

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 June 2022

Public Authority: Suffolk County Council
Address: Endeavour House
8 Russell Road
Ipswich
Suffolk
IP2 2BX

Decision (including any steps ordered)

1. The complainant has requested information from Suffolk County Council ("the Council") in relation to parents on limited contact orders, whose children have Education, Health and Care Plans (EHCPs). The Council has withheld the information, citing section 36(2)(b)(i), 36(2)(b)(ii), along with 36(2)(c) of FOIA – prejudice to the effective conduct of public affairs - and section 40(2) of FOIA – personal information.
2. The information is statistical information and the Council has not demonstrated that any of the limbs of the section 36 exemption are engaged. The Council is therefore not entitled to rely on any limb of the exemption to withhold the statistical information. The Commissioner's decision is that the Council is not entitled to rely on section 40(2) of FOIA to withhold the information requested.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information
4. The Council 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 the Act and may be dealt with as a contempt of court.

Request and response

5. On 31 August 2021, the complainant wrote to the Council and requested information in the following terms:

"How many parent/carers of children with EHCPs were placed on one of the below

a) Placing time limits on telephone conversations and personal contacts.

(b) Restricting the number of telephone calls that will be taken (for example, one call on one specified morning/afternoon of any week).

(c) Limiting the complainant to one medium of contact (telephone, letter, email etc) and/or requiring the complainant to communicate only with one named member of staff.

(d) Taking action to remove posts on social media and/or limiting future access to any of the Council administered social media channels.

(e) Requiring any personal contacts to take place in the presence of a witness.

(f) Refusing to register and process further complaints about the same matter.

(g) Where a decision on the individual has been made, providing the complainant with acknowledgements only of letters or emails, or ultimately informing the individual that future correspondence will be read and placed on the file but not acknowledged. A designated officer should be identified who will read future correspondence.

(h) Reporting the behaviours to the Police.

In the years from:

1st September 2018- 31st August 2019

1st September 2019- 31st August 2020

1st September 2020- 31st August 2021

How many parent/carers of children with EHCPs are under one of these arrangements as at 1st September 2021?"

6. The Council responded on 15 September 2021. It neither confirmed nor denied that the requested information is held, but also explained that if the information were held, it would be exempt from disclosure by virtue of section 40(1) of FOIA.
7. Following an internal review the Council wrote to the complainant on 15 September 2021. It stated that it upheld its original response.
8. Following on from the complainant contacting the Commissioner, the Council revised its position again and advised that it was applying

section 36 of FOIA – prejudice to the effective conduct of public affairs and section 40(2) of FOIA – personal information.

9. The Monitoring Officer, in their response as a Qualified Person, outlined which subsections of section 36 of FOIA the Council was applying. They advised that the Council was relying on section 36(2)(b)(i), 36(2)(b)(ii), along with section 36(2)(c). This section provides an exemption where disclosure would, or would be likely to prejudice the effective conduct of public affairs.

Scope of the case

10. The complainant contacted the Commissioner on 15 September 2021 to complain about the way their request for information had been handled.
11. The Commissioner considers that the scope of his investigation is to determine if the Council has engaged section 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA, and if it is also entitled to rely on section 40(2) of FOIA for the withheld information.

Reasons for decision

Section 36 – Prejudice to the effective conduct of public affairs

12. Section 36 is a qualified exemption, other than for information held by Parliament. This means that even if the Commissioner finds that the exemption has been applied properly, the public authority must still disclose the information unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
13. Section 36(1) of FOIA states that this exemption can only apply to information to which section 35 (formulation of government policy) does not apply.
14. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:
 - (a) would, or would be likely to, prejudice—
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or

(iii) the work of the Cabinet of the Welsh Assembly Government.

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

(3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).

(4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words “in the reasonable opinion of a qualified person”.

15. The withheld information in this case consists of the number of individuals with children on EHCPs, who have been placed on a restricted contact policy.

Is the information statistical?

16. Having viewed the withheld information, the Commissioner considers that it is statistical information.

17. FOIA does not define “statistical information”. However, the Collins Dictionary defines the word statistical as “relating to the use of statistics” and it defines the word “statistics” as:

“quantitative data on any subject, especially data comparing the distribution of some quantity for different subclasses of the population.”¹

18. The Cambridge English Dictionary defines “statistics” as:

“information based on a study of the number of times something happens or is present, or other numerical facts.”²

¹ <https://www.collinsdictionary.com/dictionary/english/statistics>

19. The Commissioner considers that graphs and data tables constitute “quantitative data” or “numerical facts.” He is therefore satisfied that this information is statistical information for the purposes of section 36(4) of FOIA.
20. Where the withheld information is statistical, the Commissioner does not consider that he is required to afford the Qualified Person’s opinion any special status. Nor is he required to decide whether that opinion is reasonable or not. He is simply required to determine whether disclosure of the withheld information would (or would be likely to), in his own opinion, otherwise prejudice the effective conduct of public affairs.

Does the statistical information engage any of the limbs of section 36?

