

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 February 2022

Public Authority: London Borough of Southwark
Address: 160 Tooley Street
London
SE1 2QH

Decision (including any steps ordered)

1. The complainant requested information from the London Borough of Southwark ("the Council") relating specifically to its Electoral Services department.
2. The Commissioner's decision is that the Council is entitled to rely on the exemption at section 40(2) of FOIA to the withheld information.
3. The Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

4. On 17 May 2021, the complainant wrote to the Council and requested information in the following terms:

"1 How many staff do you normally employ when there are no elections?

2 How many earn more than £50K?

3 What duties do staff do when there are no elections or votes?"
5. The Council responded on 10 June 2021 and provided the requested information for Question 1 and Question 3 but withheld information in relation to Question 2 citing section 40(2) of FOIA to do so.

6. Following an internal review, the Council wrote to the complainant on 28 June 2021 and maintained its reliance on section 40(2) to withhold the outstanding requested information.

Scope of the case

7. The complainant contacted the Commissioner on 28 June 2021 to complain about the way their request for information had been handled.
8. The Commissioner considers the scope of this case to be to determine if the Council has correctly applied section 40(2) of FOIA to the withheld information.

Reasons for decision

Section 40 personal information

9. 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.
10. 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').
11. 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.
12. 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?

13. Section 3(2) of the DPA defines personal data as:
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¹ As amended by Schedule 19 Paragraph 58(3) DPA.

“any information relating to an identified or identifiable living individual.”

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. 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.
16. 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.
17. The information withheld under section 40(2) of FOIA is that of members of staff from a small team of seven members. The Commissioner sought further views from the Council as to why providing the information would make the personal data identifiable.
18. The Council provided the Commissioner with further detail as to how, using information already available in the public domain, the information would be identifiable personal information.
19. In the circumstances of this case, having considered the withheld information requested, the Commissioner is satisfied that the information relates to the data subject(s). He is satisfied that this information both relates to and identifies the data subject(s) concerned. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
20. 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. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

21. 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”

22. 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.

23. 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

24. 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.
25. 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.
26. 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: -
- 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.

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) of 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”

iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

27. 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

28. 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 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.

29. The complainant raises a legitimate interest in transparency of how the Council is spending public money on the services it provides to the public, and in particular, within the Electoral Services team.

30. The Council acknowledges that the legitimate interest is that of transparency and openness.

31. The Commissioner considers there is a legitimate interest in the transparency and openness of the Council with regard to how it allocates funding.

Is disclosure necessary?

32. '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.

33. The Commissioner considers that the council provided sufficient information to meet the identified legitimate interests regarding how its expenditure for members of staff are published online, and within the 'Statement of accounts' which includes the names and job titles of those employees in a senior position earning over £150,000 per year, as well as a breakdown of salary bandings, number of employees and whether 'Schools' or 'Non-schools employees.'

34. The Commissioner considers this is sufficient to address the legitimate interests of transparency and openness by the council in relation to question 2 of the request.
35. As the Commissioner has decided in this case that further disclosure is not necessary to meet the legitimate interest in disclosure, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's view

36. The Commissioner has therefore decided that the Council was entitled to withhold the information under section 40(2).

Right of appeal

37. 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

38. 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.
39. 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
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