

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 January 2020

Public Authority: Bury Council
Address: The Town Hall
Knowsley Street
Bury
BL9 0SW

Decision (including any steps ordered)

1. The complainant has requested from Bury Council ("the Council"), information relating to the school's appeals process. The Council withheld some information under section 40(2) of the FOIA – personal information.
2. The Commissioner's decision is that the Council is entitled to rely on section 40(2) of the FOIA to withhold the information.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 2 June 2019, the complainant wrote to the Council and requested information in the following terms:

"I would like you to provide me with some further information as detailed below.

Please can you provide the following information under the Freedom of Information Regulations:

- *The number of successful appeals for [name of school] High School.*
- *The reasons for these appeals and why they were successful.*
- *The distance the child lives from [name of school] High School.*

I would also like some information regarding the waiting list for the school. [redacted]... I was told that people had moved into the catchment area since the application deadline.

Please can you confirm since the application deadline how many people have moved into the catchment area and secured a place at the school? (i.e [redacted])

What checks do you do to ensure that people haven't fraudulently used an address within the catchment area when this isn't the child's main residence?

How many late applications were received from people that lived in the catchment area?...

What position is [redacted] currently on the waiting list?"

5. The complainant sent a further email on 3 June 2019, asking for the following information:

"Please can you also provide me with a breakdown of which primary schools children are currently attending who have been allocated places for September at both [name of school] and [name of school]."

6. The Council responded on 4 June 2019. It provided some information within the scope of the requests. However, it explained that it was *"unable to go into individual cases of other children"*.

7. Following a further exchange of emails, in which the Council explained that the appeals panel considered the whole case, including extenuating circumstances, for each child, on 5 June 2019 the complainant sent another request for information, stating the following:

"Please could you provide a copy of the procedure that the panel follows when making a decision on each case?"

Also please could you provide a copy of the notes made on making a decision on our case?"

8. The Council responded on 5 June 2019, providing a copy of the school admissions appeals code. It explained that notes could be obtained from the Ombudsman.
9. The complainant wrote to the Council on 12 June 2019. In the letter, she stated that she should have been provided with
 - the reasons why the other appeals had been successful,
 - The distance the children that won their appeal live from the school, and
 - The notes taken at the relevant appeal hearing.
10. A further response from the Council was issued on 18 June 2019, in which the Head of Democratic Services stated that he believed that the request had been responded to appropriately, also commenting that the appeals process was confidential.

Scope of the case

11. The complainant contacted the Commissioner on 21 June 2019. During the Commissioner's investigation, she contacted the Council as she was not satisfied that the complaint had been considered under the FOIA. The Council advised the Commissioner that it would review the requests and responses and provide a full response in accordance with the FOIA.
12. Following a further internal review, the the Council wrote to the complainant on 17 September 2019. It provided the information relating to the distance from school and the requested appeal notes. However, it withheld the information relating to the reasons why other appeals had been successful, relying on section 40(2) of the FOIA – Personal Information.
13. The complainant contacted the Commissioner again on 4 October 2019 as she was still dissatisfied. She believed that the Council should provide a more detailed response and be able to provide generic reasons why other appeals had been successful.
14. The Commissioner considers the scope of this case to be to determine if the Council has correctly applied section 40(2) of the FOIA to the withheld information.

Reasons for decision

Section 40 Personal information

15. 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.
16. 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').
17. 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 the FOIA cannot apply.
18. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

19. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. 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.

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

22. 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.
23. In this case, the Council withheld details of individual appeals relating to the allocation of school places. The information identifies individuals by name and contains further specific information which could lead to the data subjects being identified from it.
24. The Commissioner is aware that the complainant suggested she would be happy with a "generic" response which provided information of a general nature about the reasons for the successful appeals. The Commissioner has therefore considered whether it would be possible to redact and/or paraphrase the information in order to anonymise it.
25. However, in this case, she is satisfied that the content of the withheld information is such that the relevant individuals would still be identifiable. This is because the matters considered by the appeals panel related to specific circumstances and events which, in the context of further information that may already be known to the wider community, would be likely to lead to identification.
26. The Commissioner is therefore satisfied that it is not possible to anonymise the information in order to prevent the relevant individuals being identified.
27. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that all of the information relates to specific living individuals. She is satisfied that this information both relates to and identifies them. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
28. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
29. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

30. 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".

31. 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.
32. 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

33. 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.

34. In considering the application of Article 6(1)(f) of the 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.
35. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

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".

Legitimate interests

36. In considering any legitimate interest(s) in the disclosure of the requested information under the 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.
37. 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.
38. The Commissioner understands that the complainant is attempting to obtain information regarding the basis on which appeals for children to get into a specific school were allowed.
39. The Commissioner recognises that there are legitimate interests in the Council's transparency and accountability. The Council has stated that it has followed its normal appeals process and disclosure of the information would enable this to be scrutinised.
40. The Commissioner is satisfied that there are legitimate interests in investigating the information.

Is disclosure necessary?

41. '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.
42. The Commissioner is satisfied that the specific information requested in this case has not otherwise been made available to the public and that, therefore, in this case 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

43. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the 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.

44. 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.

45. 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.

46. The Council has explained that assurances were given out to the parents of the children, that the information about the circumstances for their appeals would not be disclosed.

47. The Council acknowledges that it has a duty to be open and transparent. However, it has explained that in this case, as the data subjects were given assurances around their privacy, their interests and fundamental rights must outweigh disclosure.

48. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to the relevant individuals.

49. The Council stated that releasing the information could have an impact on the data subjects' lives as they had no expectation that their information would not be disclosed.

50. It went on to explain that the harm caused would be wholly unjustified and that the obvious effect of disclosure and the rights, freedoms and interests of the data subjects clearly outweigh any interest legitimate or otherwise.

51. The Commissioner has viewed the withheld information and is satisfied that it contains personal information about children who attend the particular school, and their families.

52. The Commissioner considers that disclosure of the withheld information would be distressing to those involved due to the nature of the information and because they had no expectation that their personal information would be made public. Disclosure under the FOIA would confirm to the world at large information of a personal or private nature and the Commissioner considers this would be an unwarranted intrusion into the lives of the data subjects.
53. The Commissioner accepts that the complainant has a private interest in the withheld information. However, she does not consider that the private interest outweighs the rights and freedoms of the third parties identified in the information requested.
54. 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.
55. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
56. The Commissioner has therefore decided that the Council was entitled to withhold the information under section 40(2).

Right of appeal

57. 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

58. 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.
59. 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

Andrew White
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