

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 October 2024

Public Authority: Norfolk County Council
Address: County Hall
Martineau Lane
Norwich
NR1 2DH

Decision (including any steps ordered)

1. The complainant has requested information regarding a safeguarding complaint he made about an incident at a school. Norfolk County Council ('the Council') disclosed some information. It withheld a small amount of information under section 40 (Personal information) of FOIA. It also confirmed to the complainant that it did not hold any further information falling within the scope of the request.
2. The Commissioner's decision is that the Council was entitled to withhold the name and email address of an Ofsted staff member under section 40(2) of FOIA. He finds that, on the balance of probabilities, the Council does not hold any further information falling within the scope of the request.
3. The Commissioner does not require further steps as a result of this decision.

Background

4. The complainant has told the Commissioner:

"The purpose of the request to the NCC [Norfolk County Council] was to obtain all correspondence...regarding a complaint I had submitted

to Ofsted and the DfE [Department for Education] concerning Health and Safety (H&S) failings leading to an incident that resulted in the hospitalisation of a child under the care of [academy trust name, redacted].”

5. Ofsted approached the Council about the matter, and the Council carried out an investigation. The complainant told the Commissioner that, in making his request, he hoped to receive records of phone calls, emails and site visits conducted as part of the investigation.

Request and response

6. On 4 December 2023, the complainant wrote to the Council and requested information in the following terms:

“Please provide me with all correspondence between the NCC CS [Norfolk County Council Children's Services] and Ofsted, the NCC CS and the Department for Education, the NCC CS and [academy trust name, redacted] (including [name of school redacted]) on the matter of your involvement.

Please could you also provide me with any resulting audit reports generated as a result of your intervention if they are not included in the above request.”

7. The Council responded on 10 January 2024. It disclosed a report of its investigation of the matter, with redactions made under sections 40(1) (the requester’s personal data) and 40(2) (personal data of third parties). It said it was withholding the initial correspondence it had received from Ofsted about the complaint in its entirety, under the same exemptions. It said no further information was held.
8. The complainant requested an internal review on 4 March 2024. He did not challenge the decision to redact personal data in the disclosed document. However, he said he had asked for copies of all correspondence between the bodies identified in the request, and he had only been provided with a report summarising the Council’s investigation. He said that the report made reference to telephone calls, emails and site visits on certain dates, and he asked that any corresponding information about them be provided, as well as the withheld correspondence from Ofsted, referred to in the refusal.
9. He also said that any information which comprised his own personal data could be disclosed to him outside of FOIA, under the subject access provisions of the UK General Data Protection Regulation (‘the UK GDPR’).

10. The Council provided the outcome of the internal review on 18 April 2024. It said that it held limited information falling within scope of the request. As regards any further information about telephone calls, emails and site visits, it said:

“That correspondence no longer exists on our systems and Norfolk County Council does not hold the data, and therefore cannot release it. It is understood that this correspondence was destroyed when the recipient left the organisation some years ago.”
11. The Council maintained that the initial correspondence from Ofsted to the Council contained third party personal data and was correctly withheld under section 40(2) of FOIA.
12. It said that it was considering the information which was the complainant's own personal data separately, under the subject access provisions of the UK GDPR.

Scope of the case

13. The complainant contacted the Commissioner on 30 May 2024 to complain about the way his request for information had been handled. He challenged the Council's decision not to disclose the Ofsted correspondence and its position that it does not hold any further information regarding its investigation into his complaint. He also said he was unhappy with its handling of his request for his own personal data.
14. During the Commissioner's investigation, and following consultation with Ofsted, the Council revised its position on withholding its correspondence. It disclosed the majority of Ofsted's initial correspondence to the Council, with the sender's name and email address redacted under section 40(2) of FOIA. It also withheld some information under section 40(1) of FOIA, it being the complainant's own personal data.
15. The analysis below considers whether the Council was entitled to rely on section 40(2) of FOIA to withhold third party personal data from the Ofsted correspondence and whether, on the balance of probabilities, it also holds further information which it has not disclosed.
16. As regards the small amount of information withheld under section 40(1) of FOIA, the Commissioner has viewed it and can confirm that it is the personal data of the complainant. The Commissioner has considered the complainant's concerns about the handling of his request for his own personal data as a separate complaint under the UK GDPR. The

application of section 40(1) of FOIA is therefore not considered further in this decision notice.

