

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 18 May 2023

**Public Authority:** Bristol City Council  
**Address:** The Old Council House  
Corn Street  
Bristol  
BS1 1JG

#### **Decision (including any steps ordered)**

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1. The complainant has requested information regarding Applied Behaviour Analysis ('ABA') companies from Bristol City Council (the Council).
2. The Commissioner's decision is that:
  - The Council was entitled to rely on section 40(2) when refusing this request.
  - The Council, on the balance of probabilities, does not hold any additional information within the scope of the request.
  - The Council breached section 17 by failing to issue a refusal notice within 20 working days.
  - The Council also breached section 10 by failing to respond to the request within 20 working days.
3. The Commissioner does not require further steps.

#### **Request and response**

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4. On 8 November 2022, the complainant wrote to the Council and requested information in the following terms:

- "Please can you list the names, and if available contact details, you have of all the Applied [Behaviour] Analysis (ABA) companies that;
- a) you have worked and/or had dealings with since 1 January 2018;
  - b) are registered as an approved contractor or supplier with Bristol City Council."
5. The Council responded on 8 February 2023. It provided some of the information it said it held, explaining that relevant redactions had been made to withhold personal data under section 40(2).
6. Following an internal review, the Council wrote to the complainant on 16 March 2023. It stated that it was upholding its original decision.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 21 January 2023 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to determine if the Council holds any additional information within the scope of the request and if it has correctly applied section 40(2).

### **Reasons for decision**

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9. 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.
10. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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').
11. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA

Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.

12. 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?
13. Section 3(2) of the DPA defines personal data as:  
  
"any information relating to an identified or identifiable living individual".
14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. 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.
16. 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.
17. In the circumstances of this case, the Council explained to the Commissioner it disclosed the names of each company it commissioned. It however only provided the company names of two of the five providers, it contacted but did not commission. The Council advised if it was to disclose the company names of the other three ABA providers it had not commissioned, it would in turn be disclosing their personal data. This is because the individuals in question are sole traders and the name of these individuals would have to be disclosed in order to meet the requirements of the request.
18. The Council further advised that, where it had contacted a named individual (as opposed to a generic contact email address) it had redacted the names of each individual it contacted and their direct email address (regardless of whether they had been commissioned by the Council or not).
19. Having considered the withheld information the Commissioner is satisfied that the information relates to the data subjects, as it would consist of the names of these individuals and their direct email addresses. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

20. 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.

21. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

22. 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”.

23. 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.

24. 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**

25. 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”<sup>2</sup>.

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<sup>2</sup> 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”.

26. 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.
27. 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**

28. 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.
29. 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.
30. The complainant advised that their interest in the requested information was to understand the Council's engagement with Applied Behaviour Analysis companies.
31. The complainant advised that the public has a right to know how the Council is engaging with ABA providers and whether it is adhering to the necessary standards and accountability, which is crucial for maintaining public trust.
32. The complainant explained that their interest also extended to welfare of all children who are receiving ABA education in the Council's jurisdiction. The release of the requested information would show the public that the Council is meeting necessary standards and providing quality education to children.
33. The complainant further concluded that disclosing the information would demonstrate that the Council is operating in a transparent manner.

34. The Commissioner is satisfied that there is a legitimate interest in part of the requested information. However, he does not think it is necessary for the contact details of the providers to be disclosed, as this information is reasonably accessible on their company websites.

**Is disclosure necessary?**

35. '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.
36. Although the Council has clearly explained that it interacts with ABA companies in two different ways (those it has contacted but not commissioned and those it had contacted and were commissioned by the Council) the Commissioner is not satisfied that there is a less intrusive way to achieve all of the legitimate interests explained by the complainant.
37. The Council has not provided all of the ABA providers company names to the complainant, therefore the complainant cannot use the information to ensure that all the ABA providers which have been contacted or commissioned by the Council are meeting necessary standards and providing a set quality care to children.

