

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 July 2023

Public Authority: Oxford City Council
Address: Town Hall
St Aldates
Oxford
OX1 1BX

Decision (including any steps ordered)

1. The complainant requested information from Oxford City Council ('the Council') about decisions made by Oxford Direct Services ('ODS') relating to furlough. The council applied section 12(1) to refuse the request (appropriate limit). During the course of the Commissioner's investigation the council disclosed some information, but it retained its reliance on section 12 on the basis that it had now exceeded the appropriate limit. It also applied section 40(2) to redact some information from that it disclosed.
2. The Commissioner's decision is that the council was correct to refuse to comply with the request in accordance with section 12(1). He has also decided that it was correct to apply section 40(2) to redact information from that it disclosed. However, he finds that the council did not provide reasonable advice and assistance and therefore failed to meet its obligations under section 16(1) of FOIA. He has also decided that it failed to comply with section 10(1) of FOIA.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with advice and assistance to help him submit a new request falling within the appropriate limit.

4. The council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 21 October 2022, the complainant made the following request for information to the public authority:

“This FOI request relates to both Oxford City Council (OCC) and Oxford Direct Services (ODS).

Please provide copies of all documents/emails and minutes from meetings where the subject of the Council and ODS' response to covid was discussed. This is to include financial and operational issues.”
6. On 29 December 2022, the council wrote to the complainant and asked him to clarify the information he was seeking as the scope of the request was too wide. On 30 December 2022, the complainant wrote to the council narrowing the scope of his request. He requested the same information, but only in relation to ODS, and only between 1 March 2020 and 30 September 2021. The council responded on the same day. It applied section 12 of FOIA to refuse the request. It did however disclose a document relating to ODS' decision to furlough staff.
7. The complainant submitted a request for review on the same day. He also narrowed the scope of his request further:

“In order to reduce your workload please provide copies of all documents/emails - corporate & management/minutes from meetings where the subject of "furlough" was discussed by Oxford Direct Services from 01 March 2020 to 30 September 2021.”
8. The council responded on 22 June 2023. It retained its reliance upon section 12, but it disclosed 28 documents to the complainant, partly redacted under the exemption in section 40(2) of FOIA (personal data of third parties). It also highlighted where other information could be found via weblinks. It subsequently told the Commissioner that it had stopped its searches for further information once it had exceeded the appropriate limit.
9. The complainant believes that further information should be held by the council. He also argues that redactions made to the disclosed information under section 40(2) of FOIA have been applied in a blanket fashion, and that that is not correct.

Reasons for decision

Section 12 – cost of compliance

10. This reasoning covers whether the public authority is correct to apply section 12(1) (cost limit) of FOIA to the request.¹ The appropriate limit² for local authorities is £450, or 18 hours of work.
11. When estimating the cost of compliance, authorities can only take into account the cost of the following activities:
 - determining whether it holds the information;
 - finding the requested information, or records containing the information;
 - retrieving the information or records; and
 - extracting the requested information from records.
12. The council explained that it has reached the appropriate limit when undertaking its searches for information falling within the scope of the complainant's request.
13. It clarified that much of the work at the time was carried out between the council and ODS, and so searches of both organisations had to take place, and it was difficult to locate documents over the two organisations. 2 hours of discussions were held with relevant personnel from both organisations in order to determine where searches would need to be carried out.
14. It said that service heads met daily during much of the time period. In carrying out preliminary searches, one service head identified at least 90 meeting folders of information in relation to 2020, all of which would need to be read in order to ascertain whether relevant information is held within them. Relevant folders from 2021 would also need to be identified and searched in the same way. Directors also held meetings and their records would also need to be searched.
15. The council said that it had therefore prioritised the key decision-making period for the furlough scheme, covering March 2020 and the following 3

¹ <https://www.legislation.gov.uk/ukpga/2000/36/section/12>

² <https://www.legislation.gov.uk/uksi/2004/3244/regulation/4/made>

months, unless other key documents from a later period were identified during the process of search and review. It said that these searches took 6 hours to complete.

