

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 October 2017

Public Authority: London Borough of Lambeth
Address: PO Box 734
Winchester
SO23 5DG

Decision (including any steps ordered)

1. The complainant has requested from the London Borough of Lambeth ("LBL") information related to an earlier request. LBL refused to confirm or deny that it held this information. It cited section 40(5) (unfair use of personal data) as its basis for doing so. It upheld this position at internal review.
2. The Commissioner's decision is that LBL was entitled to rely on section 40(5) as its basis for refusing to confirm or deny whether it held the requested information.
3. No steps are required.

Request and response

4. Initially, the complainant had made a request to the London Borough of Lambeth ("LBL") on 7 November 2016 for information of the following description:

"Dear Lambeth,

Please supply a list of the emails located for FOI Request IR149997.

I would like the following information about each email:

1. Date/time sent
2. Subject
3. Domain name of addressees, both to and from

Thank you in advance."

5. On 16 January 2017 (after the complainant had chased LBL for a reply), LBL responded. It refused to provide the requested information citing section 40(2) (unfair disclosure of personal data) and upheld this at internal review in an email of 1 February 2017.
6. On 17 February 2017, the complainant requested information of the following description:

"Please supply the information contained in IR149997.

Circumstances have changed since that request: I have now obtained consent from a pupil that Lambeth Council confirmed was referred to in the emails. The consent is attached to this Email."
7. When stating "that request" the complainant was referring to the 7 November 2016 request.
8. She attached a letter which appeared to be authorisation from one of the pupils allegedly referred to in the requested information to disclose any information held about them in the requested list of emails minus their name.
9. LBL responded to this request on 1 March 2017 and refused to confirm or deny whether it held any information within the scope of this request. It cited section 40(5) as its basis for doing so. It upheld this at internal review in a letter dated 20 March 2017.

Scope of the case

10. The complainant contacted the Commissioner on 20 February 2017 to complain about the way her request for information had been handled. She had previously been in correspondence with the Commissioner and the Commissioner had sought to establish the detail of the request and the relevant evidence. As noted LBL did not provide her with its final position on the matter until after she had raised her concerns about this request with the Commissioner.
11. The Commissioner has considered whether LBL is entitled to refuse to confirm or deny whether it holds the requested information. The request she has looked at is the request of 17 February 2017.

Reasons for decision

Section 40(5) - personal information

12. A key issue here is that LBL has already engaged with the complainant including during requests made under FOIA and certain matters have been discussed. In most cases, it is entirely appropriate for public authorities (or any organisation) to engage with individuals often on sensitive matters pertaining to them or their loved ones as individuals. However, the Commissioner does not agree that FOIA is the best forum for doing so in all cases. The Commissioner thinks that this case is a good example of this. Strictly speaking, under FOIA, when a public authority engages with a requester, it should be "applicant blind". It should ensure that there is nothing LBL would say to one requester that it would not say to any other requester about the same request. There are circumstances where this is not applicable, for example, where the request is vexatious, however, this is not applicable here. In the Commissioner's view and in the circumstances of this case, the most appropriate FOIA course of action would be to refuse to confirm or deny that the information was held citing section 40(5) as the basis for doing so. The Commissioner will explain in this notice why it is appropriate to use section 40(5) here.

13. FOI Request IR149997 (originally made in May 2016 and referred to in the main request in this case) was a request for information of the following description:

"Would it possible to reframe the request as follows, please supply copies of emails between [named individual at a named school] and the Lambeth Council personal responsible for school exclusions?"

14. LBL had explained that it was withholding information where a small number of pupils could be identified. This was less than five students. The rationale for withholding related to the small number of students and likelihood of identifying students from this small number. That request is not under consideration in this case.

15. With the request under consideration in this case, the Commissioner notes that the complainant subsequently submitted a letter which appeared to authorise disclosure in respect of one of the pupils (albeit anonymised disclosure). The complainant also argued the following:

"The case Dun v Information Commission and NAO (EA/2010/0060)¹ may also apply. In summary this provides that there may be situations in which some individuals, or a small group of people, may be able to

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http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i482/20110118_Dun_Decision_EA20100060.pdf

identify a data subject even from redacted information, because of their personal knowledge of that person, but an average member of the general public could not identify them. The question then arises as to whether it would be fair to disclose the information, given that some people close to the data subject could identify them. In the following case, the First-tier Tribunal said that the answer depends on whether those people would learn anything new that they did not already know."

