

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 August 2020

Public Authority: Birmingham City Council
Address: Council House,
Victoria Square,
Birmingham,
B1 1BB

Decision (including any steps ordered)

1. The complainant has requested the application information of a number of applicants for a senior vacancy at the council. The council applied section 40(2) to withhold the relevant information from disclosure.
2. The Commissioner's decision is that the council was correct to apply section 40(2) to withhold the information. She has however decided that the council did not comply with the requirements of section 10(1) in that it did not respond to the request within 20 working days.
3. The Commissioner does not require the council to take any steps.

Request and response

4. The complainant initially requested information of the following description. The Commissioner does not hold a copy of this request, and it is not the specific request under consideration in this decision notice:
 - a. *The position was initially advertised internally on 14 January with a closing date of 28 January 2019. How many internal applications were received?*
 - b. *When was the post advertised externally? How many external applicants were received?*
 - c. *How many applicants were interviewed – internal and external? Has an appointment been made? If so, is it internal or external?*
 - d. *What were my scores in comparison to other applicants? I understand that this will have been collated via a shortlisting matrix, and that this information can be supplied with other applicants details redacted.*
 - e. *You stated that I scored consistently adequately on all points of the person specification but that a decision had been made to only interview the "highest scoring" applicants. On what basis was this decision made?"*
5. The council responded to these requests in a series of correspondence. It provided some information however other information was withheld under section 40(2), particularly the response to parts d and e of the request.
6. Following this response, on 11 May 2019 the complainant made a request for the following information under the FOI Act:
 - f. *Redacted copies of the scoring matrix with all applicant scores.*
 - g. *Copies of application forms / CVs of the top four scoring applicants suitably redacted as necessary or provided in an anonymised form.*
 - h. *Confirmation that you, as Chair, has received Recruitment and Selection training as per BCC's Recruitment and Selection Policy.*
 - i. *Confirmation that both Panel Members have received training in BCC's Equality Policy.*

j. Confirmation that both Panel Members have received Unconscious Bias training as per Ref: 4.4 of the Workforce Development Strategy 2018 – 2022."

7. The council respond to this request on until 7 December 2019. It upheld an initial position that the scores and the matrix were exempt under section 40(2) as the information contains personal data relating to other applicants. It did however respond to questions h, I, and j.

Scope of the case

8. The complainant contacted the Commissioner on 6 August 2019 to complain about the way her request for information had been handled. She said that she wished the council to:

"Provide redacted or anonymised information relating to the CV's, supporting information, scoring matrix and comments for those individuals shortlisted and interviewed for the Post of Head of Leaders Office including mine."

9. The Commissioner notes that the request to the council did not include the comments in addition to the scoring matrix. She is not therefore able to consider this as part of the request within this decision notice.
10. She therefore considers that the complaint is whether the council is correct to withhold the information falling within the scope of parts f) and g) of the request under section 40(2) of the Act.

Reasons for decision

Section 40 personal information

Section 40(2) – personal data relating to third parties

Section 40(2) of the 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.

11. 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').
12. 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.
13. 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?

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

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. 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.
18. The withheld information consists of 3 CV's of the candidates invited for interview, together with two scoring matrices, recorded at shortlisting stage, which both contain the details of 11 individuals.

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

The scoring matrices

19. The council argues that the scoring matrices contain the names of candidates and their respective scores that were generated independently and separately by each member of the interviewing panel. They directly identify each individual candidate by name. In that form, the information is clearly personal data relating to the applicants.
20. It further argues that it is easy to distinguish an individual from other individuals and the information i.e. the scores in the matrix, demonstrate how each individual performed against the criteria and therefore the information 'relates to' each individual candidate. In light of this, the council considers the information within the scoring matrix is the personal data of third parties and the requestor.
21. In her request for information the complainant clarified that she would accept the information in redacted form, with any specific identifiers relating to the other candidates being omitted from the disclosure. The Commissioner asked the council to confirm whether that would be possible.
22. The council however considered that if information such as the names of candidates from the shortlisting matrix were redacted, individuals could still be indirectly identified if that information were known alongside other information the requestor may have, or be able to obtain.
23. It said, for example, that one of the candidates was successful in obtaining the role, and therefore releasing the matrix, even with names redacted, could be related to the successful candidate, whose name has been published, and potentially other candidates, and disclose their scores to the requestor and the world at large.
24. It considered that the redaction of names would not truly anonymise the scores contained within the matrix, as their scores, coupled with information known to the requestor or other determined individuals, could still indirectly identify these individuals thus constitute personal data about the individual.

25. The information, if redacted as requested, does not directly identify individuals. However, even where the name of an individual is not known, it does not mean that an individual cannot be identified. The Commissioner's guidance on the determining what information constitutes personal data² states the following:

'A question faced by many organisations, particularly those responding to Freedom of Information requests, is whether, in disclosing information that does not directly identify individuals, they are nevertheless disclosing personal data if there is a reasonable chance that those who may receive the data will be able to identify particular individuals.'

26. It also states:

'The starting point might be to look at what means are available to identify an individual and the extent to which such means are readily available. For example, if searching a public register or reverse directory would enable the individual to be identified from an address or telephone number, and this resource is likely to be used for this purpose, the address or telephone number data should be considered to be capable of identifying an individual.'

When considering identifiability it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals. Examples would include investigative journalists, estranged partners, stalkers, or industrial spies.'

27. The Commissioner considers that a disclosure of information which would allow a friend or colleague to identify the individual from personal knowledge of the individual would also amount to a disclosure of personal data, particularly if they would obtain new information about that individual from the disclosure. For instance, in this case, a disclosure of the information would amount to details of how they performed in the shortlisting exercise as compared to the other individuals who had applied.

² <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

&

https://ico.org.uk/media/fororganisations/documents/1549/determining_what_is_personal_data_quick_reference_guide.pdf

28. The Commissioner considered whether the disclosure of the total scores of each candidate would not provide details which could be identified against any particular candidate. She notes that only 3 candidates from the matrices were invited to interview for the role. Her presumption is that these were the top 3 scoring candidates from the matrices.
29. The Commissioner is aware that the successful candidate has been identified in local news outlets and states his role on the website 'LinkedIn'. A disclosure of his total score at shortlisting stage would therefore provide a degree of information as to how he matched the council's criteria for the position he now holds. This would be new information which the public would not otherwise know about that individual.
30. Additionally, as only the top 3 candidates from the shortlist were interviewed for the position, she considers that this would also be likely to disclose details about the other two individuals who were asked to attend interviews.
31. Disclosing the total scores from the matrices would highlight the scores of the top 3 candidates shortlisted. Friends, family and colleagues of these individuals may know that they attended an interview, and therefore, with the smaller numbers involved, the Commissioner is not satisfied that the data for these 3 individuals would be truly anonymised from the overall data.
32. She therefore considers that even redacting the matrices to disclose simply the total scores would be a disclosure of information which can be indirectly linked to specific individuals by those with the necessary background knowledge of the individuals.
33. The information therefore amounts to personal data for these individuals.

The application forms

34. As regards the application forms, 3 CV's of the candidates who were interviewed fall within the withheld information. These provide specific details of the candidates, including their identities and employment history and experience. They also provide the individuals summary of what the candidates believed they could bring to the position advertised. Clearly this information is personal data relating to the individuals.
35. The council argues that the primary purpose of an application form is to set out the candidate's background, relevant experience and suitability

for a particular role. The council considers that even if some of the information for example, names, contact details, previous roles, qualifications etc were removed, the remaining information may still build up a picture of the individual and could indirectly identify them; thus constituting their personal data.

36. Having considered the application forms of those invited to interviews, the Commissioner is satisfied that even if some information was redacted, the details provided in the forms could lead to some individuals being identified from their employment history and the other details provided. At the least, friends or colleagues who know the person concerned may be able to identify the individuals from this information and other information which they are aware of.
37. For instance, if an applicant states that he has experience in the management of environmental service departments, and has a degree in environmental science, this may allow colleagues to separate this individual from others who may have widely different backgrounds. The council is not able to know what other information contained within the forms is already known about those individuals by their friends and colleagues, and must therefore consider a disclosure of such information as potentially identifying the relevant individual from the others who were interviewed.
38. Again therefore, the Commissioner is satisfied that the information is personal data relating to the 3 candidates who were invited for interview.
39. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the individuals. She is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
40. 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.
41. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

42. 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".

43. 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.
44. 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.
45. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.
46. In addition, if the requested data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the GDPR.

Is the information special category data?

47. Information relating to special category data is given special status in the GDPR.
48. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
49. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include special category data. She has reached this conclusion on the basis that CV's include data which can be relevant to the information falling within the scope of Art. 9 such as health details.
50. The council clarified that the application forms ask candidates to confirm if they have a disability. The council considers this to be health information, which falls within the meaning of special category data. It argues that even where candidates answer 'No' they are disclosing information regarding their state of health. The Commissioner accepts this point.
51. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
52. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.

53. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
54. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

Is the information criminal offence data?

55. Information relating to criminal convictions and offences is given special status in the GDPR.
56. Article 10 of the GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:

(a) The alleged commission of offences by the data subject; or

(b) Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.

57. The council concluded that the requested information does not include criminal offence data.

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

58. Article 6(1) of the 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.
59. 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”³.

60. 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.
61. 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

62. 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.
63. 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

³ 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”.

compelling or trivial, but trivial interests may be more easily overridden in the balancing test. Although as one of the applicants for the position, the complainant has a private interest in this information, the council recognised that there is a strong public interest in the disclosure of information to demonstrate that the recruitment process is fair to all applicants. A disclosure of the information would also provide a greater understanding of, and more transparency about the recruitment process.

64. The Commissioner therefore recognises the wider legitimate interests of the public in understanding that the process was carried out in a fair and transparent way and that the role was filled following an appropriate, legal and fair process.

Is disclosure necessary?

65. '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.
66. The complainant clarified within her request that she expected, and agreed, to the redaction of personal information which would identify the individuals involved. However, the Commissioner notes above that as only 3 individuals were taken forward to interview, it is more likely that one of these 3 might be identified from the information within either the scoring matrices or the application forms which have been withheld for these individuals.
67. The council therefore determined that even if some of the information were disclosed with redactions applied, the information would still indirectly identify candidates. Therefore, it considered that it would not be possible to disclose the information to meet the requester's private and legitimate interests.
68. The legitimate interest in question is ensuring that the interview process was carried out in a fair and non-discriminatory manner, and that the role was filled following an appropriate, legal and fair process. Although the council can provide a description of the process it went through to fill the vacancy, a disclosure of the withheld information would clarify and support the council's argument that the process met these criteria. The Commissioner therefore accepts that in order to meet the legitimate interests identified it would be necessary for the withheld information to be disclosed.

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

69. 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 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.
70. 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.
71. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information would 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.
72. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

The potential harm or distress

73. The Commissioner recognises that as an exercise in determining which candidate's best suit a senior role within the council, the information which has been provided within the CV's, and the matrices, provides a significant insight into the individuals concerned. They provide an overview of their qualifications and experience, as well as more personal information relating to their professional belief that they are suitable to carry out the role they applied for.
74. Additionally, the council has clarified that not all of the candidates were employees of the council, and they may be embarrassed and distressed if details of their application for the role were to be disclosed to their current employers.
75. On this basis, the Commissioner fully accepts that a disclosure of this information would be likely to cause distress to the individuals concerned.

Information is already in the public domain

76. The Commissioner recognises that as senior professionals, many of the candidates will have provided some details of their career experience on web-based networking sites such as 'LinkedIn'. Nevertheless, it is also clear that candidates will have chosen what information to include on such sites, and their CV's are likely to include further details, and be written in a very different manner to the public profiles on such sites. Therefore, whilst some of the information will already be within the public domain, the Commissioner considers that under these circumstances this does not affect the likelihood that a disclosure of the information would be both distressing and potentially damaging to the individuals involved.
77. The Commissioner also notes that some details of the successful candidate have also been published in local media, but these are significantly different to the type and depth of information which would be disclosed via the withheld information.

Will the information already be known to some individuals?

78. The Commissioner is satisfied that friends and colleagues will be aware of the fact that the application was submitted for the role and may have some knowledge of the individuals past roles, education and experience.

Whether the individual expressed concern to the disclosure

79. The council said that the application form contains the following declaration, "*I hereby consent to Birmingham City Council and relevant partner organisations processing and retaining data contained within this form for recruitment, selection and employment related purposes only.*" It argues therefore that, in light of this, candidates only consented to the disclosure of their information for recruitment purposes and not to the world at large.
80. It said that, in addition, the successful candidate was reluctant to share their application form with the requestor when asked. It confirmed therefore that the other candidates have not been asked whether they are willing to consent.
81. The Commissioner is therefore satisfied that the individuals have not consented to their information being disclosed.

The reasonable expectations of the individuals

82. The council highlighted above the notification which it provided to the individuals who applied for the role. Based upon this they would not expect that the information they were providing to the council for the

purposes of applying for the position would subsequently be disclosed to the whole world in response to an FOI request.

83. The successful candidate would, in all likelihood, expect some details of their past experience, education and training be disclosed by the council in terms of providing details to other employees as a summary of the person who was taking over the role; the role is a senior position within the council. Additionally, following the announcement, and given the role which the successful candidate had previously, some details have appeared in local media, although this information is extremely limited in scope.
84. The Commissioner does not consider that the successful candidate would expect the level of detail provided within the CV would be disclosed to the whole world. Additionally, the Commissioner also considers that the unsuccessful interviewees would not expect that details of their shortlisting scores or the information they provided in their CV's (where relevant) would be disclosed in response to an FOI request.
85. The withheld information is essentially a mixture of information relating to both the private public lives of the applicants. Although they are seeking a senior public position, the information they provide within the CV's is a mixture of professional and personal information. The shortlisting scores also provide a degree of private personal information in that it is a mark as to how the candidates information met the criteria set by the council for the position. It is essentially a mark of their experience and personal attributes as compared to the requirements of the role they were applying for.
86. Although the Commissioner recognises the strong legitimate interest which the public has in understanding, and being able to hold the council to account, for the transparency, legality and fairness of the employment process, she considers that in this instance, this does not outweigh the rights of the individuals as regards their personal data. A disclosure of the data would be intrusive, and potentially cause significant distress, and potentially harm, to the unsuccessful candidates.
87. 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.
88. 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.

The Commissioner's view

89. The Commissioner has therefore decided that the council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 10(1)

90. Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

91. The complainant submitted her request for information on 11 May 2019. The council did not however respond to the request until 7 December 2019.
92. The council did not therefore comply with the requirements of section 10(1) in that it did not provide its response to the complainant within 20 working days.

Right of appeal

93. 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

94. 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.
95. 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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