

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 May 2024

Public Authority: London Borough of Bexley
Address: Bexley Civic Offices
2 Watling Street
Bexleyheath
Kent
DA6 7AT

Decision (including any steps ordered)

1. The complainant has requested the Monitoring Officer's full response to a Code of Conduct complaint made against a Councillor. The London Borough of Bexley ("the Council") relied on section 40(2) of FOIA (third party personal information) to withhold the information.
2. The Commissioner's decision is that the public authority has correctly relied on section 40(2) of FOIA to withhold the information.
3. The Commissioner does not require further steps to be taken.

Background

4. In October 2022 the Council received complaints from members of the public about a tweet posted by a Councillor.
5. Following an internal investigation by the Council, the Councillor was suspended from a local political party.
6. The Councillor returned to his position in April of 2023, shortly before the information request forming the basis of this notice was submitted to the Council.

7. The Commissioner issued a previous decision in respect of this request under reference IC-246302-W6C4¹.
8. In his decision the Commissioner found that the Council was not entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it held the requested information. That decision notice therefore required the Council to provide the complainant with a fresh response, ie to confirm or deny whether the information was held, and if held, disclose that information or issue a refusal notice.

Request and response

9. On 23 May 2023, the complainant wrote to the public authority and requested information in the following terms:

“Can you please share the Monitoring Officer's (full) response to the Code of Conduct complaint recently made against [name redacted] after his "Can we send her back and get our money back?" comment regarding Nazanin Zaghari-Ratcliffe. (The alleged offence is a matter of public record, so there is presumably no breach of privacy).”
10. The public authority responded on 1 June 2023. It stated that it was refusing to neither confirm nor deny whether the requested information was held, with reliance on section 40(5B).
11. Following an investigation by the Commissioner, as referred to in paragraphs seven and eight above, the Council provided the complainant with a fresh response to their request on 30 November 2023. The Council confirmed that it held the requested information, however it was relying on section 40(2) to withhold it. It provided the complainant with an outline of the role of the Monitoring Officer how complaints about a councillor's conduct are handled and, while it recognised that there is a general requirement for transparency in public life, it argued that the complaints process is undertaken in confidence and any councillor subject to a complaint would have a legitimate expectation of a right of privacy.
12. As he is entitled to within his discretionary powers, the Commissioner accepted the complaint for investigation without an internal review.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4027465/ic-246302-w6c4.pdf>

Scope of the case

13. The complainant contacted the Commissioner on 30 November 2023 to complain about the way their request for information had been handled.
14. The Commissioner considers that the scope of his investigation is to establish whether the public authority is entitled to withhold the requested information under section 40(2) of FOIA.

Reasons for decision

Section 40 - personal information

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). 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 UK General Data Protection Regulation ('UK 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 FOIA cannot apply.
18. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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.

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 the circumstances of this case, taking into account his findings in his previous decision, and having considered the withheld information, the Commissioner is satisfied that the information does relate to the data subject. This is because it is a report into complaints made about their behaviour. The name of the data subject quite obviously is information that both relates to and identifies the Councillor concerned.
24. The Commissioner notes that the identity of the Councillor is already known to the complainant.
25. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
26. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
27. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

28. 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".

29. 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.
30. 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

31. 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.

32. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
33. 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

34. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
35. 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.
36. In their grounds of complaint, the complainant stated "the MO's judgement is of public interest, especially when there are concerns about "the MO "protecting" a Councillor from the local ruling party". The

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".

complainant has not provided any further information to substantiate these claims, however, he understands that the Councillor's suspension and later reinstatement attracted scrutiny in the local press. The Commissioner considers these concerns to form the case-specific legitimate interests.

37. In its response to the Commissioner's investigation, the Council acknowledged the legitimate interest in transparency in public life and ensuring confidence in local government and its mechanisms for dealing with alleged Code of Conduct breaches.

Is disclosure necessary?

38. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
39. As in his previous decision, the Commissioner noted that a description of the complaint and high-level details of the Monitoring Officer's review of the Council's initial assessment is published on the Council's website. While the Commissioner recognises that this is not the same as releasing the full report, he does consider that the Council has publicly made available the substance of the Monitoring Officer's review, per its complaints handling procedure.
40. The Commissioner therefore considers that the broader legitimate interest in the disclosure of the information – namely, transparency around Code of Conduct complaints handling procedures – has already been met by the Council.
41. With regards to the case-specific interest - which the Commissioner understands to be gaining clarity on allegations of a council officer conspiring to shield a Councillor from their peers (as described at paragraph 36 above) - disclosure of the Monitoring Officer's full report appears to have been sought by the complainant in order to confirm or deny speculations of bias within the Council. The Commissioner recognises that disclosure of the requested information holds the potential to dispel publicly circulated rumours, and that this is the least intrusive means of achieving this aim.
42. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

43. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
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. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
47. The Commissioner considers that the rights of the data subject outweigh any legitimate interest in disclosure. As explained at paragraph 40, the Council has already met the broader legitimate interest in ensuring it is transparent about how it handles complaints made about a Councillor, and the Commissioner does not find that the case-specific interest described at paragraph 41 carries significant weight to the extent that it would justify the disclosure of the Councillor's personal data. This is because the case-specific interest is seemingly based on speculation, rather than being grounded in fact. The Commissioner does not consider it appropriate to employ the FOIA mechanism to fact-check rumours about a person.
48. Furthermore, considering the prior media interest in the complaint the Commissioner believes that disclosure of the requested information carries the possibility of causing real and actual distress to the data subject, and that they would have a reasonable expectation that the information would not be publicly disclosed.

49. Finally, the Commissioner is unable to see how disclosure of the full report is likely to add material value to the information already made publicly available on the Council's website outlining the outcome of the complaint.
50. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's 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.
51. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
52. The requested information is therefore exempt from disclosure on the basis of section 40(2) of FOIA.

Right of appeal

53. 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

54. 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.
55. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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