Reasons for decision

Section 40(2) – Personal information

17. 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.
18. In this case, the relevant condition is contained in section 40(3A)(a)¹. 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 GDPR.
19. 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.
20. 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?

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

"any information relating to an identified or identifiable living individual".
22. 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.

¹ 2 As amended by Schedule 19, paragraph 58(3) DPA

23. 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.
24. The information being withheld under section 40(2) of FOIA is the name and email address of the Ofsted staff member who sent the correspondence to the Council. The Commissioner is satisfied that this is information about, and which identifies, a living individual. The withheld information therefore meets the definition of personal data at section 3(2) of the DPA.
25. The second element of the test is to determine whether disclosure of this personal data would contravene any of the DP principles. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

26. Article 5(1)(a) of the UK GDPR states that: "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 UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK 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".
30. When 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.

31. The test is a cumulative one, with each test needing to be met before the next may be applied. If a test cannot be met then the processing will not be lawful.

Legitimate interests

32. When considering any legitimate interests in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
33. The Commissioner recognises that the complainant has a personal interest in the overall matter to which the request relates, as the incident he complained about involved a family member. Among other things, he wants to know how his complaint to Ofsted was presented to the Council.

Is disclosure necessary?

34. '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.
35. The withheld information is the name and email address of the Ofsted staff member who wrote to the Council asking it to investigate the complaint. The body of the correspondence (apart from the complainant's own personal data) has been disclosed, allowing the complainant to scrutinise how his complaint to Ofsted was presented to the Council.
36. The Commissioner does not consider that the publication of the staff member's name and email address would add anything of significance to the information that has already been disclosed. The data subject does not express any views on the complaint in question and the

correspondence is merely a request for the Council to respond to the complaint about the school. It appears to be composed of standard paragraphs setting out Ofsted's remit and the scope of its enquiry.

37. The Commissioner is therefore not persuaded that disclosure of the staff member's name and email address is necessary to satisfy the general interest in knowing about how Ofsted presented the complaint to the Council. It would not be proportionate to disclose this personal data into the public domain when there is little apparent benefit which would flow from its disclosure.
38. Therefore, in the particular circumstances of this case, the Commissioner does not consider that disclosure under FOIA is necessary to meet the legitimate interests identified at paragraph 33 and therefore he has not gone on to conduct the balancing test.
39. As disclosure is not necessary, there is no lawful basis for this processing, and it is unlawful. It therefore does not meet the requirements of principle (a).
40. The Commissioner's decision is that the Council was entitled to withhold the name and email address under section 40(2), by way of section 40(3A)(a) of FOIA.

Section 77 – Offence of altering etc. records with intent to prevent disclosure

41. The complainant told the Commissioner that he had not received all the information he was expecting to, and he was concerned that the Council was deliberately trying to conceal, or block access to, information that it held about its handling of his child safeguarding complaint.
42. Section 77 of FOIA makes it an offence for a public authority to alter, block, conceal, erase or destroy information with the intent to prevent disclosure in response to a request made under FOIA.
43. Prior to the Commissioner's investigation, his Criminal Investigation Team examined the information the complainant provided. It determined that there is insufficient evidence to substantiate this allegation.
44. The Commissioner has therefore proceeded to consider the complainant's concerns under section 1 of FOIA.

Section 1 – Information held

45. Where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant

believes may be held, the Commissioner applies the civil standard of 'the balance of probabilities'.

46. This means the Commissioner must decide whether, on the balance of probabilities, a public authority holds any further information which falls within the scope of the request. In deciding where the balance of probabilities lies, the Commissioner will consider the evidence and arguments of both parties, as well as any other pertinent information.
47. The Council says that it does not hold any further information falling within scope of the request.
48. The complainant disagrees. He believes that information about a child safeguarding complaint would have been retained for 10 years, "according to standards of the LADO [Local Authority Designated Officer]". He also considers that information in the report referring to phone calls, emails and site visits points to the existence of information documenting them.
49. The issue for the Commissioner to consider here is whether the requested information **is** held by the Council. It is not whether it **should be** held by the Council. On this point, the Commissioner is mindful of the comments made by the Information Tribunal in the case of Johnson / MoJ (EA2006/0085), that FOIA:

