

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 October 2014

Public Authority: Oxfordshire County Council
Address: County Hall
New Road
Oxford
OX1 1ND

Decision (including any steps ordered)

1. The complainant requested a copy of a named report from Oxfordshire County Council (the 'Council') relating to allegations he had made about some of its officers falsifying safeguarding records. The Council provided some information, but withheld the remainder under section 40(2) of FOIA, (personal information).
2. The Commissioner's decision is that under FOIA the Council was not obliged to confirm whether or not it held the requested information on the basis of section 40(5)(a). The Commissioner requires no steps to be taken as a result of this decision.

Request and response

2. On 20 May 2014 the complainant wrote to the Council and requested information in the following terms:

"Can you send me [name redacted] report.

If you decide to treat this as a request for information can you please send me an acknowledgement."

3. The Council wrote to the complainant on 18 June 2014 to inform him that it considered that the report engaged section 30(1)(a) of FOIA

(investigations and proceedings conducted by public authorities), and advised him that it needed additional time to consider the public interest test associated with that exemption.

4. The Council provided its response on 15 July 2014. It stated that section 30 applied to the requested report but that the balance of the public interest favoured disclosure of the report. It said, however, that section 40(2) (personal information) applied to parts of the report and it therefore provided the complainant with a redacted copy. Of the five associated appendices, the Council disclosed the first two appendices with redactions for personal information and withheld appendices three to five in their entirety on this basis.
5. Following an internal review the Council wrote to the complainant on 13 August 2014 and revised its position in relation to the application of section 30(1)(a). Instead, it said that it considered section 31(1)(g), law enforcement, by virtue of 31(2)(b), the purpose of ascertaining whether any person is responsible for any conduct which is improper, applied to the report. However, having weighed up the associated public interest test, the Council determined that the public interest favoured disclosure of the report. It maintained that section 40(2) applied to all the redacted parts of the report and to parts of appendices 1 and 2 and to the whole of appendices 3-5.

Scope of the case

6. The complainant contacted the Commissioner on 18 August 2014 to complain about the way his request for information had been handled. In particular, he asked the Commissioner to consider whether the redactions made for personal information were appropriate. He also asked the Commissioner to disregard Appendices 1, 2 and 4 and to consider appendices 3 and 5 only. He also asked the Commissioner to consider the extent of the section 40(2) redactions in the report itself.
7. During the Commissioner's investigation, the Council confirmed that it no longer wished to rely on section 31(g) and 31(2)(b), leaving section 40(2) as the only exemption it wished to rely on to withhold some of the requested information.
8. The Commissioner notified the complainant of the Council's decision to rely solely on section 40(2) on 7 October 2014.

Reasons for decision

Section 40 personal information

9. Section 1 of FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:
 - a. the duty to inform the applicant whether or not requested information is held and, if so,
 - b. the duty to communicate that information to the applicant.
10. Section 40(5)(a) of FOIA excludes a public authority from complying with the duty imposed by section 1(1)(a) of FOIA - confirming whether or not the requested information is held - in relation to information which, if held by the public authority, would be exempt information by virtue of subsection (1). In other words, if someone requests their own personal data, there is an exemption from the duty to confirm or deny under FOIA.
11. Section 40(5)(b)(i) of FOIA states that the duty to confirm or deny:

"does not arise in relation to other information if or to the extent that either:

 - i) the giving to a member of the public of confirmation or denial that would have to be given to comply with section 1(1)(a) would (part from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or*
 - ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."*
12. The Commissioner's view is that the Council should have argued that confirming whether or not it held the requested information would breach the data protection rights of those staff members alleged to have falsified records, as it would reveal under FOIA whether they had been the subject of a complaint about their conduct. Such an argument is relevant to the exemption contained at section 40(5)(b)(i).
13. Similarly, the Council should have argued that confirming whether or not it held the requested information would breach the data protection rights of the complainant himself. Section 40(5)(a) states that the duty to confirm or deny does not arise in relation to information which is, if held,

the requestor's personal data and thus exempt from disclosure on the basis of section 40(1) of FOIA.

14. The consequence of these sections 40(1) and 40(5)(a) is that if a public authority receives a request for information which, if it were held, would be the requestor's personal data, then it can rely on section 40(5)(a), to refuse to confirm or deny whether or not it holds the requested information.

15. It is important to note that sections 40(1) and 40(5)(a) are class based exemptions. This means there is no need to demonstrate that disclosure (or confirmation) under FOIA would breach an individual's rights under the DPA when engaging these exemptions.

16. Section 40(1) of FOIA states that:

"Any information to which a request relates is exempt information if it constitutes personal data of which the applicant is the data subject".

17. The Data Protection Act 1998 (DPA) defines personal data as:

"...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

18. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

19. In the circumstances of this case, the Commissioner is satisfied that at least some of the requested information, if held by the Council, would be the complainant's personal data. This is because the complainant would be identifiable from some of the information that has been requested, given that it would most likely contain his name and possibly his contact details. Furthermore, the information would obviously relate to concerns the complainant raised with the Council.

20. Therefore, the Commissioner accepts that parts of the requested information, if held, would be the complainant's own personal data and would be exempt from disclosure on the basis of section 40(1) of FOIA.

Furthermore, as section 40(1) of FOIA applies to such information, the Council is not required to confirm or deny whether it holds any of the requested information under FOIA by virtue of section 40(5)(a).

21. Additionally, if the Council were to respond to this FOIA request by providing the complainant with information falling within the scope of his request that is not his personal data (if indeed any such information was held) then it would, under FOIA, also be confirming that it holds personal data of which he is the data subject, ie it would be confirming that he had made a complaint about the conduct of some of the Council's staff members.
22. In cases such as this, to confirm or deny whether non-personal information is held is also to confirm or deny whether the requestor's personal data is held. For the reasons set out above, the Commissioner is satisfied that under section 40(5)(a), the Council has no duty to confirm whether any such personal data is in fact held.
23. The Commissioner is satisfied that confirming or denying whether it holds any information under the terms of the FOIA means that the Council would be confirming, to the world at large, whether it holds information relating to allegations of falsification of safeguarding records raised by this complainant. He therefore considers that the Council should instead have relied on section 40(5)(a) and should have neither confirmed nor denied whether it holds the requested information in its entirety.

Other matters

24. The Commissioner has some sympathy with the complainant whose position is confused by the different access regimes set up by Parliament in relation to personal data and public information.
25. The Commissioner notes that an applicant wishing to access their own personal data is free to pursue this right under the DPA. Furthermore, he considers that it is appropriate that any decision as to whether or not a data subject is entitled to be told whether personal data about them is being processed should be made in accordance with the scheme of that Act.

Right of appeal

26. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

27. 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.

28. 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

Jon Manners
Group Manager
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