

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 May 2023

Public Authority: Bristol City Council
Address: The Council House
College Green
Bristol
BS1 5TR

Decision (including any steps ordered)

1. The complainant requested from Bristol City Council ('the council'), information relating to its new Trans Inclusion and Gender Identity Policy. The council disclosed some information, however, it said that some feedback was not held, and it withheld other feedback on the basis that section 40(2) of FOIA applied (personal data of third parties).
2. The Commissioner's decision is that the council was correct to apply section 40(2) to withhold the feedback. He has also decided that, on a balance of probabilities, it was correct to state that other information was not held.
3. The Commissioner does not require further steps.

Request and response

4. On 15 September 2022, the complainant wrote to the council and requested information in the following terms:

"BCC currently have an open consultation on their new Trans Inclusion and Gender Identity Policy:

<https://www.ask.bristol.gov.uk/trans-inclusion-and-gender-diversity-policy-consultation>.

In the Equality Impact Assessment, under 'Background and Previous Engagement' it reads:

'A previous HR document 'Transgender and Employment - A guide for managers', which was published on the Council's website in 2012, was removed in 2019 on the basis that it was too limited in scope and had outdated language and advice. Some of the content in our proposed policy approach (for both policies) is taken from existing Council guidance that was based on material originally drafted by a working group in 2018 led by local charities SARI and Diversity Trust to develop a "Road Map for Trans Inclusive Feminism and Women's Services in Bristol" with representatives from various LGBTQ+ groups, women's rights organisations, and public bodies (including BCC and police). In drafting this guidance, we also had feedback from local academics at the University of Bristol Law School, and Sociology Dept. UWE Bristol. We circulated a draft version of the guidance document and invited comments from our Bristol City Council LGBT+ staff led group, Stonewall UK, and local women's rights stakeholders. This feedback was used to inform the final version of the guidance document, which was approved by Corporate Leadership Board in April 2021.'

Please can you provide me with the draft version of the guidance document, the feedback from the Bristol City Council LGBT+ staff led group, Stonewall UK, and local women's rights stakeholders, and the final version of the guidance document, which was approved by Corporate Leadership Board in April 2021."

5. The council responded on 13 October 2022. It disclosed a copy of the draft, and the final guidance. However, it said that feedback provided by Bristol City Council LGBT staff led group and Stonewall was not held as it was provided verbally. Additionally, it said that it was withholding feedback provided by local women's rights stakeholders on the basis that section 40(2) of FOIA applied (personal data of third parties).

6. Following an internal review council wrote to the complainant on 9 December 2022. It maintained its decision that no feedback from Stonewall or its LGBT staff led group is held, and that section 40(2) applied to the remaining information.

Scope of the case

7. The complainant contacted the Commissioner on 21 December 2022 to complain about the way their request for information had been handled.
8. The complainant said that they wished to complain about the application of section 40(2) to withhold the feedback information from disclosure. They also complained that the council was not correct to state that no feedback was held from Stonewall and the LGBT staff led group.

Reasons for decision

Section 1 – General right of access to information

9. Section 1(1) requires that a public authority must inform a requestor, in writing, whether it holds information falling within the scope of the request. If it does hold relevant information, it also requires that it communicates the information to the requestor, subject to any exclusions or exemptions applying.
10. In scenarios where there is some dispute between the amount of information held which a public authority says it holds, and the amount of information that a complainant believes is held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
11. In other words, in order to determine such complaints, the Commissioner 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).

The complainant's position

12. The complainant does not accept the council's argument that it does not hold feedback from Bristol City Council LGBT staff led group and from Stonewall UK.

The Council's position

13. The council clarified to the Commissioner that it does not hold the information as their comments were made to members of the equalities team verbally and no record of these discussions was made. It confirmed to the Commissioner that it had checked with the relevant officers that this was the case.
14. Given the council's assurances, the Commissioner has not asked the council to carry out searches of its records. As it has confirmed with the relevant officers that no records were taken of the meetings, then no records will be held by the council and the Commissioner considers that it would not therefore be a proportionate to require the council to carry out searches where it has sought and clarified its position by asking the parties directly involved.