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

38. 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.
- 34.
39. 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
40. 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.
  41. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
  42. The Commissioner acknowledges that there is always a public interest in whether a public authority (in this case, the Council) is operating in an open and transparent manner. The Commissioner also acknowledges that if all of the requested information was disclosed, the complainant may have a greater understanding of how the Council engages with ABA companies it has not commissioned.
  43. The Council explained to the Commissioner that companies contacted but not commissioned by it, would have a reasonable expectation of privacy in this matter. It stated that the correspondence between the Council and the providers was initiated by the Council.
  44. The Council explained that the reason that they were not commissioned bears no reflection on their quality as an ABA provider. However, the fact that they were not commissioned or had any contact with the Council in the first place could be misinterpreted and have a negative impact on them.
  45. The Council concluded that it had provided the name of companies it had commissioned to the complainant and this should satisfy any interests in the credentials of these companies, without personal data needing to be disclosed.
  46. The Commissioner recognises that the email addresses the Council is withholding may well be used for professional purposes. However, the fact that the providers were contacted by the Council but did not receive a commission is their personal data and the email address cannot be disclosed without, in turn, revealing that the individual was contacted. The individuals would have a reasonable expectation that the Council would not disclose such information. Therefore disclosure would be contrary to their reasonable expectations and likely to cause the individuals in question a certain amount of damage and distress.

47. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest in the disclosure of the information 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.
48. 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.
49. The Commissioner is therefore satisfied that the Council was entitled to rely on section 40(2).

### **Section 1 – Information held/not held**

50. Section 1 of FOIA states 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.'

51. If a public authority does not hold recorded information that falls within the scope of the request, the Commissioner cannot require the authority to take any further action.
52. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-Tier Tribunal decisions, and the civil standard of proof based on the balance of probabilities, must decide whether the public authority holds any information which falls within the scope of the request (or was held at the time the request was made).
53. The Council explained that all searches had been carried out by the Head of Statutory Special educational needs and disability ('SEND') services for the Council. Searches were conducted in two different ways: details of ABA providers commissioned by the Council and details of ABA providers contacted but not commissioned by the Council.
54. The Council also informed the Commissioner that the ABA providers it commissions all have records within the SEND service and relevant information was easily extracted from the spreadsheet and provided to the complainant.



55. The Council used search terms of "ABA" and "applied behavioural analysis", these searches were conducted for all SEND staff. It confirmed no other part of the Council is likely to hold the requested information, which is why no searches were done outside of the SEND staff.
56. The Council advised that there are only three ABA providers commissioned by the Council and the head of statutory SEND Services, would be aware of these names. For the providers contacted but not commissioned, this information had recently been requested as part of a judicial review and had already been collated through searches of the individual and group inboxes of the SEND department.
57. The Council also explained that other ABA providers can be personally commissioned for young people with special education needs or disability, by their families, using their Direct Payments. If services had been personally commissioned, the Council would not have a record of the provider.
58. For the providers who were contacted but not commissioned by the Council, searches were conducted in individual inboxes and group inboxes of all SEND staff for the requested information.
59. The Council confirmed that no paper records existed for this type of information as communications with providers were carried out exclusively by email, therefore no paper searches were required.
60. The Council advised that it had no record of any information within the scope of the request being destroyed prior to or after the request was made. It also confirmed that there is no separate retention period for details of ABA providers commissioned by the Council, however all records relating to the provision of educational psychology services must be retained for 25 years from the date of birth of the child. The Council acknowledged that, as it maintains a relationship with the providers it commissions, there is clear need to retain details of who the providers are.
61. The Council also explained that there is a general email retention policy of 2 years, this applies to any emails which don't contain information captured by Bristol City Council's Document Retention Schedule. The Council concluded that unlike the providers it commissions, there is no business purpose to retain details of non-commissioned providers beyond the usual retention period described above.
62. The Commissioner is satisfied that the Council has carried out appropriate searches to locate the relevant information. It is possible that other ABA providers operate in the area but, where services are not

commissioned by the Council, it would not hold records of such providers.

63. Based on the information provided by the Council above, the Commissioner is satisfied that, on the balance of probabilities, the Council does not hold any additional information within the scope of the request.

### **Procedural matters**

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64. The Council breached section 10 by failing to respond to the request in 20 working days.
65. The Council also breached section 17 by failing to issue a refusal notice within 20 working days.

## Right of appeal

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66. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

67. 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.
68. 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 .....**

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**