought.

54. The Commissioner accepts that the disclosure of this other information has gone a considerable way to meet the legitimate public interest in transparency. However, he considers that disclosure of the identity of the external expert would be necessary to fully meet the legitimate interests identified above, and may therefore be lawful, depending on the outcome of the balancing exercise, below.

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

55. 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.
56. 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.
57. In the Commissioner's view, a key issue is whether the individual concerned has 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.
58. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
59. The Council states that from the outset, the expert witness gave their opinion with the understanding it would be in confidence and anonymity and that this was also agreed with their employer.
60. The Council also states that it has previously sought consent to disclose the name of the expert and this was refused by the individual.

61. The Council also argues that disclosure of the expert's name is also likely to, in effect, disclose their employer and where they work and that it does not wish to expose them to potential harassment.
62. The Commissioner considers that, as set out above, the legitimate interest in the identity of the expert is relatively limited given the information the Council has already disclosed about the opinion from the expert.
63. He further considers that the likelihood of unwarranted damage and distress being caused to the expert, due to the high profile nature of the subject matter in this case, is high.
64. Based on the above factors, the Commissioner has determined that there is 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.
65. 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.

### **The Commissioner's view**

66. 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

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67. 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)

68. 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.
69. 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 .....**

**Victoria James**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**