21. The Council argued that to release the information, it would potentially cause individuals to be aware of the Council’s threshold for restrictions and, as such, could lead to the Council being challenged unduly.
22. It also advised that it considers the Council must be able to decide what action to take when an individual behaves in a certain way that is harmful to its staff and/or councillors. It should be able to be confident that these issues would not become matters for public discussion.
23. The Council has also argued that it may apply the policy for unacceptable behaviours/restricted contact less frequently if the numbers were published, as it could lead to staff not wanting to recommend individuals to be placed on contact restrictions. It also stated that this could lead to staff having excess stress and therefore lead to more sick days being taken.
24. The Council advised that if the information were to be released it could prevent staff from having open and honest discussions regarding whether it is the most appropriate course of action for the situation. It considers that releasing this statistical data would set a precedent for this type of information, along with other sensitive information being released under future FOIA requests. This in turn would lead to staff having less open and honest discussions for fear of the information being released.

The Commissioner’s view

² <https://dictionary.cambridge.org/dictionary/english/statistic>

25. In the Commissioner's view, the Council has not demonstrated why any of the limbs of the exemption are engaged.

26. **Section 36(2)(b)(i) and Section 36(2)(b)(ii)**

27. In respect of sections 36(2)(b)(i) and (ii) the Commissioner notes his own guidance on section 36 that states:

"an exchange of data or purely factual information would not in itself constitute the provision of advice or, for that matter, the exchange of views".³

28. The withheld information is purely factual information. It is not advice and it not an exchange of views. Even if the Commissioner were to accept that disclosing this data would likely inhibit the staff members/monitoring officer from implementing this policy on individuals', that would not in itself be inhibiting the provision of advice or the exchange of views. The Commissioner does not consider that disclosing factual data should reasonably inhibit any open and honest discussions between staff members of the Council.

Section 36(2)(c)

29. Having determined that neither of the limbs under section 36(2)(b) applies to the statistical information, the Commissioner has gone on to consider whether disclosure "would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs" as specified under section 36(2)(c) of FOIA.

30. His guidance on this limb of the exemption and the relevant case law state that, in order to engage this limb, a public authority must demonstrate some form of prejudice, not covered by another limb, that might result from disclosure.

31. The Commissioner accepts that the Council does need such a policy in place to protect its staff members and councillors. However, the information being withheld does not represent any form of deliberation as to whether an individual should or should not be placed on a contact restriction, it only shows the Monitoring Officer's decision that they should. The Council should have appointed a senior person of sufficient robustness to make sure that the policy is applied consistently in order

³ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

to protect staff. That person should be making their decision based on balancing the Council's public service functions against the welfare of its staff. The policy in question does not state that the organisation's reputation will be a relevant factor, so it should not be influencing the Monitoring Officer's decisions. The Commissioner is not suggesting that the Monitoring Officer is influenced by this, but this is the inference of the Council's argument.

32. The Commissioner considers that the withheld information would reveal little more than is already revealed through the Council's own publicly available Unreasonable Behaviour Policy. As such, the Council's claims that revealing the information would lead to more unreasonable behaviour are therefore unsubstantiated.
33. The Commissioner is therefore not satisfied that the Council has demonstrated that there is a real likelihood that disclosure of any of the withheld information would otherwise prejudice the effective conduct of public affairs and, therefore, none of the limbs of the section 36 exemption are engaged. However, he considers that, even if he were so persuaded, the public interest would be likely to favour disclosure.

Section 40(2) – personal data

34. 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.
35. In this case, the relevant condition is contained in section 40(3A)(a)⁴. This applied where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation (UK GDPR').
36. 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.
37. 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.

⁴ As amended by Schedule 19 Paragraph 58(3) DPA

Is the information personal data?

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

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

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

40. 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.

41. 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.

42. The withheld information in this case consists of the number of individuals with children on EHCPs, who have been placed on a restricted contact policy.

43. In this case, the Council has explained that the requested information relates to a small number of individuals and, due to the low numbers, they could be identified. The Commissioner does not, however, see how those individuals could be identified from the information requested and notes that the Council did not provide any detailed reasoning to corroborate its argument on this point.

44. The Commissioner refers to the recent Upper Tribunal case NHS Business Services Authority v Information Commissioner and Spivak GIA/0136/2021⁵

“Identifying a pool that contains or may contain a person covered by the data is not sufficient. Saying that it is reasonably likely that someone is covered by the data is not sufficient. Still less is it sufficient to say that it is reasonably likely that a particular individual may be one of the pool. Linking any specific individual to the data in any of these circumstances does not rely solely on the data disclosed and other data available by reasonable means; it involves speculation.”

⁵ [GIA_0136_2021-00.pdf \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/gia/0136-2021-00.pdf)

45. The above Tribunal hearing explains that a public authority needs to make a case for the identifiability of an individual or individuals.
46. In this case, the Commissioner considers that the Council has failed to demonstrate how an individual could be identified from the data requested. An individual cannot use the data to link EHCP recipients with a contact restriction and they cannot link contact restrictions with an EHCP recipient – unless the individual already knew both facts, in which case, disclosure of the withheld information would not tell them anything that they did not already know.
47. The complainant has explained that they fail to see how someone could be identified from figures, unless they had made it known publicly themselves that they are under such an exemption. They also added that there are over 5000 children/young people with EHCPs in Suffolk.

The Commissioner's view

48. While the Commissioner notes that there are low numbers involved, the data on its own, would not allow any individuals to be identified. As such, the Commissioner considers that the requested information is not personal data and, therefore, the Council is not entitled to rely on section 40(2) of FOIA to withhold it.

Right of appeal

49. 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

50. 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.
51. 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

Michael Lea
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