

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 June 2022

Public Authority: Vale of Glamorgan Council

Address: Civic Offices
Holton Road
Barry
Glamorgan
CF63 4RU

Decision (including any steps ordered)

1. The complainant submitted a request to the Vale of Glamorgan Council ("the Council") on 16 August 2021. The Council provided a substantive response to this request on 1 October 2021. They further updated their response on 9 June 2022 and provided all of the information requested except for one piece of data which they withheld under section 40(2) of FOIA.
2. The Commissioner's decision is that the Council has appropriately withheld one piece of information under section 40 of FOIA. However, they failed to respond to the request within the statutory time frame of 20 working days and has therefore breached section 10(1) of FOIA.
3. The Commissioner does not require the Council to take any action in relation to this decision notice.

Request and response

4. On 16 August 2021, the complainant wrote to the Council and requested information in the following terms:

“Questions

Q1 Specifically in Key Stage 3/4, how many pupils are enrolled in total within the ASD class at Ysgol Y Deri from September 2021? Please can you also provide me the same details for September 2018, 2019 & 2020? Also please provide a breakdown of how many of these pupils were from Cardiff LA.

Q2 In September 2018, 2019, 2020 & 2021 how many pupils were enrolled at the whole of Ysgol Y Deri?

Q3 Please provide details of how many pupils at Ysgol Y Deri were from Cardiff LA in September 2018, 2019, 2020 & 2021?

Q4 February 2021 - July 2021 how many new pupils were offered a place at Ysgol Y Deri? Please include what LA's they were from.

Q5 In September 2021 how many new pupils will be joining Ysgol y Deri from Cardiff LA?

Q6 When Ysgol Y Deri was built, did Cardiff council provide any funding towards the build?”

5. The Council acknowledged receipt of the initial request on 1 October 2021 and provided a response.
6. The complainant wrote again to the Council on 2 October 2021. They refined their request to ask for data “in September” for question one to three rather than “from September” and requested an internal review.
7. The Council provided a response to the refined request and explained the refined data was withheld due to the small numbers of data involved. They provided their internal review on 26 October 2021.
8. Following the involvement of the information commissioner’s office the Council provided an updated response to the complainant on 9 June 2022.

Scope of the case

9. The complainant initially contacted the Commissioner on 4 October 2021 to complain about the delay of the initial response and dissatisfaction with the response. The Commissioner advised the complainant to request an internal review.
10. The complainant contacted the Commissioner again upon receipt of the internal review to complain about the way the request had been handled.
11. The Commissioner contacted the complainant with his initial findings on 7 April 2022 which indicated the exemption under section 40(2) (personal information) of FOIA had most likely been correctly applied if the numbers were very low, alongside other identifiable information.
12. The complainant responded on 8 April 2022 to advise whilst they understood the initial findings, they wished for a full investigation to be completed to understand how pupils would be identified.
13. The Commissioner wrote to the Council to request its full response to the Commissioner's questions on 8 April 2022 relating to the withheld data for the refined questions under section 40(2) of FOIA.
14. The Council responded on 11 May 2022 to confirm it had re-run the data search following the Commissioner's letter and found it produced exactly the same numerical detail as previously provided to the complainant.
15. The Council provided an updated response to the complainant on 9 June 2022. They clarified that following a re-run of the data no change in figures had been found and therefore all information requested had been shared with the complainant. This was with the exception of one piece of numerical data related to question four.
16. The Council withheld the number of children who were admitted to the school in the short period specified in question four. They did confirm no applicants were admitted from Cardiff which provided a partial answer to question four. They indicated any further disclosure could allow individuals to be identified when considered alongside other information that might be available to the complainant.
17. The scope of the case is to consider if section 40(2) was appropriately applied to question four. As well as to consider the breach under section 10 of FOIA in relation to the delay in the Council's response to this request.

Reasons for decision

Section 40 personal information

18. 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.
19. 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 UK General Data Protection Regulation ('UK GDPR').
20. 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.
21. 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. Section 3(2) of the DPA defines personal data as:

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

Is the information personal data?

22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
23. 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.
24. 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.

