

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 January 2017

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

Decision (including any steps ordered)

1. The complainant has requested information relating to concerns expressed about the performance of a local primary school.
2. Oxfordshire County Council ("the council") disclosed all the information it said it held which was covered by the request, with redactions made under section 40 (personal information) of the FOIA. The complainant challenged the council's application of section 40 and also believed that it held more information which it had not disclosed to him.
3. The Commissioner's decision is that the council was entitled to apply the exemption at section 40. The Commissioner also decided that, on the balance of probabilities, at the time of the request the council did not hold any further information. The Commissioner requires no steps to be taken.

Background

4. The request was concerned with decisions made in respect of a named Church of England primary school.
5. The request was made against a background of concerns about the school's poor performance, the reasons for which were disputed by key stakeholders. While arrangements were being made to address the

school's performance, several key members of staff left the school and the governing body stepped down.

6. The Commissioner understands that locally, feelings continue to run high as to where the fault for the school's underperformance lay.

Request and response

7. On 13 July 2015, the complainant wrote to Oxfordshire County Council and requested information in the following terms:
 1. *Please supply copies of parent complaints regarding [school name redacted] received by the authority between 30th April 2015 and 8th June 2015.*
 2. *Please supply copies of all written communications between [3 names redacted] (all officers of the authority's Children, Education and Families Directorate) and [name redacted] (of Oxford Diocesan Board of Education) between 30th April 2015 and 1st July 2015 regarding [school name redacted].*
 3. *Please supply copies of minutes, notes or summaries of meetings at which either or all of [names redacted] attended and where governance of [school name redacted] was discussed between 30th April 2015 and 1st July 2015*
8. The council responded on 29 July 2015. It disclosed 29 documents, with redactions made in respect of section 40(2) of the FOIA (personal information) to remove personal data about third parties other than the people named in the request.
9. After an exchange of correspondence, in which the complainant queried why certain attachments referred to in the disclosed material had not also been disclosed to him, on 1 September 2015 the council provided the complainant with an internal review of its handling of his request. It acknowledged that the attachments in question had not been included in its response. It disclosed them, with the exception of two emails, which it withheld, citing section 21 (information accessible to applicant by other means) of the FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 13 November 2015 to complain about the way his request for information had been handled by the council.

11. During the course of the investigation, the council agreed to withdraw its reliance on section 21 and disclosed the information which it had hitherto withheld under that exemption. The Commissioner has therefore not considered the council's application of section 21 in this decision notice.
12. During the investigation the council stated that section 40(2) had been incorrectly applied in respect of one redaction and that it wished to apply section 40(1) of the FOIA (personal data of the requester) instead. Following the combined cases of the Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exemption or exception either before the Commissioner or the First-tier Tribunal and both must consider any such new claims.
13. On examining the withheld information, the Commissioner noted that five redactions had been made in respect of what amount to personal 'pleasantries' exchanged between correspondents. These fall outside the scope of the request and therefore they have not been considered in this decision notice.
14. In his complaint to the ICO, the complainant only challenged the council's application of 40(2) insofar as it had been applied to the body of the emails and other documents. He clarified that he was not concerned with challenging redactions made to conceal the identities of senders or recipients. He also considered that the council may hold further information that was not exempt under section 40, but which it had not disclosed.
15. Taking all the above into account, the Commissioner considers the scope of this decision notice to be whether the council was entitled to rely on section 40(2) of the FOIA to withhold personal data (excluding information about the senders and recipients of information). She has also considered its application of section 40(1) of the FOIA in respect of one redaction. She has also examined the council's assertion that it does not hold any further information which is covered by the complainant's request.

Reasons for decision

Section 40(1) – personal information of the requester

16. Section 40(1) of the FOIA provides that information which is the personal data of the requester is exempt from disclosure under the FOIA. This is because there is a separate legislative access regime for an individual's own personal data, namely the right of subject access under section 7 of the Data Protection Act 1998 ("the DPA"). The exemption is

absolute, which means there is no requirement to consider the public interest.

17. The council explained that it had incorrectly cited section 40(2) in respect of one redaction, and that section 40(1) should instead be considered to apply as the redacted information constituted the complainant's own personal data.
18. In order to rely on the exemption provided by section 40(1), the requested information must constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

"'personal data' means 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 intentions of the data controller or any other person in respect of the individual."