16. It said that ODS searched and retrieved over 50 emails identified using the key word 'furlough', plus attachments, to check if they fell within the scope of the request and identify whether any exemptions might be applicable. It said that this took 11 hours in total. The Commissioner notes, however, that the taken to decide whether exemptions are applicable cannot be taken into account in this calculation.
17. It said that further reviews took place between it and ODS to extract information for the final response at various stages of the process. This took an additional 2-3 hours. It clarified that the time spent on redacting the 28 documents which have been disclosed has not been included within this calculation.
18. It said that it concluded that further time spent on searches would take them over the appropriate limit. Firstly, because over 1000 staff are involved across both organisations, and therefore the number of emails, meeting notes and other documents generated on the subject would be large. Secondly, it noted that a number of staff have now left the organisations and it would therefore need to retrieve data from their accounts, which would involve a prohibitive additional cost and staff time resource.
19. It said that as it identified senior managers involved in furlough discussions, it had prioritised searches of their document sources in the hope that the information it could disclose by this method would provide a sufficient picture around the decision to implement furlough.
20. Having considered the council's arguments, the Commissioner is satisfied that the council was correct to apply section 12 to the request. Despite the complainant narrowing the scope of his request twice, the Commissioner notes that the scope of the request still remains very broad. Furlough was a new issue for authorities and would have had a large impact upon local councils and their partnered companies. There would have been many issues needing to be considered and addressed, both within ODS and the council, in order to plan and implement this. Even with the narrowed requests, therefore, the Commissioner considers it likely that many other documents will be held by the council in addition to those it has already located. The council's arguments in this respect support that conclusion.
21. Additionally, as ODS operated as part of the council during that period, it is inevitable that both organisations would need to conduct searches to find the relevant information. As the request has such a wide scope,

and having carried out the searches it has, the Commissioner recognises that it is reasonable of the council to conclude that responding further would therefore exceed the appropriate limit.

22. In conclusion, the Commissioner is satisfied that the public authority's arguments are justified because the difficulty of conducting searches over two large organisations on such a broad-spectrum request such as 'furlough' over the course of many months. It has estimated, reasonably, that further searches would exceed the appropriate limit.
23. The Commissioner's decision is therefore that the public authority was correct to apply section 12(1) of FOIA to the request.

Section 16(1) – The duty to provide advice and assistance

24. Section 16(1) of FOIA provides that a public authority should give advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice³ in providing advice and assistance, it will have complied with section 16(1).
25. The Commissioner notes that the public authority did provide advice and assistance to the complainant. In its refusal notice, dated 29 December 2022, it said to the complainant that:

"If you could be more specific about the details you are interested in, we can ensure that the communications and minutes we provide you with are relevant and useful. It would also be helpful for you to clarify whether you are interested only in our initial response in 2020, or whether you require information concerning our ongoing responses throughout the progression of the pandemic."
26. However, when responding to the narrowed request of 30 December 2022 it disclosed information to him but did not ask the complainant to clarify what information he might be seeking in order to narrow the scope of the request further, and to within the appropriate limit.

³ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

27. The Commissioner's guidance on section 16(1) states that:

"You should not:

- give the requester part of the information requested, without giving them the chance to say which part they would prefer to receive;
- fail to let the requester know why you think you cannot provide the information within the cost limit;
- advise the requester on the wording of a narrower request but then refuse that request on the same basis; or
- tell the requester to narrow down their request without explaining what parts of their request take your costs over the limit. A more specific request may sometimes take just as long to answer."⁴

28. The Commissioner notes that the council did provide the opportunity for the complainant to narrow the scope of his request on a number of occasions. It also supplied some degree of direction as to how he could narrow the scope of his request. However, when the complainant took this into account the council's response was still that section 12 was applicable. Equally, in terms of its final response to the request of June 2023, it simply disclosed the information it had located up to the appropriate limit without first asking the complainant whether that was likely to be the information he wished it to provide. It did not ask him to further narrow the scope of its searches to specific areas of ODS operations in order that the information which could be disclosed within the limit was relevant to his area of interest.

29. Although the Commissioner recognises that the council was simply trying to be helpful in disclosing the information which it had located, he considers that it should have provided further information to the complainant as to the type of information which it could provide to him and given him the choice to amend his request to this further. The Commissioner is therefore satisfied that the public authority did not meet its obligations under section 16 of FOIA.

⁴ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/guide-to-freedom-of-information/refusing-a-request/#2>

30. The Commissioner therefore requires the council to now provide appropriate advice and assistance to the requester and to treat any amended request as a new request for information.