16. LBL explained to the Commissioner that in response to the 17 February 2017 request, it was now refusing to confirm or deny whether it held any information within the scope FOI Request IR149997 because *"Disclosure of the date/time of the emails could be used by individuals with other knowledge of the cases to ascertain which individuals would be likely to be discussed."* It added that *"Although the information may not be relevant to members of the public in general; we consider it could still be used to further rumours or assumptions about the pupils by parents/others connected with the school."* Finally, it expressed concern about the danger of contributing to a mosaic of information that could be used to put more personal data unfairly into the public domain.
17. Section 40(5)(b)(i) FOIA provides that if a public authority receives a request for information which, if held, would be the personal data of a third party², it can rely on section 40(5)(b)(i) to neither confirm or deny whether or not it holds the requested information if it would contravene the requirements of the Data Protection Act ("DPA") to provide either confirmation or denial.
18. If a person requests their own personal data under FOIA, that information is absolutely exempt from disclosure under section 40(1). By virtue of section 40(5)(a) (a "neither confirm nor deny" provision relating to a requester's own personal data), the public authority should not be engaging with the requester under FOIA about their own personal data. That person can go on to request that information under the DPA or, more usually, the public authority will treat that request separately and address it under DPA – entirely outside FOIA – having satisfied themselves as to the identity of the requester and having collected an administration fee of £10. A person may request information which is partly their own personal data and partly not their personal data – a "hybrid request". A public authority should make sure there is a clear demarcation between the two in its response to the hybrid request.

² Someone other than the requester or the person on whose behalf the requester is acting (e.g. their child)

19. For the avoidance of doubt, with respect to a requester's own personal data, the requester cannot choose between having their request dealt with under FOIA rather than DPA. FOIA does not offer that choice – it specifically excludes a requester from doing so.
20. Consideration of section 40(5)(b) involves considering whether the provision of confirmation or denial would, of itself involve the disclosure of personal data and secondly, whether such confirmation or denial (being, in effect a disclosure of personal data) would be in breach of any of the data protection principles.

Would confirmation or denial mean the disclosure of personal data in this case?

21. The definition of personal data is set out in section 1 of the DPA:

" ...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."

22. The two main elements of personal data are that the information must 'relate' to a living individual and the individual must be identifiable. Information will relate to an individual 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.
23. Additionally, there is personal data which falls within the DPA definition of sensitive personal data. This includes information about allegations of criminality made against a person and information about a person's physical or mental health. There are extra conditions which must be satisfied for processing such information.
24. The Commissioner is satisfied that the request in this case tracks back to an earlier request involving information about school exclusions which related to certain individuals. This is clearly something that would have been biographically significant for certain pupils. As noted above, FOIA does not prevent schools or local councils engaging with parents or carers outside the requirements of the FOIA. However, the Commissioner is satisfied that confirmation or denial under FOIA in this case could readily lead to the identification of certain children more widely. Even if a parent or carer already has knowledge about their own child's involvement in alleged events, they do not necessarily have information about other children's involvement. Confirmation or denial in

this case would facilitate that. It would tell the public something about individuals that was not previously known or formally confirmed. The Commissioner would add that school exclusions usually relate to very serious matters which may be connected with allegations of criminality and/or physical or mental health.

25. The complainant clearly has particular knowledge of certain events at a particular school which relates to school exclusions and which involves a small number of pupils. With only a little further local knowledge (which the Commissioner is satisfied the complainant has and is equally convinced that other people have in whole or part), the students can be identified. The Commissioner is satisfied on this point because she has seen other FOIA cases closely related to this matter. These relate to events in the small community of a school where some individuals (parents/carers and pupils) will have – or think they have – knowledge of matters relating to this request.
26. The Commissioner also notes that even if one person is happy for the Council to “go public” about their personal data – and it should be noted that this person still wants to have their name withheld, according to the supporting letter submitting by the complainant – this does not trump LBL’s data protection obligations with regard to anyone else. It may be impossible to make available information under FOIA about one pupil without a detrimental impact on the others. This includes confirming under FOIA that requested information about particular pupils is even held in the first place.
27. Therefore, the Commissioner accepts that confirmation or denial as to whether any information is held would involve a disclosure of personal data.

Would confirmation or denial in this case breach the first data protection principle of the DPA?

28. The first data protection principle states –

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

*(a) at least one of the conditions in Schedule 2 is met, and
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”*

29. When a public authority provides confirmation or denial under FOIA as to whether it is holding someone’s personal data, it is, in fact, disclosing to the world personal data about identifiable individuals. It is saying “we have information about this person in respect of this request” or “we do not have information about this person in respect of this request”. If it is

entitled to rely on section 40(5) in this case, it is saying, we are not obliged to make any comment under FOIA about whether we hold the requested information.