19. 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.
20. Having looked at the very small amount of information which has been withheld under section 40(1), and bearing in mind the definition of personal data outlined above, the Commissioner is satisfied that it constitutes the complainant's personal data and that the council was therefore entitled to rely on section 40(1) to refuse to disclose it under the FOIA.
21. The complainant is referred to his rights under section 7 of the DPA with regard to accessing personal data about himself.

Section 40(2) – personal information

22. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a person other than the requester and its disclosure under the FOIA would breach any of the data protection principles or section 10 of the DPA.
23. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as

defined by the section 1 of the DPA, set out at paragraphs 18 and 19, above.

Is the withheld information personal data?

24. The information withheld in this case relates to concerns expressed by various interested parties about the performance of a school. Redactions have been made to conceal names and other information about, and which might identify, particular individuals.
25. The Commissioner has viewed the withheld information. She is satisfied that the redactions have been made in respect of information about living individuals, who can be identified from that information. She is therefore satisfied that the information constitutes personal data in accordance with section 1 of the DPA.

Would the disclosure of this personal data contravene any of the data protection principles?

26. The Commissioner notes in this case that the council said that disclosure would breach the first data protection principle.
27. The first principle states that personal data should only be disclosed in fair and lawful circumstances, the conditions of which are set out in schedule 2 of the DPA.
28. The council has argued that disclosure of the requested information would breach the first data protection principle in that it would be unfair to the data subjects. In deciding whether disclosure of this information would be unfair, the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subjects and the consequences of disclosure on those data subjects, and she has balanced the rights and freedoms of the data subjects with the legitimate interests in disclosure

Nature of the information, data subjects' reasonable expectations and consequences of disclosure

29. The redacted personal data comprises the names (and other identifying information, some of which reveals information about people's private lives) of people who have expressed concerns about the school, and the names of council employees, school staff, diocese staff and other interested parties involved in responding to those concerns.
30. The Commissioner accepts that individuals who are the subject of complaints made to public authorities, and those who submit those complaints, are generally entitled to expect that their personal information will not be disclosed into the public domain. Otherwise, public authorities would find it more difficult to encourage the relevant

interested parties to engage with them when conducting internal investigations and inquiries. The Commissioner recognises that individuals have a reasonable expectation that a public authority, in its role as a responsible data controller, will respect confidentiality in this regard.

31. With regard to the redactions in respect of council employees, school staff, diocese staff and other interested parties, the council has explained that redactions have only been made in respect of personal data relating to junior, non-public facing individuals, and that no redactions have been made in respect of the individuals named in the request. It acknowledged that the redacted information relates to these individuals in their professional capacity but believed that their reasonable expectations, given their lack of seniority, would be that their personal data would not be made public. The Commissioner accepted that in the circumstances of the case, such an expectation was reasonable.
32. Having had regard to the local and sometimes heated nature of the debates about the school, the Commissioner is satisfied that complainants and those referred to in their complaints, would find the consequent loss of privacy caused by disclosing the requested information to be distressing and unnecessarily intrusive. Disclosure could cause distress to all the data subjects identified in the information and could also cause damage to their future prospects and general reputation.
33. With regard to the redactions in respect of council employees, school, diocese staff and other interested parties, while the information relates to them in their professional capacity, at paragraph 31 the Commissioner has accepted that disclosure would not be within their reasonable expectations. Consequently the placing of information about them in the public domain may cause them unwarranted distress and feelings of intrusion.

Balancing rights and freedoms with legitimate interests

34. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for its own sake, along with specific interests.
35. However, the interest in disclosure must be a public interest, not the private interests of the individual requester. The requester's interests are only relevant in so far as they may reflect a wider public interest. This is because, when information is disclosed under the FOIA, it is effectively disclosed to the world at large, and not merely to the requester.

36. The complainant has not set out how or why the wider public interest would be served by the disclosure of the requested information.
37. The Commissioner accepts that, as a public authority, there is a legitimate interest in the council being transparent and accountable with regard to the decisions it makes. However, she considers that this public interest is served to a large degree by the amount of information that it has already disclosed to the complainant. For example, it has not sought to withhold details of the concerns expressed to it in their entirety, only those references which identify third parties. The complainant believes that the redactions represent "substantive content". However, the Commissioner, having viewed the redactions, has verified in paragraph 25, above, that only personal data has been redacted and considers that the redacted information adds very little, if anything, to the meaning of the other information disclosed.
38. Although the Commissioner can appreciate why the information might be of particular interest to the complainant, she is mindful of the fact that the FOIA is request and motive blind and has not seen any evidence to indicate that there is sufficient wider legitimate public interest in disclosure which would outweigh the rights and freedoms of the data subjects in this case.
39. Taking all of the above into account, the Commissioner concludes that it would be unfair to the various data subjects identified in this decision notice to disclose the withheld information, and that it would therefore breach the first data protection principle. She is satisfied that disclosure would not be within the data subjects' reasonable expectations; that it may have detrimental consequences for the data subjects; and that there are no wider legitimate interests to be served by disclosure which would be capable of outweighing the data subjects' strong expectations of, and right to, privacy.
40. The Commissioner has therefore decided that the council was entitled to apply section 40(2) of the FOIA to withhold the personal data.

