

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 September 2024

Public Authority: London Borough of Newham
Address: Town Hall
Barking Road
East Ham
London
E6 2RP

Decision (including any steps ordered)

1. The complainant has requested a copy of a report outlining the findings of an inquiry into allegations made about senior Council officials. London Borough of Newham ('the Council') relied on section 40(2) of FOIA (third party personal information) to refuse the request.
2. The Commissioner's decision is that the Council was entitled to rely on section 40(2) of FOIA to refuse the request.
3. The Commissioner does not require further steps.

Request and response

4. On 2 February 2024, the complainant wrote to the Council and requested information in the following terms:

"In January 2024, a report, commissioned by LBN, was presented to the Standards Advisory Committee (SAC). This was the result of an enquiry by external consultants into allegations from both [NAME REDACTED] and [NAME REDACTED] arising from a meeting of the Budget Scrutiny Commission. The allegations of both parties were of a serious nature.

However, the report of the inquiry was submitted to the SAC on 'green pages' and has been kept as confidential.

This is a matter of public interest and I request that you provide a complete and unredacted copy of the report.”

5. The Council responded on 1 March 2024. It stated that it was relying on section 40(2) of FOIA to withhold the requested report.
6. Following an internal review, the Council wrote to the complainant on 9 May 2024. It maintained its position.

Scope of the case

7. The complainant contacted the Commissioner on 12 May 2024 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 whether the Council was entitled to rely on section 40(2) of FOIA to refuse the request.

Reasons for decision

Section 40(2) – personal information

9. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
10. Section 40(3A) of FOIA 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, as set out in Article 5 of the UK General Data Protection Regulation (UK GDPR).

Is the information personal data?

11. Section 3(2) of the Data Protection Act 2018 defines personal data as:
“any information relating to an identified or identifiable living individual.”
12. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

13. 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.
14. The complainant has requested information concerning a report into allegations from and about two senior council officials. The Commissioner is satisfied that, as the officials concerned are named in the request, the requested information both relates to and would identify the individuals concerned. He therefore considers that the requested information falls within the definition of 'personal data' in section 3(2) of the DPA.
15. The Council has explained that it considered whether a redacted copy of the report could be disclosed to the complainant but it found that the large amount of personal information included in the report meant that this would not be possible.

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

16. In the case of a request under FOIA, 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.
17. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.
18. 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 child¹"

¹ 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 UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".

19. In considering the application of Article 6(1)(f) of the UK 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.
20. 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

21. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.
22. The Council has acknowledged that there is a legitimate interest in disclosure of the requested report, namely transparency in council official conduct issues, and the Council's assurance that it complies with its duty under the Localism Act to promote and maintain high standards of conduct.
23. The complainant has argued that it is in the public interest to have access to the report and its findings when it was paid for by public funds. They argued that it is also in the public interest to know how Council officials behave when they are acting in their official capacity. In their request for an internal review they stated:
- "It might be embarrassing to reveal some details of their behaviour. This, I submit is not sufficient to deny local electors and council tax payers' knowledge of how the people elected to represent them, behave."
24. The Commissioner is satisfied that the complainant has a legitimate interest in the requested information.

Is disclosure necessary?

25. '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.

26. The Council has argued that disclosure of the report into the public domain is not necessary to achieve the legitimate interest in transparency. The Council explained that it appointed an experienced external investigator to consider the allegations carefully in order to compile the report. The report also received scrutiny from the Council's Standards Advisory Committee on three occasions in January and April 2024. The Council considers that these measures along with the fact that the outcome of the report will be published will meet the legitimate interest without needing to disclose the report itself.
27. In its responses to the complainant, the Council advised that the report had concluded that there was no breach of the Code of Conduct by any of the individuals investigated. In its submission to the Commissioner, it added that the Council's established practice is to publish reports where it is found that there has been a breach of the Code of Conduct but not to publish the report where it concludes that there has been no breach. The Council stated that the situation would be different if the report had made findings that there had been breaches of the Code of Conduct for Members but this is not the case.
28. The Commissioner acknowledges that the Council has provided the complainant with the outcome of the inquiry but he notes that the complainant has requested a copy of the report itself. He considers that disclosing the requested report would be necessary to fulfil the request.

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

29. 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.
30. 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.
31. 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.
 32. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
 33. The Council has explained that the nature of the inquiry means that the report contains a large amount of personal information – that of the subjects of the inquiry and that of the witnesses. Although the inquiry concluded that no breach of the Code of Conduct occurred, the report details the allegations and witness testimonies. The Council considers that the disclosure of this information could cause reputational damage to the individuals concerned.
 34. The Commissioner appreciates that the complainant has a legitimate interest in this information, and although the outcome of the inquiry is already publicly available, the detail of the report would only be obtained through disclosing the requested information.
 35. However, given the Council's policy on the publication of Code of Conduct investigations, the Commissioner considers that the individuals named in this case would reasonably expect that their personal data would not be disclosed to the world at large under FOIA, and that disclosure would therefore cause those individuals harm or distress.
 36. The Commissioner considers the wider public interest in transparency about inquiries into the conduct of council officials is satisfied through the report being carried out by an external investigator, and the report outcome being made public.
 37. 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 disclosing the requested information would be unlawful as it would contravene a data protection principle; that set out under Article 5(1)(a) of the UK General Data Protection Regulation.

38. 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.

Right of appeal

39. 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

40. 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.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Keeley Christine
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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