The Commissioner's conclusion

15. The Commissioner has considered the council's position, in conjunction with the request.
16. Whilst the complainant disbelieves the council's position, it has confirmed with the relevant officers that feedback was received verbally, and no records of the discussions were recorded.
17. There is no contradictory evidence available to the Commissioner that indicates the council's position is wrong.
18. On this basis the Commissioner has concluded that, on the balance of probabilities, the requested information is not held.

Section 40(2) - personal information of third parties

19. The following analysis explains why the Commissioner is satisfied that the public authority was entitled to apply section 40(2) of FOIA to the relevant part of the complainant's request.
20. Section 40(2) of FOIA allows a public authority not to disclose information if it is personal data, i.e. information from which individual(s) could be identified and if one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

Is the information personal data?

21. The Commissioner is satisfied that the requested information is personal data. It relates to the feedback provided by individuals who can be identified from information already within the public domain, together with the information itself due to its nature, and due to the small number of individuals involved in providing feedback regarding the policy.
22. Having viewed the withheld information, the Commissioner is also satisfied that redacting the direct identities of the individuals would not prevent them being identifiable from the remaining information, together with other information in the public domain.
23. Having considered the council's arguments the Commissioner is satisfied that the information is personal data.

Would disclosure contravene principle (a)?

24. 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".

25. 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.
26. 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

27. Article 6(1) of the UK 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.
28. 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”¹.

29. In considering the application of Article 6(1)(f) of the UK 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.
30. 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

31. 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

¹ 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”.

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.

32. The withheld information is being used as feedback in order to formulate a new council policy. The public will therefore have a legitimate interest in understanding the feedback which the council received from experts and other parties in the field during the consultation period. In this way, the council would be transparent about the reasons it has made the decisions it has regarding the policy.

Is disclosure necessary?

33. '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.
34. In order for the council to be completely transparent about the information which it relied upon when formulating the policy, it is necessary to understand the nature of the feedback which it received. Additionally, knowing the identities of those who submitted the feedback would aid in understanding the experience of those making the submissions.

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

35. 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 the 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.
36. 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.

37. 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.
38. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
39. The public has a legitimate interest in understanding the reasons for the council's policy, and the evidence and submissions upon which this was made. The Commissioner also recognises that where experts in a particular field submit opinions which are to be taken into account in order to formulate a policy, they should generally have an expectation that their identities and their input may need to be disclosed as a consultee over the policy in order that the council is transparent. In this way the council is transparent about who it spoke to, and about the information it relied upon when formulating its policy. The Commissioner notes, however, that the council did provide a list of the bodies it has consulted with when formulating the policy.
40. On the counter side, the Commissioner notes that the parties submitted their feedback with an understanding that they would remain confidential to the council and the small group of others who were in the email conversation about the guidance which was being worked upon. They would therefore have no expectation that their submissions and their identities would subsequently be disclosed in response to an FOI request in this instance. Some of the individuals specifically asked that their submissions remain anonymous due to these concerns.
41. Additionally, a disclosure under FOI is considered to be to the whole world, and this level of disclosure is likely to cause the parties distress, as there is a risk of unwanted attention being received. The issues concerned are emotive and have gathered significant media attention. The council highlighted that negative comments have already been expressed on social media about individuals who were assumed to have contributed to the feedback.
42. In conclusion, the Commissioner considers that a disclosure of the withheld information would be an unwarranted when compared to the individuals' rights and freedoms under the UK GDPR. They were specifically under the impression that their submissions would be retained in confidence and that their identities would not be disclosed. The council has also highlighted the risks that disclosing their identities may result in unwanted contacts, harassment or unwanted opinions being expressed about them based upon their feedback and their views.

43. 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 the disclosure of the information would not be lawful.
44. 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.
45. As the Commissioner has concluded that disclosure would not be lawful under Article 6(1)(f) of the UK GDPR, he has not gone on to separately consider whether disclosure would be fair or transparent.

Right of appeal

46. 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

47. 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.
48. 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

Ian Walley
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