

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 February 2023

Public Authority: Portsmouth City Council
Address: Civic Offices
Guildhall Square
Portsmouth
Hampshire
PO1 2AL

Decision (including any steps ordered)

1. The complainant requested information from Portsmouth City Council ("the Council") about the number of staff involved with elective home education and the training they had received. The Commissioner's decision is that the Council is entitled to rely on section 40(2) of FOIA to withhold the requested information.
2. The Commissioner does not require the Council to take any steps.

Request and response

3. On 14 October 2022, the complainant made the following request for information to the Council:

"Please provide the following information in respect of staff in the education department involved with elective home education:

1. How many staff do you have who deal with elective home education.

2. How many of those staff members have received training related to elective home education from Birkbeck college, or [redacted]?

3. How many of those staff members have received training related to elective home education from another external source? Please specify source.
 4. How many of those staff members have received no external training related to elective home education, but have received 'on the job' training?
 5. Do you have any other feedback in respect of training related to elective home education?"
4. The Council provided information in response to parts 1 and 5 of the request but refused to provide information in response to parts 2, 3 and 4 of the request, citing section 40(2) (personal information) of FOIA as its basis for doing so.

Reasons for decision

Section 40 - personal information

5. This reasoning covers whether the Council was correct to apply section 40(2) of FOIA to the request.¹
6. Section 40(2) says that information is exempt information if it is the personal data of another individual and disclosure would contravene one of the data protection principles. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
7. In this case, the Commissioner is satisfied that the withheld information is personal data. This is because, in response to part 1 of the request, the Council disclosed that there were only six members of staff (the data subjects) relevant to the request and it believed that "it would be possible to identify those individuals and attribute the information to them". Also, the information is about the data subjects, i.e. what individual training they have undertaken.

¹ <https://www.legislation.gov.uk/ukpga/2000/36/section/40>

8. The Commissioner recognises that small numbers carry a greater risk of identification than larger ones – but that does not mean that every small number identifies any individual. Whether individuals can be identified will depend on the particular facts, such as the size of the overall dataset, the number of data points that have been requested and the information, already in the public domain, that could potentially be cross-referenced with the disclosed information. It is not sufficient for there to be only a hypothetical risk of identification. If there is no realistic route to identification, the information is not personal data, regardless of its sensitivity.
9. When considering the possibility of identification, the Commissioner applies the “Motivated Intruder Test.” This test starts with a hypothesis that there exists a person who wishes to identify the individuals covered by the disputed information. The person is willing to devote a considerable amount of time and resources to the process of identification. They may have some inside knowledge (i.e. information not already in the public domain) but will not resort to illegality – they are determined but not reckless. The Commissioner looks to see how such a person would go about identifying the individuals involved. In this instance, people may be identified from the withheld information.
10. 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.
11. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary and whether these interests override the rights and freedoms of the individuals whose personal information it is.
12. The Commissioner considers that the complainant is pursuing a legitimate interest and that disclosure of the requested information is necessary to meet that legitimate interest.
13. It is necessary to balance the legitimate interests in disclosure against the fundamental rights and freedoms of the data subjects. In doing so, it is necessary to consider the impact of disclosure.
14. In the Commissioner’s view, a key issue when considering the balancing test is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to the individuals, taking into account whether or not they have consented to its disclosure.

15. In this case the Commissioner has considered both the complainant's concerns about staff training and the need for oversight and also the Council's determination that disclosure of the individuals' personal data would be unlawful.

16. In its internal review decision, the Council explained to the complainant that:

"... Having conducted a legitimate interests assessment, I acknowledge there is public interest in ensuring staff are appropriately trained to carry out their role. I note however that there is no requirement for staff who deal with Elective Home Education to complete specific training or achieve a particular qualification or accreditation. It would therefore be a subjective view as to whether specific training was adequate or appropriate.

When balancing the rights and freedoms of the staff against the legitimate interests of the public, I have also taken into account the fact the staff concerned are not deemed to be senior officers and would therefore have a lower expectation that their information may be disclosed.

When considering the impact on the individuals concerned, I have taken into account various local challenges brought by members of the public against the council (and the outcomes) and how disclosure of this information could have a further impact on staff.

Having weighed up all factors of this case, I believe the balance is in favour of the individuals' right to privacy ..."

17. In its submissions to the Commissioner, the Council also pointed out that the six staff members "... are known locally to parents of children who are Electively Home Educated ..." and, they believed, this would make it "... possible to identify those individuals and attribute the information to them".

18. Based on the above factors, the Commissioner has determined that the fundamental rights and freedoms of the individuals outweigh the legitimate interest identified above. The Commissioner therefore considers that disclosing the requested information would be unlawful as it would contravene a data protection principle; that set out under Article 5(1)(a) of the UK General Data Protection Regulation. The public authority was therefore correct to apply section 40(2) of FOIA to this request.

Right of appeal

19. 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

20. 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.
21. 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

Michael Lea
Team Manager
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Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF