

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 October 2024

Public Authority: Oxford City Council
Address: Town Hall
St Aldate's
Oxford
OX1 1BX

Decision (including any steps ordered)

1. The complainant requested information held by Oxford City Council (the council) about complaints it has received relating to alleged misconduct of staff employed by Oxford Direct Services Ltd (ODSL).
2. Whilst the council originally refused the request under section 40(2) (third party personal information) of FOIA, during the Commissioner's investigation, it revised its position and provided the complainant with some of the requested information.
3. The Commissioner's decision is that the council is entitled to rely on section 40(2) as its basis for refusing to provide the remaining withheld information.
4. However, as the council failed to provide the information that it did disclose to the complainant within the statutory timescales specified under FOIA, the Commissioner has recorded a breach of section 10(1) (time for compliance).
5. The Commissioner does not require further steps.

Request and response

6. By way of background, between March 2024, and May 2024, the complainant submitted a number of requests to the council relating to alleged misconduct of ODSL employees. In response, the council confirmed that it had received five complaints alleging misconduct by ODSL employees. It also provided the job titles of council officers, and the relevant teams, who had received the complaints.
7. On 14 May 2024, the complainant then submitted what the council considered to be two further requests for information, as follows:
 - Request 1. "Of the 5 complaints made to the Council, did you inform ODS of the complaints and if so, how many complaints were passed on."
 - Request 2. "...if there was any communication between the Council and ODS concerning the complaints, please provide the names of the job titles of the officers who exchanged communications from Council to ODS."
8. On 21 May 2024, the complainant contacted the council again, stating that:

"...so that there is no confusion, I would like the job title of persons at both the Council and ODS, if any comms was exchanged."
9. On 11 June 2024, the council responded to the complainant, advising that it was refusing their information requests of 14 May 2024, and 21 May 2024, under section 40(2) of FOIA.
10. On 12 June 2024, the complainant requested an internal review, stating that they did not accept that the job titles of those officers at ODSL who may have been informed of the complaints would identify any individual.
11. Correspondence continued to be exchanged between parties about what the complainant was asking the council to reconsider, and on 10 July 2024, the council provided its internal review response, upholding its previous decision that section 40(2) of FOIA was engaged.
12. The complainant subsequently asked for further clarification of the council's internal review response. The council then confirmed that it maintained its position that it was entitled to refuse the requests of 14 May 2024, and 21 May 2024, under section 40(2) of FOIA.

Scope of the case

13. In the original complaint received by the Commissioner on 12 June 2024, the complainant had provided details of the requests that they had made since 10 March 2024. They said that they were concerned that the council had decided to withhold the job titles of the officers at ODSL who were informed of the complaints that had been received by the council in response to their requests.
14. Following receipt of the council's internal review response of 10 July 2024, the complainant contacted the ICO again, saying that they remained dissatisfied with the handling of their requests, and that they wanted the council to confirm the following:

"if the complaint of misconduct reported to the Council was relayed to ODS Ltd and if so, the job titles of the officers at both Oxford City Council and ODS Ltd, who were involved in the exchange of communications."
15. The Commissioner considered the information described by the complainant to fall within scope of their requests of 14 May 2024, and 21 May 2024, and he advised both the council and the complainant that his investigation would focus only on the council's handling of these requests.
16. During the Commissioner's investigation, the council then issued a revised response to the complainant's requests. It confirmed that all five complaints it had received were forwarded to ODSL. It also provided the job titles of the council officers that exchanged communications with ODSL about each complaint, and the relevant council departments that were involved.
17. The council advised the complainant that it remained of the view that revealing the job titles of the officers at ODSL who exchanged correspondence with the council about each of the five complaints would result in a disclosure of personal information, and breach a data protection principle. The council said it was therefore refusing to provide this information under section 40(2) of FOIA.
18. The Commissioner will decide whether the council is entitled to rely on section 40(2) as its basis for refusing to provide the job titles of the officers at ODSL who exchanged communications with the council about the five complaints.

Reasons for decision

Section 40 - personal information

19. 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.
20. 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).
21. 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.
22. 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?

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

"any information relating to an identified or identifiable living individual".
24. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
25. 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.
26. 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.

27. The council has said that it believes that individuals who were the subject of the complaints could be identified by the release of the withheld information, and that as the complaints are about them, it is their personal data.
28. The Commissioner considers that, at the very least, the individuals who submitted the complaints to the council would be able to identify those employees who are the subject of the complaints. Furthermore, the Commissioner considers that the disclosure of the withheld information would have a direct impact on those employees; it would reveal how complaints that were made about them were handled and investigated.
29. Having considered all of the council's arguments, the Commissioner is persuaded that a disclosure of the requested information would identify individuals, and that it also relates to such individuals.
30. For the reasons sets out above, the Commissioner is satisfied that the withheld information falls within the definition of 'personal data' in section 3(2) of the DPA.
31. 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.
32. The Commissioner considers the most relevant DP principle in this case to be principle (a).

Would disclosure contravene principle (a)?

33. 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".

34. 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.
35. 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

36. 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"¹.

37. 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.
38. 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

39. 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.
40. 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.
41. It is the Commissioner's view that there is a legitimate interest in understanding the processes and procedures that are followed by a

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".

public authority, which has a responsibility to protect public money and uphold certain standards. Disclosure of the withheld information would promote accountability and transparency, enabling members of the public to satisfy themselves that the measures that ODSL, and the council, have in place and the action that is taken in response to allegations of misconduct, is appropriate.

42. The Commissioner therefore considers that the complainant is pursuing a legitimate interest, and that disclosure of the requested information is necessary to meet that legitimate interest.

Is disclosure necessary?

43. '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.
44. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims of openness, transparency and accountability identified in paragraphs 39-42 above.

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

45. 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.
46. 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.

47. 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.
48. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
49. The council has said that it has consulted ODSL on the potential disclosure of the withheld information, and it is ODSL's position that it should not be released in the circumstances of this case.
50. The council argues that the disclosure of the withheld information would breach a data protection principle, as it would be unlawful and unfair.
51. The Commissioner considers that all of the individuals who were the subject of complaints about potential misconduct would, in this instance, have a very firm and reasonable expectation that details about how their complaints were handled would remain confidential and would not be made available to "the world at large" in response to an information request.
52. In the Commissioner's view, disclosure of the withheld information would reveal details about a confidential process. Whilst the individuals that have made the complaints may potentially be informed of the outcome (if the nature of the complaint also relates to them) this does not provide them with an automatic right to be informed of every step of the process that was followed in response to their complaint about another individual.
53. Having considered all of the information available, the Commissioner considers that the disclosure of the withheld information, which would reveal how matters were investigated by ODSL, would cause the employees who were the subject of the complaints harm and distress.
54. The Commissioner also considers that the information provided to the complainant in response to their requests, and also the information disclosed in response to additional requests published on the "whatdotheyknow"² website, goes some way in meeting the legitimate

² [Results page 1 - WhatDoTheyKnow](#)

interest in accountability and transparency about how complaints concerning alleged misconduct of ODSL employees are dealt with.

55. Given the information already available to the public on the matter, the Commissioner considers there to be limited additional value in terms of accountability and transparency in the release of information which confirms which officers within ODSL exchanged communications with the council. In contrast, the Commissioner considers the potential harm caused to individuals who were the subject of the complaints, in terms of damage and distress as a result of the disclosure of the requested information, to carry significant weight in this case.
56. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the relevant employees' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the withheld information would not be lawful.
57. 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.
58. The Commissioner has therefore determined that the council was correct to apply section 40(2) to that part of the complainant's requests which relates to the job titles of staff at ODSL.

Procedural matters

Section 10(1) – time for compliance with request

59. Section 10 of FOIA states that, subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
60. In this case, the council initially withheld all of the information relevant to the complainant's requests of 14 May 2024, and 21 May 2024. During the Commissioner's investigation, the council then provided part of the requested information.
61. In failing to provide this information within the statutory time for compliance, the Commissioner finds that the council breached section 10(1) of FOIA.

Right of appeal

62. 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

63. 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.
64. 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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