Section 40(2) – personal data of third parties

31. The complainant argues that the application of section 40(2) to redact personal data from within the information which was disclosed was incorrect. However, the following analysis explains why the Commissioner is satisfied that the public authority was entitled to apply section 40(2) to redact the information from disclosure.
32. The complainant argued that the council has applied a blanket approach to redacting personal data in the information which it disclosed to him in its response of 22 June 2023. The council, however, in disclosing the information, clarified the approach that it had taken in redacting personal data. It said that:
- Correspondence on staff furloughed during this time period has not been disclosed due to the risk of identifying individuals and therefore is exempt from disclosure under s40 (personal data) of the FOIA.
 - Please also note that we have redacted names and contact details of officers under the same exemption, s40 (personal data) of the FOIA, apart from the names of senior managers from Oxford City Council and ODS and Cabinet Members.
33. Section 40(2) of the 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.
34. The Commissioner is satisfied that the redacted information is personal data for the purposes of the UK GDPR. It is the names and contact details of individuals identified within the correspondence.
35. As regards the second part of the test, the relevant condition for this case is contained in section 40(3A)(a). 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'). These are set out in Article 5 of the UK General Data Protection Regulation ('the UK GDPR'). The most relevant DP principle in this case is principle (a):
- "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

36. 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.
37. 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. The Commissioner considers that the lawful basis most applicable in this case is basis 6(1)(f). Broadly, this 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”.

38. 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.

(i) Legitimate interests

39. The complainant wishes to understand whether ODS furloughed members of its staff, but subsequently hired private contractors to carry out their work in their place. ODS has previously clarified its position on this.⁵
40. The public has a legitimate interest in knowing how the council's decisions impacted upon its finances and thus the resources which it had available to use. Large amounts of public money would be involved in implementing the furlough scheme.

⁵ <https://www.odsgroup.co.uk/getmedia/d0b6c715-85f3-40f6-88de-624592968ca2/ODS-Furlough-Statement-July-2021-Final.pdf>

41. The public also has a general legitimate interest in local authorities being transparent about their actions and in the authority allowing scrutiny of its decision making.

(ii) Necessity test

42. The Commissioner notes that a disclosure of the information would be necessary to meet the legitimate interests identified above.

(iii) The balancing test

43. The Commissioner has determined that, whilst the public has a legitimate interest in disclosure, and disclosure would be necessary to satisfy that interest, there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms.

44. The Commissioner has determined this by balancing the legitimate interests he has identified against the fact that the individuals concerned would have a reasonable expectation that their information would not be disclosed to the public. He recognises this for the following reasons:

- Primary decisions about implementing the Government's furlough scheme would have been made at a high level within the council, at a director and senior officer level, and potential agreed by council or cabinet members. For these individuals, therefore, the public has a legitimate interest in accessing records relating to their decision-making in order that the actions of the council are transparent and open to scrutiny. In line with this, the council confirmed that it has disclosed the names of senior officers or members within the information it has disclosed.
- However, the public has less of a legitimate interest in knowing the identities of less senior staff. The accountability for council decisions rests with higher level officers and councillors. In general, lower grade staff are accountable to the council itself for their actions, not to the public. They would not therefore expect that information relating to them would be disclosed in response to this request.
- Unless circumstances have merited otherwise, the Tribunal Service has generally found that personal data relating to less senior officers does not need to be disclosed in order for a public authority to be transparent about its actions. The Commissioner has not seen any evidence indicating that there are any circumstances which would make the legitimate interests of the public outweigh the rights of the individuals in this case.

- The Commissioner has therefore decided that disclosing that information would therefore be unlawful for the purposes of compliance with the DPA.
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.
46. The council was therefore correct to redact the names and contact details under section 40(2) of FOIA.

Section 10(1) - Time for Compliance

47. Section 10(1) provides that "Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."
48. The Commissioner notes that the complainant made his request for review on 30 December 2022. The council did not provide its response to this until 23 June 2023.
49. Where a requestor narrows a request due to advice and assistance, or a finding that section 12 applies, the Commissioner's guidance⁶ states that public authorities should treat the narrowed request as a new request for information. The guidance states: "If the requester refines their request appropriately, you should then deal with this as a new request. The time for you to comply with the new request should start on the working day after the date you receive it."
50. The council should therefore have responded to the narrowed request of 30 December 2022 within 20 working days of its receipt. It did not however provide its response until months later.
51. The Commissioner has therefore decided that the council did not comply with the requirements of section 10(1) in respect of the complainant's request of 30 December 2022.

⁶ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/guide-to-freedom-of-information/refusing-a-request/#2>

Right of appeal

52. 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

53. 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.
54. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF