

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 March 2023

Public Authority: Rotherham Metropolitan Borough Council
Address: Riverside House
Main Street
Rotherham
S60 1AE

Decision (including any steps ordered)

1. The complainant requested information from Rotherham Metropolitan Borough Council ("the Council") about an investigation in to the Chief Executive ("the Chief Executive") of a charity ("the Charity") to which the Council provided funding. The Council provided some information within the scope of the request, stated that some of the information requested was not held, refused parts of the request under section 12 of FOIA (cost of compliance) and section 14(2) of FOIA (repeat request) and withheld some information under section 40 of FOIA (personal information) and section 36 of FOIA (prejudice to the effective conduct of public affairs).
2. The Commissioner's decision is as follows:
 - on the balance of probabilities, the Council does not hold any information within scope of parts 3,4 and 6 of the request
 - the Council has failed to demonstrate that section 12 is engaged as a basis for refusing to respond to parts 5,7,8 and 9 of the request
 - the Council was not entitled to rely on section 14(2) to refuse part 1 of the request

- the Council was entitled to withhold some, but not all of the information it withheld under section 40
 - the Council was not entitled to rely on section 36(2)(c) to withhold the information withheld on that basis.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
- carry out searches of its network files using relevant search terms that relate to the specific topic of this request and provide the complainant with a fresh response to parts 5,7,8 and 9 of the request.
 - issue a fresh response to part 1 of the request, which does not rely on section 14(2).
 - disclose the information which the Commissioner has decided is not exempt under section 40 as listed in paragraph 62 of this notice
 - disclose the information within scope of the request within the email withheld under section 36(2)(c), making appropriate redactions of personal data in compliance with FOIA.
4. The public authority 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 23 February 2022, the complainant wrote to the Council and requested information in the following terms:

“My Freedom Of Information Act Request (FOIAR) is for information created or sent during the inclusive period from Friday 19 August 2016 to Friday 2 September 2016 (a period of 10 working days, as Monday 29 August was a bank holiday).

I am requesting:

- 1) An unredacted copy of the email sent on 23 August 2016 at 3.44 pm by Mandy Atkinson [Subject: FW: Sheffield Star] to the RMBC Chief Executive Sharon Kemp and Ian Thomas, copying in Shokat Lal and Leona Marshall. That email stated:

I have made SYP aware of what our statement would be.

A spokesman for Rotherham Council confirmed that the council has received three complaints, adding: "An independent investigation is now underway, and as such we are unable to comment further at this stage."

- 2) A copy of the communication RMBC sent "to Ms X, CEO of the charity on 30 August 2016" referred to in point 8 in LGO Decision 15.1.18 RMBC (17 003 725).
- 3) A copy of each communication sent to any media source between 19 August 2016 and 4 September 2016 about the "independent investigation" referred to in the email on 23 August 2016 at 3.44 pm from Mandy Atkinson.
- 4) A copy of communications with "SYP comms" about the "independent investigation" referred to in the email on 23 August 2016 at 3.44 pm from Mandy Atkinson.
- 5) Any other records about the "independent investigation".

Given that the LGO found fault with RMBC and by implication the group called Gold Command, please provide the following information as it is clearly very much in the public interest to do so.

- 6) The names and positions of the identified "senior police and council officers and stakeholders who could support the management of this issue".
- 7) Any communication involving the group called Gold Command and "senior police and council officers and stakeholders who could support the management of this issue".
- 8) Any communications about the "two independent persons".
- 9) Any communications with the "two independent persons".

Please also provide the following information:

- 10) Leona Marshall's position on 23.8.16 and please state if Leona is still employed by RMBC (and if not when Leona left RMBC)."
6. The Council responded on 12 April 2022. It provided some information within the scope of the request, stated that some of the information requested was not held, refused parts of the request under section 12 (cost of compliance) and section 14(2) (repeat request) and withheld

some information under section 40 (personal information) and section 36 (prejudice to the effective conduct of public affairs).

