

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 August 2021

Public Authority: Oldham Metropolitan Borough Council

Address: Civic Centre
West Street
Oldham
OL1 1UT

Decision (including any steps ordered)

1. The complainant has requested information regarding child sexual exploitation. Oldham Metropolitan Borough Council refused the request and cited the exemptions provided by sections 31(1) (investigations and proceedings) and 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that Oldham Metropolitan Borough Council was entitled to withhold information on the basis of section 31(1) and section 40(2).
3. The Commissioner does not require any steps.

Request and response

4. On 24 January 2020, the complainant wrote to Oldham Metropolitan Borough Council ("the council") and requested information in the following terms:

"Copies of any electronic communications received or sent by Councillor [redacted] dated from June 1, 2013 and February 28, 2014, which include the words child sexual exploitation or CSE, in the subject line, body of the email, text or any attachment."

5. The council responded on 21 February 2020 and denied holding the requested information.
6. The complainant requested an internal review on 21 February 2020.
7. Following an internal review the council wrote to the complainant on 4 August 2020 and advised that the position had been revised as it now confirmed that it did hold information within the scope of the request. The information in scope of the request was withheld on the basis of section 30(1) (investigations and proceedings), and section 40(2) (personal information) of the FOIA.
8. On 28 June 2021 during the course of the investigation, the council revised its response. It released some documents which had previously been withheld, but redacted some information on the basis of section 40(2). The council maintained that a number of documents remained exempt from disclosure on the basis of section 31(1).

Scope of the case

9. The complainant contacted the Commissioner on 01 September 2020 to complain about the way the request for information had been handled. Specifically that the council were withholding information in scope of the request.
10. The Commissioner has considered whether the council is correct to withhold information on the basis of section 31(1) and, in relation to the personal data redacted from the materials disclosed to the complainant, section 40(2).

Reasons for decision

Section 30 investigations and proceedings

11. The council has cited sections 31(1)(a), 31(1)(b), 31(1)(c) and 31(1)(g) in relation to the withheld information.
12. Section 31(1) provides that: *"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-*
 - (a) the prevention or detection of crime,*
 - (b) the apprehension or prosecution of offenders,*
 - (c) the administration of justice,*
 - (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),*
13. Under subsection 31(1)(g) of the FOIA, information is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any public authority of its functions for any of the purposes specified in subsection 31(2). The purposes listed in section 31(2) which the council has cited are:
 - (a) the purpose of ascertaining whether any person has failed to comply with the law,*
 - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,*
 - (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,*
14. In order for a prejudice based exemption, such as section 31, to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual and of substance; and

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure “would be likely” to result in prejudice or disclosure “would” result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner’s view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
15. Consideration of section 31(1) of the FOIA is a two-stage process; even if the exemption is engaged, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

Applicable Interests

16. The first point for the Commissioner to consider is whether the arguments provided by the council relate to the relevant applicable interests. These being named by the council as the prevention or detection of crime, the apprehension or prosecution of offenders, the administration of justice and the exercise by the council of its functions for the three identified purposes.
17. By way of background the council provided the following information:
- The council is currently the subject of an independent review in relation to allegations of covering up historic child sexual exploitation. The investigation has been commissioned by the Greater Manchester Combined Authority.
 - In September 2017, the Mayor of Greater Manchester, in his role as Police and Crime Commissioner launched an independent assurance exercise to explore the current and potential future delivery model of the response to child sexual exploitation (CSE) across Greater Manchester.
 - In November 2019, the Leader of Oldham Council, and the Chair of Oldham Safeguarding Partnership, wrote jointly to the Mayor and the Greater Manchester Safeguarding Standards Board to request that the review into safeguarding practices in Oldham be combined into the independent review team’s assurance work.
 - The remit of the review is to focus on historical allegations relating to child sexual exploitation and consider whether the council and its partner agencies provided an appropriate response to protect

children vulnerable to or known to be victims of child sexual exploitation.

