

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 October 2023

Public Authority: Westminster City Council
Address: Westminster City Hall
64 Victoria Street
London
SW1E 6QP

Decision (including any steps ordered)

1. The complainant has requested Westminster City Council (the Council) provide information in respect of staff in the education department that are involved with elective home education. The Council provided some information. It withheld the remaining information under section 40(2) (personal information).
2. The Commissioner's decision is that the withheld information engages section 40(2) as to disclose it would breach the data protection principles.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 14 October 2022, the complainant wrote to the public authority and requested information in the following terms:

'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 Professor Daniel Monk (the course designer)?

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?'
5. The Council responded on 1 November 2022. It stated that

'The information is exempt from disclosure under Section 40(2) of the Freedom of Information Act (FoIA). The information is personal data as defined by the Data Protection Act 2018 (DPA). As it is information about someone else the release of this information would constitute a breach of the first Principle of the DPA.

This is because disclosure would be unfair to those people who could be identified from the information who have no expectation that their personal data would be made public. This response therefore acts as a refusal notice under section 17 of the FoIA.'
6. Following an internal review the Council wrote to the complainant on 3 November 2022. It stated that it had reviewed the request and was able to provide the following information:
7. 'Do you have any other feedback in respect of training related to elective home education? No.
8. In response to questions 1-4 the Council provided a key:

'**key:** * represents numbers between 0-5 We have anonymised this information due to the potential of identifying individuals.'
9. Answers to questions 1-4 consisted of *.

Scope of the case

10. The complainant contacted the Commissioner on 4 November 2022 to complain about the way their request for information had been handled. The complainant does not consider the information they have requested to be personal information and as such the Council has no basis for withholding.

11. 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(2) of FOIA.

Reasons for decision

Section 40 - personal information

12. 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.
13. 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').
14. 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.
15. 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?

16. Section 3(2) of the DPA defines personal data as:
"any information relating to an identified or identifiable living individual".
17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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

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

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

19. 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.
20. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects. Whilst the request does not ask the Council to provide personal information the Commissioner is satisfied that if the Council were to provide the numbers, individuals could potentially be identified. This is because the numbers are low enough to increase the risk of identification. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
21. 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.
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 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 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 such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.

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”.

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 this case the Commissioner has considered the complainant's concerns about staff training and the need for transparency.
33. The Commissioner recognises the complainant's position that there may be a wider public interest in information relating to training provided to local authority employees. In their complaint the complainant has pointed out that ICO guidance states:

 'For example, in circumstances where the qualifications of a particular person have been requested, there may be a clear legitimate interest in the public being able to access an individual's professional qualifications. The only way to meet this aim might be to disclose this personal data'
34. 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.

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. 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

37. 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.

38. 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.
39. 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.
40. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
41. 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.
42. In its submissions to the Commissioner the Council pointed out that "...members of staff would not expect details of their specific/ training qualifications to be made known to the world at large via an FOI request." And they consider that it would be a "disproportionate intrusion of their natural expectation of privacy".
43. The Council also stated that it had concerns that this information could be used to target individuals by any person in the wider world if released in response to this request. And as a result, the legitimate interest in disclosure does not outweigh the rights and freedoms of the individuals.
44. ICO guidance states that:
- 'A request concerning the professional practice of an individual can refer to personal data which is much more intrusive. In such circumstances it may be possible to argue that although there is a legitimate interest in understanding standards of competence in the public sector, this is met by the oversight of professional governing bodies (or the checks and balances within an organisation) rather than focusing on the

performance of one particular individual. The seniority of the individual would be significant in these considerations.³

45. 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.
46. 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.

³ [section-40-regulation-13](#)

Right of appeal

47. 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

48. 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.
49. 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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