7. The Council upheld this position at internal review.

Reasons for decision

Section 1 – information not held

8. Section 1(1) FOIA provides that:

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

9. The Council informed the complainant that it does not hold any information within scope of parts 3, 4 and 6 of the request.
10. The Commissioner has sought to determine whether, on the balance of probabilities, the Council holds any information within scope of these parts of the request.
11. During the course of his investigation the Commissioner asked the Council to provide details of the searches it has carried out to ensure that any information held within the scope of these parts of the request would have been identified.
12. The Council provided details of the searches it carried out of its corporate email system and of the Communications Team’s files, including relevant network files and the system used for issuing press releases.
13. The Commissioner is satisfied that, on the balance of probabilities, the Council does not hold any information within scope of parts 3, 4 and 6 of the request.

Section 12 – the cost of compliance exceeds the appropriate limit

14. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate cost limit. The appropriate limit for the public authorities such as the Council is £450. As the cost of complying with a request must be calculated at

the rate of £25 per hour, section 12(1) effectively imposes a time limit of 18 hours for the Council.

15. A public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held
 - locating the information, or a document containing it
 - retrieving the information, or a document containing it
 - and extracting the information from a document containing it
16. With respect to parts 5,7,8 and 9 of the request the Council carried out searches of its email system but informed the complainant that to carry out a full search including a "manual trawl and interrogation of network files" would exceed the cost limit, stating that the cost to comply with any of parts 5,7,8 and 9 would each individually exceed the cost limit.
17. Regarding the email searches no information was identified within scope of parts 7,8 or 9 of the request. The Council did identify some information within the scope of part 5 of the request, some of this information was disclosed, some was withheld under sections 40 and 36, the Council's application of these exemptions is considered separately below. This section of the decision notice will consider only whether the Council was entitled to rely on section 12 of FOIA with respect to each of parts 5,7,8 and 9 of the request.
18. The Council's argument regarding parts 5 and 7 of the request is that the terms "independent investigation" and "gold command" are widely used by the Council across a range of topics so searching these terms would return a very high number of results which would then need to be checked to determine whether they contain information within scope of the request.
19. Specifically they stated:

"A search on the phrase 'independent investigation' is further complicated by being a commonly used term within a local authority setting. Independent investigations are commonplace and common phrase for social care (children), social care (adult), planning, revenues and benefits, etc. Any potentially relevant location would have to be manually interrogated. Thousands of folders would have to be checked to determine whether there is a document potentially in scope."

and

"Network searches regarding the term 'Gold Command' would return hundreds of results (agendas, minutes, agenda supporting documents, action lists, emails saved to network, etc.). Gold Command relates to specific issues established for specific purposes."

20. The Council also stated that when searching its network files, unlike for the email search, it was not possible to filter the search for the time period specified in the request.

21. Regarding parts 8 and 9 of the request the argument provided by the Council was as follows, the Council did not specifically state the search term(s) that it considered would return thousands of results:

"Manual folders were not trawled for the reasons stated above (i.e. any potentially relevant location would have to be manually interrogated and thousands of folders would have to be checked to determine whether there is a document potentially in scope)."

22. The Commissioner asked the Council to confirm whether it had carried out a sampling exercise in order to determine its estimate. The Council stated, "network sampling was not undertaken due to the volume covered in the above narrative".

23. A public authority does not have to make a precise calculation of the costs of complying with a request, and only an estimate is required. However, that estimate must be a reasonable one. In *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency (EA/2006/0004)*, the Information Tribunal stated that a reasonable estimate is one that is 'sensible, realistic and supported by cogent evidence'.

24. A sensible and realistic estimate is one which is based on the specific circumstances of the case. It should not be based on general assumptions, for example that all records would need to be searched in order to obtain the requested information when it is likely that staff in the relevant department would know where the requested information is stored. This does not mean that a public authority has to consider every possible means of obtaining the information in order to produce a reasonable estimate. However, an estimate is unlikely to be reasonable where a public authority has failed to consider an absolutely obvious and quick means of locating, retrieving or extracting the information.

25. The Commissioner accepts the Council's explanation regarding the fact that it is not possible for it to filter the search results of a network search by the time period stated in the request.

26. However, the Commissioner is not satisfied that the Council has provided a reasonable estimate of the time it would take to comply with parts 5,7,8 and 9 of the request supported by cogent evidence.
27. The Commissioner notes the Council has not actually provided an estimate of the time it would take to comply with any of parts 5,7,8 and 9 of the request. Nor does it appear from its submissions to the Commissioner that the Council has carried out any searches of its network files in order to reach its position that thousands of results would need to be checked with regards to parts 5, 8 and 9 of the request and hundreds with regards to part 7 of the request. In addition he notes that for parts 8 and 9 of the request the Council has not stated the search term(s) that it considered would return thousands of results.
28. The Commissioner accepts that a search for the terms "independent investigation" and "Gold Command" across the Council's network files is likely to provide many results which are not within scope of this request. However, the Commissioner's view is therefore that the Council has failed to identify the most appropriate search terms to quickly locate information within the scope of these parts of the request.
29. As the Commissioner is not satisfied that the Council has provided a reasonable estimate of the time it would take to comply with parts 5,7,8 and 9 of the request his decision is that, for the reasons stated above, the Council has failed to demonstrate that section 12 is engaged as a basis for refusing to respond to these parts of the request.
30. The Council is now required to carry out searches of its network files using relevant search terms that relate to the specific topic of this request and provide the complainant with a fresh response to parts 5,7,8 and 9 of the request.

Section 14(2) – repeated requests

31. Section 14(2) of the FOIA states that:

"Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with a previous request and the making of the current request."

32. As covered in the Commissioner's guidance on section 14(2)¹ a public authority may only apply section 14(2) to a request where it has either previously;
- provided the information to the same requester in response to a previous FOIA request; or
 - confirmed that the information is not held in response to an earlier FOIA request from the same requester.
33. The guidance clearly states that if neither of these conditions apply, then the public authority must deal with the request in the normal manner.
34. The Council refused part 1 of this request on the grounds that it was a repeated request. The Council's stated grounds for doing so were as follows:
- "This email was previously provided to you under FOI-895-20/21 (issued 05/02/21). As stated in that FOI response (and its associated Internal review issued 26/02/21), the redactions applied were in line with Section 40 of the FOI Act.
- Due to the above, this element of your request is being refused as a repeat request under Section 14(2) (vexatious or repeated requests)."
35. As part 1 of this request was for an unredacted copy of the email previously provided in redacted form, it was not for either information already provided to the complainant under a previous FOIA request or for information that the Council had already confirmed it does not hold.
36. The Commissioner's decision is therefore that the Council is not entitled to rely on section 14(2) to refuse this part of the request.
37. The Council is now required to issue a fresh response to part 1 of the request, which does not rely on section 14(2).

Section 40 – personal information

38. The Council withheld the following information under section 40(2) of FOIA:
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¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/dealing-with-repeat-requests/>

- The letter requested in part 2 of the request
 - Some information within scope of part 5 of the request (one email and one document were withheld in full, some emails were partially redacted)
 - Some information requested in part 10 of the request, specifically, "please state if Leona is still employed by RMBC (and if not when Leona left RMBC)".
39. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
40. The Commissioner must first consider whether the withheld information is personal data.
41. Section 3(2) of the Data Protection Act 2018 defines personal data as:
- "any information relating to an identified or identifiable living individual."
42. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
43. With regards to the letter requested in part 2 of the request which the Council has withheld in its entirety under section 40(2) of FOIA, the Commissioner finds that the letter contains only a very small amount of personal data. The content of the letter relates to the Charity rather than any living person. The only personal data within the letter is the name of the recipient and the name, job title and contact details of the sender.
44. With regards to the information redacted from the emails that were disclosed in response to part 5 of the request the following information has been redacted under section 40(2):
- The name of the sender of an email sent on 2 September 2016 and the name of a cc'd recipient when the email was forwarded on the same day
 - A phrase from the subject line of emails sent on 23 August 2016 which refers to an individual
 - Some information within emails sent on 23 August 2016
45. The Commissioner is satisfied that all of the redacted information as listed in the above paragraph is personal data.

46. With regards to the email withheld in its entirety within the scope of part 5 of the request, the Commissioner finds that the email contains only a very small amount of personal data. The content of the email relates to the provision of the briefing note attached to the email (which has also been withheld in its entirety). The only personal data within the email is the name of the recipients (one of whom is also named within the body of the email), the name, job title and contact details of the sender and the Chief Executive's name which is included in the file name of the attachment.
47. The document withheld in its entirety within the scope of part 5 of the request is, as stated above, a "briefing note" which contains details of allegations made against the Chief Executive. The Commissioner is satisfied that all of the information in this document is the personal data of the Chief Executive and much of it is also the personal data of the people who made complaints about the Chief Executive or were referred to in those complaints.
48. With regards to the information requested in part 10 of the request, "please state if Leona is still employed by RMBC (and if not when Leona left RMBC)", the Commissioner is satisfied that this is the personal data of the person named in this part of the request.
49. The commissioner has therefore decided that the exemption is not engaged for the following information as it is not personal data:
 - the letter requested in part 2 of the request, other than the name of the recipient and the name, job title and contact details of the sender.
 - the email within the scope of part 5 of the request to which the briefing note was attached, other than the name of the recipients, the name, job title and contact details of the sender and the Chief Executive's name which is included in the file name of the attachment.
50. For the information that the Commissioner has determined is personal data, the next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
51. For clarity, the information which the Commissioner has determined is personal data is as follows:

- the name of the recipient and the name, job title and contact details of the sender in the letter requested in part 2 of the request
 - The name of the sender of an email sent on 2 September 2016 and the name of a cc'd recipient when the email was forwarded on the same day
 - A phrase from the subject line of emails sent on 23 August 2016 which refers to an individual
 - Some information within emails sent on 23 August 2016
 - the name of the recipients of the email to which the briefing note was attached, the name, job title and phone number of the sender of that email and the Chief Executive's name which is included in the file name of the attachment
 - the entire briefing note.
 - the information requested in part 10 of the request, "please state if Leona is still employed by RMBC (and if not when Leona left RMBC)"
52. 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.
53. 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.
54. 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. The Commissioner must therefore determine whether this legitimate interest overrides the rights and freedoms of the data subjects.
55. Regarding the name of the recipient and the name, job title and contact details of the sender in the letter requested in part 2 of the request, the Commissioner considers that in the case of the name of the recipient and the name and job title of the sender the legitimate interest in disclosure overrides the rights and freedoms of the data subjects. This is because the name of the recipient is already in the public domain and due to the seniority of the staff member who sent the letter. The Commissioner's view is that this staff member would not have a

reasonable expectation that their name and job title and the fact that they sent this letter would not be disclosed under an FOI request. However, given the legitimate interest in the disclosure of the contact details of that staff member is very limited, the Commissioner's decision is for their contact details the legitimate interest in disclosure does not override the rights and freedoms of the data subject.

56. Regarding the name of the sender of an email sent on 2 September 2016 and the name of a cc'd recipient when the email was forwarded on the same day, the Council has stated these names were redacted on the grounds that they were staff members in grades below Head of Service and their names were not already in the public domain. The Commissioner considers that these staff have a reasonable expectation of privacy and that therefore their rights and freedoms outweigh the relatively limited legitimate interest in the disclosure of this information.
57. Regarding the phrase from the subject line of emails sent on 23 August 2016 and the small amount of information redacted from the body of two of these emails, the Council has not provided any arguments as to why its position is that this specific information should be withheld or the impact of disclosure on the rights and freedoms of the data subjects. Its arguments provided in relation to the redactions made to the emails disclosed under part 5 of the request refer to staff names only. In the absence of any arguments from the Council, the Commissioner's decision is that the legitimate interest in the disclosure of this information overrides the rights and freedoms of the data subjects.
58. Regarding the name of the recipients of the email to which the briefing note was attached, the name, job title and phone number of the sender of that email and the Chief Executive's name which is included in the file name of the attachment the Commissioner considers that for all of the names and job title of the sender the Council should take a consistent approach with that it took for the redaction of the emails already disclosed and consider the seniority of the staff and whether the information is already in the public domain. Regarding the name of the Chief Executive the Commissioner's decision is that as this information is already in the public domain the legitimate interest in disclosure overrides the rights and freedoms of the data subject. For all of the other names and the job title of the sender the Commissioner's decision is that where these staff are at Head of Service grade or higher (or equivalent in other organisations) or where their names are already in the public domain the legitimate interest in disclosure overrides the rights and freedoms of the data subjects as these individuals would not have a reasonable expectation that their names would not be disclosed under an FOI request. For any staff below the grade of Head of Service or higher (or equivalent in other organisations) whose names are not already in the public domain the Commissioner's decision is that these

staff have a reasonable expectation of privacy and that therefore their rights and freedoms outweigh the legitimate interest in the disclosure of this information. Regarding the phone number of the sender, the Commissioner's decision is that the very limited legitimate interest in disclosure does not override the rights and freedoms of the data subject.

59. Regarding the briefing note, the Commissioner acknowledges the significant legitimate interest in the disclosure of information both about the concerns raised about the Chief Executive of a Charity that was receiving funding from the Council and how the Council dealt with these concerns. However he also considers that the Chief Executive would have a strong expectation of confidentiality regarding the basis of the investigation in to their actions as would the people who raised their concerns. The Commissioner also considers that more appropriate avenues exist for addressing the legitimate interest in addressing the concerns raised about the Chief Executive and/or understanding how the Council carried out its investigation. The Council carried out an investigation in to the concerns raised about the Chief Executive and the Local Government Ombudsman has considered a complaint about how the Council carried out its investigation. Taking this in to account the Commissioner's decision is that although the legitimate interest in the disclosure of the briefing document is significant this is nevertheless overridden by the rights and freedoms of the data subjects.
60. Regarding the information requested in part 10 of the request, "please state if Leona is still employed by RMBC (and if not when Leona left RMBC)" the Commissioner considers that the individual named in this part of the request would have a reasonable expectation that information about their employment status would not be disclosed under an FOI request and that therefore the rights and freedoms of the data subject outweigh the limited legitimate interest in the disclosure of this information.
61. The commissioner has therefore decided that for the following information the exemption is engaged as the rights and freedoms of the data subjects outweigh the legitimate interest in disclosure:
- The contact details of the sender of the letter requested in part 2 of the request (i.e. their email address and phone number)
 - the name of the sender of an email sent on 2 September 2016 and the name of a cc'd recipient when the email was forwarded on the same day
 - any names of staff below the grade of Head of Service (or equivalent in other organisations) whose names are not already in

the public domain included in the email to which the briefing note was attached.

- the entire briefing note.
- the information requested in part 10 of the request, "please state if Leona is still employed by RMBC (and if not when Leona left RMBC)".

62. The Commissioner has therefore decided that for the following information the exemption is not engaged as the legitimate interest in disclosure outweighs the rights and freedoms of the data subjects:

- The letter requested in part 2 of the request other than the contact details of the sender (i.e. their email address and phone number)
- the phrase from the subject line of emails sent on 23 August 2016 and the small amount of information redacted from the body of two of these emails
- the email within the scope of part 5 of the request to which the briefing note was attached, other than any names of staff below the grade of Head of Service (or equivalent in other organisations) whose names are not already in the public domain.

63. The Council is now required to disclose the information listed in paragraph 62.

Section 36 – prejudice to effective conduct of public affairs

64. The Council withheld one email within the scope of part 5 of the request under section 36(2)(c).

65. Section 36(2)(c) of FOIA states that:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of this information under this Act would, or would be likely to inhibit-

- would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

66. Section 36 is a unique exemption which relies upon the opinion of the public authority's 'qualified person' in order to be engaged. In this case the qualified person's opinion was provided by the Assistant Director of Legal Services at the Council.

67. When considering the Council's application of section 36, the Commissioner does not necessarily need to agree with the opinion of the qualified person in order for the exemption to be engaged. He needs only satisfy himself that the qualified person's opinion is an opinion that a reasonable person could hold.
68. The qualified person's opinion regarding the prejudice that would occur should the email be disclosed was as follows:

"release of the requested information would set a precedent for any person, requestor included, to ask for and expect to receive any email held by the Council (even where there is no public interest and no public value). The Council's limited resources would be significantly diverted to undertake any such request and this would notably impact on its ability to effectively deliver its services."
69. The Commissioner is not satisfied that the above is an opinion that a reasonable person could hold. In his view there is no causal link to be made between the disclosure of a single email which contains summaries of information already in the public domain and the prejudice described in the qualified person's opinion. Disclosure of this email would not, for example mean that in response to future requests the Council would be required to disclose information withheld under qualified exemptions in circumstances where the public interest in maintaining an exemption outweighs that in disclosure. In addition the provisions under sections 12 and 14 of FOIA act to protect the resources of public authorities, again disclosure of this email would not limit the Council's ability to rely on these provisions to refuse future requests.
70. The Commissioner's decision is therefore that section 36(2)(c) is not engaged.
71. The Council is therefore required to disclose the information within scope of the request within the email withheld under section 36(2)(c), making appropriate redactions of personal data in compliance with FOIA.

Right of appeal

72. 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

73. 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.
74. 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

Victoria James
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