- The assurance review will consider, but will not be limited to, allegations that have circulated on social media of inappropriate access to young people. It is also looking at the extent to which historical actions and employment records have been adequately investigated in the case of known offenders previously employed within Oldham public services.
 - The findings of the report completed by the assurance team will be published and communication enquiries will be dealt with by the Greater Manchester Combined Authority (GMCA) on behalf of the Mayor, in his role as Police and Crime Commissioner, in consultation with the council and other partners.
 - The investigation will review the practice of the council in response to allegations of child sexual exploitation between 2011 and 2014, with particular reference to the concerns expressed in social media and elsewhere that the statutory agencies were aware of this abuse and failed to respond appropriately to safeguard the children and subsequently covered up these failings.
18. The council advised that the withheld emails were provided to the independent review team for the purposes of the investigation.
19. The council advised that, subject to the findings of the review, it may consider various aspects of investigative, or enforcement or regulatory action. This could include, but not be limited to, referrals to the police for investigation, regulatory functions of the council including enforcement under the Licensing Act, or improper conduct such as under the Member's Code of Conduct.
20. The Commissioner has examined the Terms of Reference ("the TOR") for the review, and the withheld information. Having considered the above arguments provided by the council, she is satisfied that they properly relate to the cited exemptions. Therefore the first limb of the three part test, outlined above, is met.

The nature of the prejudice

21. The Commissioner next considered whether the council demonstrated a causal relationship between the disclosure of the requested information and the prejudice that cited sections under 31(1) are designed to protect. In her view, disclosure must at least be capable of harming the

interests in some way, such as by having a damaging or detrimental effect on those interests.

22. The council advises that it does not wish to pre-empt the findings of the review team. Neither does it wish to enter into a public discourse in relation to any issues raised, ahead of the publication of the report.
23. The council states in view of the scale and significance of the independent review, and the requirement for the reviewers to scrutinise the exempt material, that disclosure at this stage could prejudice the investigation.
24. The council contends that the information requested should be exempt until the release of the final report such that the council has an opportunity to review the conclusions of the report and action any appropriate regulatory activity that may arise.
25. The Commissioner notes, from the TOR, that the review of materials which includes the withheld information, may spur follow-up activities, such as interviews and further investigations.
26. The Commissioner agrees that release of the information into the public domain at this stage could prejudice the investigation or the council's ability to undertake appropriate regulatory actions. It could, therefore, cause harm to the stated applicable interests.
27. The Commissioner is satisfied that this prejudice is real and of substance, and that there is a causal relationship between the disclosure of the requested information and the prejudice which the exemptions are designed to protect. Therefore the second limb of the three part test, outlined above, is met.

Likelihood of prejudice

28. The council did not specify the level of likelihood being relied, but has indicated that the prejudice "could" occur. Therefore the Commissioner has considered the lower level of prejudice, which is that prejudice "would be likely to" occur as a result of disclosure.

Is the exemption engaged?

29. In a case such as this, it is not sufficient for the information to merely relate to an interest protected by section 31(1). Its disclosure must also at least be likely to prejudice those interests. The onus is on the public authority to explain how that prejudice would arise and why it is likely to occur.

30. The Commissioner considers that disclosure of the requested information has the potential to give a pre-emptive view of the lines of further investigation and the possible findings of the review. This would be likely to disrupt the investigative process and prejudice the ability for appropriate legal or regulatory actions to be taken.
31. The Commissioner is therefore satisfied that section 31(1) is engaged.

Public interest test

32. Section 31(1) is a qualified exemption. The Commissioner must now consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

33. The council recognises that disclosure enables openness and transparency.
34. The Commissioner is of the view that the subject matter of the requested information is highly relevant to this public interest consideration. The issue of child sexual exploitation and how various public authorities have responded to allegations of this nature has been a matter of debate and controversy. In some cases public authorities have been criticised for deficiencies in responding to allegations of child sexual exploitation¹.
35. Having viewed the withheld information, the Commissioner is of the view that it is relevant to the council and other organisations acted in relation to allegations of child sexual exploitation. She is also of the view that the subject matter and content of this information is a valid and weighty factor in favour of disclosure of this information.

Public interest arguments in favour of maintaining the exemptions

36. Council contends that due to the size and significance of the independent review, that the information should not be released as it may prejudice both the investigation and any necessary actions that are identified on its conclusion.
37. The council argues that the report from the investigation will be in the public domain within the next few months, and therefore go some way towards satisfying the public interest.