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

25. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to a small number of the individuals who are children with specific needs who attend the school. They were admitted to the school within a very short time period between April 2021 to July 2021.
26. The Commissioner agrees with the Council that when combined with other information relating to parent groups and forums or activity groups for children with additional needs in the local area, it is possible given the very specific nature of question four identification could be made. It is particularly possible the complainant who as a parent with a child in this cohort may hold additional information to be able to identify individuals. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
27. 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.
28. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

29. 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."

30. 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.
31. 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

32. 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.

33. 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:-
- a. **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - b. **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - c. **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
34. 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

35. 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.
36. 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.
37. The complainant has outlined that they have a personal interest in the information being disclosed. They have indicated in their complaint to
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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 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".

the Commissioner that the request was required to support an education tribunal they were due to attend. The complainant has indicated they required this information to support their appeal for a place at the school for their own child.

38. The Commissioner accepts the complainant has a legitimate interest in obtaining the information.

39. The Council acknowledge the legitimate interest in relation to the requested information. However, they indicate the school is an oversubscribed specialist school and identified the following concerns:

“there is often an element of competition amongst parents for school places and it is commonplace for information to be shared between parents on various social media platforms and groups.

We further considered that potential parent communities or information groups relating to parents of special needs pupils is an even smaller pool of individuals, and considering the nature of the request it could therefore increase the possibility of identification and/or distress parents who felt that they or their child may be identified by information we had published.”

40. The Commissioner considers the very specific details requested in question four when considered alongside the information above would increase the likelihood of identification of individual children.

Is disclosure necessary?

41. ‘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.

42. The Council has confirmed the specific information requested in question four is not available elsewhere in the public domain other than from possible information shared in parent forums on an informal basis.

43. The complainant has indicated the information was not available to them elsewhere at the time of their request. They advised due to the lateness of the response they attended the tribunal without the information requested.

44. The Commissioner accepts, that in addition to other information available to the complainant, disclosure of the number held by the Council may have been useful for the purposes of the tribunal. However,

the Commissioner considers it is possible this information could have been shared via the tribunal to a limited number as part of that process through those procedures rather than requested under FOIA. Indeed the complainant has indicated subsequently more information was shared via that process. Information if disclosed in this way is limited to attendees as part of a confidential process and not shared with the world at large as it would be under FOIA.

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

45. 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.
46. 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.
47. In the Commissioner's view, a key issue is whether the individual(s) concerned have a reasonable expectation 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.
48. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
49. The Council have confirmed that the information they hold is numerical but could lead to other information in the public domain being used to actually identify individual children by name. Based upon the information available the Commissioner is in agreement with this view.

50. As the requested information could potentially lead to identification of specific individuals the Commissioner agrees with the Council in its application of the exemption under section 40(2) of FOIA. It is unlikely the children or their parents would have an expectation for information to be disclosed which might make the children identifiable. It is likely that such disclosure would cause distress to those parents and children. The fact the information is about children is particularly important as their data requires additional protection.
51. The Commissioner therefore considers that disclosure of this information would be disproportionately intrusive to the data subjects in this situation and interference with their rights to privacy must be proportionate.

Commissioner's conclusion

52. 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 in this case. 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 conclusion that disclosure would be unlawful, the Commissioner considers that it is not necessary to go on to separately consider whether disclosure would be fair or transparent.
54. The Commissioner has therefore decided that the Council was entitled to withhold the information under section 40(2) of FOIA by way of section 40(3A)(a).

Section 10

55. 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.

56. Section 8(1) of the FOIA states:

In this Act any reference to a "request for information" is a reference to such a request which –

- (a) is in writing,

- (b) states the name of the applicant and an address for correspondence, and
- (c) describes the information requested.

57. The Commissioner considers that the request in question fulfilled these criteria and therefore constituted a valid request for recorded information under FOIA.
58. Section 10 of FOIA states that responses to requests made under the Act must be provided "promptly and in any event not later than the twentieth working day following the date of receipt". This was not achieved in this case.

Commissioner's conclusion

59. From the evidence presented to the Commissioner in this case in failing to issue a response to the request within 20 working days, the Council has breached section 10 of FOIA.

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

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