

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 January 2024

Public Authority: London Borough of Bexley
Address: Bexley Civic Offices
2 Watling Street
Bexley Heath
Kent
DA6 7AT

Decision (including any steps ordered)

1. The complainant has requested copies of rejected nomination statements for Bexley Civic Recognition Awards 2023. The London Borough of Bexley ("the Council") initially sought to withhold the requested information under section 41 (information provided in confidence) of FOIA, however, at internal review amended its position and withheld the requested information under section 40 (personal information) of FOIA.
2. The Commissioner's decision is that the Council is entitled to rely on section 40 to withhold the requested information.
3. The Commissioner does not require any steps.

Request and response

4. On 24 May 2023, the complainant wrote to the public authority and requested information in the following terms:

"Hello,

Can you please supply nomination statements for *rejected* Bexley Civic Recognition Awards 2023 Nominations?

Thank you."

5. The public authority responded on 15 June 2023. It confirmed that it held the requested information but was seeking to withhold it with reliance on section 41 of FOIA.
6. On the same day, the complainant requested an internal review. The complainant stated that they held concerns about the impartiality of the awards panel, and that they did not believe the exemption to apply. They noted that they had completed a nomination statement themselves, and that it had been rejected and did not remember any assurances of confidentiality. The complainant also raised that successful nomination statements had been shared by the Council.
7. Following an internal review the public authority wrote to the complainant on 4 July 2023. It stated that:

"The rejected nominations were excluded within the exempt papers considered by the Panel. The information is exempt from disclosure under Paragraph 1 of Part 1 of Schedule 12A of the Local Government Act 1972, being information relating to any individual.

The information is exempt from disclosure under section 40(3A) since disclosure would contravene the requirements of the Data Protection Act 2018."

Scope of the case

8. The complainant contacted the Commissioner 5 July 2023 to complain about the way their request for information had been handled.
9. In their grounds of complaint, the complainant stated:

"I requested nomination statements for *rejected* candidates for the council's civic-recognition awards. (I later clarified that I did not need nominants' names, only nominees'). The Council refused, on privacy grounds. I disagree – nomination statements were submitted with the understanding that they could be published, and, as noted, I don't need to know who nominated, only who *was* nominated. I need the data to examine a possible (partisan) bias of the awards panel."
10. The Commissioner considers the scope of his investigation to be to establish whether the public authority is entitled to withhold the requested information under section 40 of FOIA.

Reasons for decision

Section 40 personal information

11. 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.
12. 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 General Data Protection Regulation ('GDPR').
13. 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.
14. 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?

15. Section 3(2) of the DPA defines personal data as:
"any information relating to an identified or identifiable living individual".
16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.
18. 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.
19. The Commissioner has had sight of the withheld information and is satisfied that the majority of it relates directly to the data subjects. The

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

Commissioner considers it immaterial that the complainant later clarified that they were requesting the names of nominees rather than the names of the persons submitting the nominations; the names of the nominees quite obviously is information that both relates to and identifies those concerned, and the remainder of the information contained in the nomination statements will also contain the personal data of the nominees. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

20. The withheld information also contains nominations for charities, social groups and organisations. The Commissioner has considered whether this constitutes personal data and has concluded that, while the main body of the nomination statements do not explicitly contain third party personal data, it would be possible - via a mosaic process of coordinating the withheld information with information already in the public domain, or information already known to interested parties - to identify individuals. Therefore he finds that this information falls within the definition of 'personal data' in section 3(2) of the DPA.
21. The Council, in its submissions to the Commissioner, also stated that it understood the complainant was requesting copies of a nomination statement that they themselves submitted as part of the disclosure, and that this would constitute the complainant's personal data. The Commissioner agrees that this would constitute the complainant's personal data. However, the Commissioner understands that the complainant is not seeking this information as part of this FOI request and therefore he has not considered this particular information further in this notice.
22. 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.
23. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

24. Article 5(1)(a) of the 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 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.

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

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

27. 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.

28. In considering the application of Article 6(1)(f) of the 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.

29. 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

30. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that

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 GDPR would be contravened by the disclosure of information, Article 6(1) of the 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”.

such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.

31. 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.

32. In its submissions to the Commissioner, the Council identified the legitimate interest to be the following:

"The applicant made a nomination for someone to be nominated for an award under the Council's Civic Recognition Scheme. The applicant's nomination was unsuccessful."

33. However, the Council also continued to state that it has not identified any legitimate interest in the disclosure of the information. It is unclear from the Commissioner precisely what the Council's position is in respect of the legitimate interest in the requested information.

34. Based on the information provided to him by the complainant, the Commissioner understands that the complainant is requesting disclosure of the information as they believed that there was bias in the judging panel. The Commissioner considers that this demonstrates that there is a legitimate interest in the disclosure of the information.

Is disclosure necessary?

35. '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.

36. In its submissions to the Commissioner the Council stated that:

"Disclosure of the information held is not necessary to meet the legitimate interest in question, as the applicants nomination failed to meet the relevant criteria and not appear to be a valid/appropriate nomination [sic]"

37. In their request the complainant stated that they wish to see all of the rejected nomination statements for the Civic Recognition Awards, rather than simply the nomination statement that they submitted. The Commissioner understands that as the Civic Recognition Awards is an initiative run by the Council and therefore all nominations for the awards

are submitted to the Council, it is the central repository for the information sought by the complainant. There are no clear alternative measures available through which the complainant could obtain the requested information, therefore disclosure would be necessary to meet the legitimate interest identified above.

38. Consequently, the Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

39. 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.
40. 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.
41. 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.
42. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

43. In support of their position the complainant pointed the Commissioner to an entry³ in the Council's disclosure log in which the full list of Civic Recognition Awards winners had been disclosed, which includes the names of winners as well as the names of those who nominate them. The complainant also stated that, having inspected the online nomination form, they could not find any information regarding potential disclosure or non-disclosure of information provided in awards nomination submissions.
44. The Commissioner recognises the complainant's position, however is of the understanding that the persons referred to in the rejected nomination statements – whom are, possibly, unaware that a nomination had been submitted on their behalf – would have a reasonable expectation that their personal data would not be shared. The Commissioner considers this would also be the case even if they were made aware of a nomination statement submitted on their behalf that was unsuccessful.
45. Further, and in respect of the disclosure of the winners of the Civic Recognition Awards, the Commissioner takes the position that by its very definition as an initiative designed to recognise outstanding civic contributions by members of the public, the winners of the awards would have a reasonable expectation that their personal data – in this case, their names - would be disclosed so that they may be recognised for their achievements.
46. In correspondence with the Commissioner the complainant explains:
- “To add a little colour to the complaint, the FOI was prompted by 40% of awards in 2022, and 40% again in 2023, going to members of one organisation, with which at least one of three jury members is affiliated.”
47. The Commissioner notes that the complainant has not provided him with any further evidence to support their allegation that the judging panel may be biased, therefore the Commissioner is unable to consider this matter as anything other than speculation. On this basis the Commissioner does not find it fair to compromise the reasonable expectations held by the data subjects that their personal information will not be disclosed.

³ <https://bexleyportal.icasework.com/resource?id=D6412380&db=NnUgsj5ww2w%3D>

48. Finally, the Commissioner also considers that disclosure of this information could be distressing to those persons whose nominations did not meet the threshold criteria for being considered for an award, as it may reveal that their civic contributions to the community were not considered to merit recognition by the panel.
49. 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.
50. 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 withheld information is therefore exempt from disclosure on the basis of section 40(2) of FOIA.

Right of appeal

51. 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

52. 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.
53. 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

Jonathan Slee
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