"... does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold".
50. The Council explained to the Commissioner that on receipt of the complaint correspondence from Ofsted, LADO did not consider that it met the threshold for their involvement. They referred it on to Education Quality Assurance, Intervention & Regulation Service (part of Children's Services) who:

"...carried out a full investigation in 2019. That report was released to [the complainant] on 10 January 2024 with redactions applied as part of the original FOI request. That report contained a list of phone calls and visits undertaken as part of the investigation, the outcomes of which were assimilated into the final report. It is this list that we believe [the complainant] has taken to mean that further information is held."
51. The Council has explained to the Commissioner that it has conducted extensive searches for relevant information and it is satisfied that it holds only the following information falling within scope of the request:

- The initial correspondence from Ofsted (disclosed).
- The original complaint from the complainant to Ofsted, forwarded to the Council with its initial correspondence (withheld under s40(1) - this falls to be considered under the subject access provisions of the UK GDPR, as noted in paragraph 16).
- The Council's report of its investigation into the complaint (disclosed).

52. In a detailed response to the Commissioner, the Council set out the searches it had conducted for any further information:

"Both LADO and Education Quality Assurance, Intervention & Regulation Service carried out their own searches within their own filing systems and databases. No paper records are held as none were received originally, nor any generated at the time. The complaint was not out of the ordinary and was handled within the normal processes of both services. There is no reason that it would have been forwarded or sent on to any other service to generate further documentation or extra copies. Beyond the original referral from Ofsted, there was no other correspondence between NCC and any other partners. It was a standard complaint handled under the normal process at the time.

...

Education Quality Assurance, Intervention & Regulation Service searched their Customer Relationship Management system (CRM) and Outlook. These are the only places that records are held. No paper records are held. The report generated by [the investigating officer] was held in the CRM. No other documentation is collected during investigations. If the school shared any emails or documentation it would be held on the CRM and none were found during the search. The process for the investigation involves the team having conversations with the school and populating their findings from those discussions directly into the report held on CRM. No information was found under this complaint file besides the original referral and the final report.

LADO – The only documentation held on the file was the referral email from Ofsted. LADO uses both Liquid Logic which is a social care database of service users and involvement with them, and an A-Z networked filing system to store records.

...

The Education Quality Assurance, Intervention & Regulation Service searched networked CRM/Outlook. CRM information was saved within the complaint logged for the school. The email address [complainant's email address, redacted] was used for searches on Outlook. Subsequent searches for [complainant's name, redacted], Ofsted, Department for Education and [academy trust name, redacted] have been undertaken and no results returned.

LADO have carried out several searches as follows:

A-Z – Search terms: full name / first name only / second name only / different spellings of name / part of name

...

Liquid Logic Search terms: full name / first name only / second name only / different spellings of name / part of name...date of birth / postcode with house number / postcode only

Email – Search terms: name / dates / keywords (Ofsted, Department for Education, [academy trust name, redacted])

The searches by LADO returned only the original referral email/complaint from Ofsted

...

Subsequent searches for Ofsted, Department for Education, [academy trust name, redacted] have been undertaken and no results returned."

53. Lastly, the Council corrected the statement it had made to the complainant that information had been held but deleted. It said that if the information had ever existed, the Council would be required to have retained it for between 75 - 99 years, depending on the context in which it was held (Child Protection or LADO). It said it was therefore satisfied that the information could never have been held, as its retention policies would not have permitted its deletion.

The Commissioner's decision

54. The Commissioner is satisfied from the Council's detailed submission to him that it has conducted reasonable enquiries for further information falling within scope of the request. It used appropriate and relevant search terms when searching for information, which would have located any recorded information, had it been held. He notes that no new information was identified.

55. The Council has explained its working practices, clarifying that details obtained from on any phone calls and site visits would have been entered directly into the report as it was being compiled, with no separate records of them held.
56. The Commissioner is not required to prove beyond doubt that the Council does or does not hold any relevant information. He is only required to make a decision based on the civil standard of the "balance of probabilities".
57. Having considered the rebuttal of the complainant's points provided by the Council, and the comprehensive searches for information that it conducted, the Commissioner accepts the Council's position that, on the balance of probabilities, it does not hold any further recorded information falling within scope of the complainant's FOIA request.

Right of appeal

58. 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

59. 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.
60. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Samantha Bracegirdle
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