¹ [independent-inquiry-into-child-sexual-exploitation-in-rotherham](#)

38. It states that the exemption needs to be maintained during this sensitive period of time in order that the council has opportunity to review the conclusions of the report and consider appropriate actions.
39. The Commissioner agrees that there is a public interest in preserving a safe space for ongoing investigations, and in this case this is a valid factor in favour of maintenance of the exemptions.

Balance of the public interest

40. When balancing the opposing public interests in a case, the Commissioner must decide whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.
41. The Commissioner accepts that there is a presumption running through the FOIA that openness is, in itself, is regarded as something which is in the public interest.
42. The Commissioner also recognises the importance of the public having confidence in the course of actions taken by public authorities. This is especially in regard to such serious issues and accusations involving children. Public confidence is increased by openness and transparency, which may involve allowing the public access to information about controversial matters. As noted above, the subject matter and content of the withheld information weigh significantly in favour of disclosure here.
43. However in this case, the Commissioner is mindful that the timing of the request, in view of the ongoing investigation, is a critical consideration. She agrees that it would not be in the public interest to prejudice the investigation or its potential outcomes.
44. The Commissioner also notes the council has stated that information will be put into the public domain regarding the investigation and review within the next few months.
45. Having given due consideration to the arguments set out above, the Commissioner has decided that the public interest in maintaining the exemptions outweighs the public interest in disclosure, and therefore that sections 31(1) has been applied appropriately in this case.

Section 40 personal information

46. 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.
47. In this case the relevant condition is contained in section 40(3A)(a)². 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").
48. 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 the FOIA cannot apply.
49. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

51. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
52. 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.
53. 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.
54. The withheld information comprises of:

² As amended by Schedule 19 Paragraph 58(3) DPA.

- The names and email addresses of council staff that are not in senior, decision making roles.
 - Details relating to three serious cases. The council advises that although abbreviations have been used, due to the uniqueness of the cases, combined with information already in the public domain, identification could be possible.
55. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that this information both relates to and identifies the data subjects concerned. This information therefore falls within the definition of “personal data” in section 3(2) of the DPA.
56. 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.
57. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

58. Article 5(1)(a) of the GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

59. 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.
60. 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.

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

61. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that “*processing shall be lawful only if and to the extent that at least one of the*” lawful bases for processing listed in the Article applies.
62. 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”³.

63. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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.
64. 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

65. In considering any legitimate interest(s) 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 interest(s) 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

³ 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”.

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

66. The Commissioner considers that, due to the nature of the request and the ongoing public enquiry, the requester has a legitimate interest in the accountability and transparency of the council in relation to child safeguarding practices in Oldham.

Is disclosure necessary?

67. "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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
68. The Commissioner considers that the disclosure of junior council officer names, who are not in decision making roles, is not necessary to meet the legitimate interest in accountability and transparency. She has therefore not gone on to conduct the balancing test for this category of withheld information. 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).
69. However the Commissioner considers that further transparency would be provided through the disclosure of the details of serious case reviews.

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

70. 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 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.
71. 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.

72. 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.
73. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
74. The council states that there has been a high level of interest on social media and in the press. The disclosure of the information could result in a disproportionate and unwarranted level of interference with the rights and freedoms of the individuals concerned.
75. The Commissioner considers that the individuals or their relatives, would not have any expectation that their personal data, in this context, would be disclosed to the world at large.
76. The Commissioner also considers that such a disclosure, identifying individuals in connection with serious case review details, could result in unwarranted damage or distress.
77. The Commissioner is also mindful that the independent review in relation to allegations of covering up historic child sexual exploitation, is currently ongoing. Once it is concluded, this may provide further information to address the stated legitimate interest.
78. 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 there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
79. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

80. 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).
81. Since the end of the transition period following the UK's departure from the EU, the GDPR were replaced by the UK GDPR. As this request was received before the end of that transition period, the application of section 40(2) has been decided by reference to the GDPR. However the

Commissioner is also satisfied that the disclosure of the personal data to which that exception was applied would contravene the UK GDPR for exactly the same reasons.

Right of appeal

82. 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

83. 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.
84. 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

Janet Wyles
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