30. The request in this case relates back to exclusions of certain pupils at a particular school.
31. LBL can only provide confirmation or denial if it is fair and lawful to do so if and would meet one of the DPA Schedule 2 conditions. The Commissioner is also satisfied that it would be necessary to satisfy one of the Schedule 3 conditions in this case as well. However, she does not propose to set out further detail about this because of the sensitivities involved. If confirmation or denial would be unfair and unlawful or would fail to satisfy the specified criteria, then section 40(5) applies.
32. The Commissioner has first considered whether disclosure would be fair.
33. When considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
 - the individual's reasonable expectations of what would happen to their information (including confirmation or denial as to whether it is held);
 - the consequences of confirmation or denial (if it would cause any unnecessary or unjustified damage or distress to the individual concerned);
 - any legitimate interests in the public having confirmation or denial that it is held; and,
 - the balance between these and the rights and freedoms of the individuals who are the alleged data subjects.
34. As noted above, the Commissioner does not find the supporting letter from one individual particularly persuasive. The Commissioner would also observe that all public authorities must be particularly careful as to the extent of information they make public about children, particularly where that information may be sensitive personal data. Children would reasonably expect this to be the case, as would their parents or carers. Public disclosure about challenging events in a child's school career can be particularly detrimental to that child. Even confirming or denying that a child was involved in some way in an alleged event can be detrimental to that child's well-being and development. It makes public a challenging aspect of a child's school career where it would not be appropriate to do so.
35. Given the nature of the request and the sensitivity of the subject matter, the Commissioner considers that confirming or denying in this

case could lead to an intrusion into the private life of the individuals concerned and the consequences of any disclosure could cause them damage and distress.

36. That said, despite the reasonable expectations of individuals and the fact that damage or distress may result from confirmation of denial, it may still be fair to provide that confirmation or denial, if there is a more compelling legitimate interest in doing so. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the individual or individuals concerned against the public interest in confirming or denying if the information is held.
37. The Commissioner would stress that this is not the same balancing exercise that is carried out when considering the public interest test under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting personal information. A legitimate interest in confirming publicly whether information is held must outweigh the legitimate interest in protecting the rights and freedoms of the data subject if providing confirmation or denial is to be considered fair.
38. The legitimate interest in providing confirmation or denial must be an interest that serves the wider public, not the private interest of the individual requester. The requester's interests are only relevant insofar as they reflect a wider and legitimate interest. The Commissioner cannot see any particular weighty public interest in providing confirmation or denial although she acknowledges the compelling personal interest that the complainant has in finding out more about the alleged events.
39. In light of the nature of the requested information and the reasonable expectations of the individuals to whom it allegedly relates, the Commissioner is satisfied that confirming or denying if the requested information is held would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to those individuals. She considers that these arguments outweigh any legitimate interest in obtaining confirmation or denial. The Commissioner has concluded that confirmation or denial in this case would breach the first data protection principle. She therefore finds the exemption at section 40(5) is engaged and the duty to confirm or deny does not arise.
40. Any individual can make a subject access request under the Data Protection Act to seek to obtain information an organisation holds about them. A parent or other with designated parental responsibility for that child can exercise this right on behalf of the child. If a person disagrees with the response they receive from an organisation they can ask the Commissioner to make an assessment about this and/or they can apply to a court to enforce their right of access. FOIA does not impose a block on dialogue between a school or a local council and relevant parties such

as parents or carers or the pupils themselves about challenging events. However, it may be that the DPA, rather than FOIA is the more appropriate route. The Commissioner has published extensive guidance on an individual's right of access to their own personal data under the DPA.³ It should be noted that an individual is not obliged to quote the DPA when seeking to access their own (or their child's) personal data.

41. The Commissioner also notes that LBL provided confirmation in respect of the earlier request. In the Commissioner's view, this was not the correct response and LBL has acknowledged this in correspondence with her. LBL should have refused to confirm or deny under FOIA that it held any relevant information for the reasons set out above. The fact that it made this error does not mean it was now obliged to make the same error in respect of the 17 February 2017 request. Again, the Commissioner would draw the complainant's attention to the information in Note 3 about accessing your own or your child's personal data under the DPA.

³ <https://ico.org.uk/for-the-public/personal-information/>

Right of appeal

42. 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

43. 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.

44. 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

Elizabeth Hogan
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