

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

### **Decision notice**

**Date:** 9 September 2024

**Public Authority:** Liverpool City Council  
**Address:** Cunard Building  
Water Street  
Liverpool  
L3 1AH

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

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1. The complainant requested information relating to an allegation made about themselves relating to a child in their foster care. Liverpool City Council (the Council) provided the complainant with their own personal data and withheld the remaining information under sections 40(2) (personal data) and section 41 (information provided in confidence). The Commissioner's decision is that the information is exempt from disclosure under sections 40(1) and 40(2) of the FOIA. He does not require any steps to be taken.

#### **Request and response**

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2. On 29 December 2023, the complainant wrote to Council and requested information in the following terms:

"I would like to submit a Freedom of Information request related to an allegation that was made about me in June 2023 (related to Child L).

I would like to receive by email all related information that was gathered as part of the investigation between Liverpool City Council and Compass (fostering services)".

3. The Council responded on 11 January 2024 and stated that the information requested was exempt under sections 40 and 41 of the FOIA. The Council also confirmed that it had provided all relevant information to the complainant related to the subject matter in line with their Subject Access Request (SAR).
4. On 15 January 2024, the complainant requested an internal review of the handling of their request. They also sent a further email to the Council on 14 March 2024 chasing a response.

### **Scope of the case**

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5. The complainant contacted the Commissioner on 14 March 2024 to complain about the way their request for information had been handled.
6. The Council failed to carry out an internal review and as such the Commissioner accepted this complaint without an internal review having been carried out.
7. The scope of the Commissioner's investigation into this complaint is to determine whether the Council should disclose the remaining information held relevant to the complaint.

### **Reasons for decision**

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#### **Section 40(1) – the complainant's own personal data**

8. Section 40(1) of FOIA provides that any information to which a request for information relates is exempt information if it constitutes personal data of which the requester is the data subject.
9. Section 3(2) of the DPA defines personal data as:  
"any information relating to an identified or identifiable living individual"
10. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
11. 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.
12. The Commissioner has viewed the withheld information which consists of case notes that were written by professionals involved in providing the child in question's foster care package, including details of discussions with the child concerned. The Commissioner is satisfied that the

withheld information identifies and relates to specific living individuals, including the complainant and the child, in relation to the foster care of the child. The Commissioner finds that the withheld information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

13. The Commissioner notes that, although the Council did not specifically cite section 40(1) of the FOIA, it has confirmed that it also dealt with the request as a SAR and provided some information to the complainant.
14. In his published guidance on personal data of both the requestor and others the Commissioner makes it clear that in circumstances where the personal data of the applicant is very closely linked to the personal data of other data subjects, ie it would be 'mixed' personal data, there is no requirement to assess the relative extent and/or significance of the different sets of personal data in order to establish the 'dominant' data subject. This is because there is no basis for regarding the individual whose data is more extensive or significant than the others as being the only data subject.
15. Where a request is made for information which, if held, would be the personal data of the applicant, the public authority should consider the information in its entirety under section 40(1) of the FOIA.
16. Taking the above into account, the Commissioner is satisfied that some of the information is the complainant's own personal data. This is because the requested information relates to allegations against them. The Commissioner therefore finds that regulation 40(1) applies to this information. As section 40(1) is an absolute exemption there is no public interest test to apply.
17. However, having viewed the withheld information, the Commissioner notes that some of the information could be released without disclosing the complainant's own personal data. The Commissioner has gone on to consider whether section 40(2) applies to the information contained within the withheld information which does not constitute the complainant's own personal data.

### **Section 40(2) – Third party personal data**

18. 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.

19. 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).
20. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 of the FOIA cannot apply.
21. 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.
22. The Commissioner is satisfied that some of the withheld information identifies and relates solely to a specific living individual who is not the complainant, ie it relates to the child. This includes information about their daily life and day to day activities. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
23. 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.
24. The most relevant DP principle in this case is principle (a).

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

25. Article 5(1)(a) of the GDPR states that:
26. "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
27. 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.
28. 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.

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

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

29. 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>.'

30. 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.

31. 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

32. In considering any legitimate interest(s) in disclosing the withheld 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.

33. 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

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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"

compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

34. The withheld information in this case relates to an allegation made against the complainant regarding the care of a child in their foster care. The Council considers that there is no wider legitimate interest in disclosing information about the child or any allegations about their care.
35. The Commissioner accepts that the complainant has a legitimate interest in accessing the withheld information. However, he also notes that the Council has provided the complainant with some information in response to their subject access request.

### **Is disclosure necessary?**

36. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least restrictive means of achieving the legitimate aim in question.
37. The Council advised that it considered the legitimate interests of both the complainant and the child in question. However, it considers that the complainant's legitimate interests have been satisfied to an extent through the information it disclosed as part of a SAR. It advised that, as with all its SAR responses, an explanation of the redactions was given.
38. The Commissioner is unaware of any other avenue by which the complainant could obtain this information. Therefore, disclosure under FOIA is the only viable option open to them.

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

39. 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 EIR 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.
40. 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.
41. In the Commissioner's view, a key issue is whether the data subject has a reasonable expectation that their information will not be disclosed or that the public authority will not confirm whether or not it holds their personal data. 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.
  42. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
  43. The Council stated that investigations of this nature are conducted with a reasonable expectation of anonymity. Due to the personal nature of the information requested, the Council considers that disclosure would cause unjustified damage or distress to the child in question. It would also leave the Council open to claims of a personal data breach.
  44. Disclosure under FOIA is to the world at large. The Commissioner understands that data subjects have a clear and strong expectation that their personal data will be held in accordance with data protection laws. In this case, the Commissioner is satisfied that the data subject would have a reasonable expectation that the Council would not disclose information relating to their care and wellbeing to the world at large. They would expect such information to remain confidential to them and the Council, given that any information that may be held is their personal data.
  45. The Commissioner is also satisfied that, due to the personal nature of the withheld information, disclosure when that is not expected, would be seen as intrusive, and would cause unnecessary and unjustified distress to the data subject.
  46. 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.
  47. 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.

48. 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).
49. As the Commissioner has concluded that the withheld information is exempt under section 40(2), he has not gone on to consider the Council's application of section 41 of the FOIA to the information.

## **Other matters**

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50. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern

## **Internal review**

51. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA.
52. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
53. In this case the complainant requested an internal review on 15 January 2024 and at the time the Commissioner accepted the complaint on 9 April 2024 no internal review had been conducted. In light of the delay the Commissioner accepted the complaint without an internal review having been completed.
54. The Commissioner considers that in failing to conduct an internal review within the timescales set out above, the Council has not acted in accordance with the section 45 code. This is a matter that may be revisited should similar outcomes be noted by the Commissioner in any future cases relating to the Council. The Commissioner expects the Council to ensure that reviews it handles in the future adhere to the timescales he has set out in his guidance.



55. The Commissioner uses intelligence gathered from individual cases to inform his insight and compliance function. This aligns with the goal in his draft "Openness by design"<sup>3</sup> strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting systemic non-compliance, consistent with the approaches set out in his "Regulatory Action Policy"<sup>4</sup>.

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<sup>3</sup> <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

<sup>4</sup> <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

## **Right of appeal**

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56. 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)

57. 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.
58. 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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