Section 1 - extent of information held

41. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and if so, to have that information communicated to him/ her.
42. The complainant is concerned that the council may not have identified all the recorded information it holds which is relevant to his request. In cases where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil

standard of the balance of probabilities. In essence, the Commissioner will determine whether, at the time the request was received, it is likely or unlikely that the public authority held further information relevant to the complainant's request.

43. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the council to check whether the information was held and any other reasons offered by the council to explain why the information was not held. She will also consider any reason why it is inherently likely or unlikely that information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held, she is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.

The complainant's position

44. The complainant had had extensive contact with the council regarding complaints and concerns about the school's performance. While he could not identify specific documents which he considered had been omitted from the council's response, he said that he had been advised by the council that significant numbers of complaints had been received from parents and other third parties. In light of that, he did not believe that the bundle of information disclosed to him contained all of the complaints.

45. He made the following comments about lack of meeting minutes:

"There are no minutes of meetings, despite me having been informed that many took place and, indeed, I attended a meeting on 30th April 2015 with [name redacted] and [name redacted] in attendance and they appeared to make handwritten notes, albeit not full minutes. [Name reacted] in particular wrote out an action plan of points arising from the meeting and I witnessed her doing so."

46. With this in mind, the Commissioner asked the council to explain its reasons for considering that it did not hold any further information. She asked a series of detailed questions aimed at establishing the likelihood of it holding any more information and any specific reasons that it had for believing that it did not hold more information (including details of any searches conducted).

The council's position

47. The council maintained the position that it had disclosed to the complainant all the information it held which was described in his request, albeit with redactions. While it acknowledged that the complainant believed that it must hold more information, it said that this was not the case.

48. The council explained that its search for information was made by contacting the staff who had dealings with the primary school about its performance issues. It believed that these staff, through their knowledge of the business area, would be well placed to locate any relevant information held, both by themselves or elsewhere within the council.
49. Searches were made of electronically held files and inboxes of the officers who dealt with this matter (including networked and locally held files). Had the council been in possession of any further information which was relevant to the complainant's request, these searches would have revealed it. However, they did not.
50. This led the council to conclude that it did not hold any further information beyond what had already been disclosed to the complainant.

Conclusion

51. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the requested information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in paragraphs 42 and 43, above, the Commissioner is required to make a finding on the balance of probabilities.
52. The council had already disclosed to the complainant in excess of 30 documents, but the complainant suspected that it held more. The Commissioner notes the complainant's comments, in paragraph 45, about the meeting of 30 April 2015 not yielding formal minutes. However, the Commissioner notes that the disclosure bundle forwarded to her by the complainant does in fact contain the minutes of that meeting, and so this point may be disregarded.
53. With regard to the wider point of whether other meetings were held, the minutes of which were not disclosed, the Commissioner accepts that notes taken at a meeting will not necessarily go on to form recorded information held by a public authority. They might be discarded without ever being transposed into a formal minute of the proceedings. Alternatively, a note might be taken of a meeting by an attendee who is not a member of council staff, in which case the council would not hold it, unless a copy was later shared with it by the note taker.
54. While the complainant might consider that the council should routinely keep records of all meetings at which it is represented, it is not the Commissioner's role to make a ruling on what information a public authority should or should not create or retain.
55. The Commissioner is satisfied in this case that the council has demonstrated that it has reasonable grounds for considering that it does

not hold any further information beyond what has already been disclosed (specifically, that thorough searches of the business area which dealt with the matter about which the complainant requested information have failed to locate any further relevant information).

56. Taking all the above onto account the Commissioner is satisfied that that, on the balance of probabilities, at the time of the request the council did not hold any further information which fell within the scope of the request.

Right of appeal

57. 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

58. 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.

59. 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

Samantha Bracegirdle
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