

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 August 2022

Public Authority: Royal Borough of Kensington and Chelsea
Address: Town Hall
Hornton Street
London
W8 7N

Decision (including any steps ordered)

1. The complainant submitted a request to the Royal Borough of Kensington and Chelsea Council ("the Council") on 2 July 2021. The request related to social work recruitment, and the diversity and ethnic identification of staff in social work teams and other areas of employment in the Council.
2. The Council provided an initial response to the request but withheld some information under Section 40 (personal information) under FOIA.
3. The Council produced a further substantive response in their internal review, following the involvement of the Information Commissioner. However, the Council continued to withhold information under section 40 in relation to some of the data.
4. An updated response was provided in June 2022, subsequent to the Commissioner's investigation letter. The Council provided all the information requested except for answers to three questions in section four of the request.
5. The Commissioner's decision is that the Council are correct to rely on section 40 in relation to the withheld information.
6. The Commissioner does not require any further steps to be taken by the Council in relation to this decision notice.

Request and Response

On 2 July 2021, the complainant made the following request under FOIA to the Council:

"1. Information and questions about policies and procedures around recruitment at RBKC.

A. Please provide me with the council's policies and procedures around recruitment.

B. Please provide me with the council's policies and procedures around interview notes of every single candidate for a post:

- I would like to know how the interview notes are stored, for example as written notes in paper form, as written notes in paperless format scanned and uploaded on a data base, or as typed up notes and saved on a data base.
- If interview notes are stored electronically, I would like to know what happens to the notes written during the interview on paper.
- If there is a requirement that interview notes should be typed up,
- I would like to know how soon after the interview the notes should be typed up. - It important to know whether members of an interview panel at RBKC require to submit their notes around candidates score to the HR straight after an interview, but before the final decision on individual scoring is made.

In case the notes need to be submitted to HR I would like to know:

- How soon after an individual interview member of the panel are required to submit their notes.
- If the council stores only paperless notes on a data base either scanned or typed up
- I would like to know whether it is possible to access the notes and to amend the record after scanned notes are uploaded on the system or after the interview notes were typed up and saved on data base.

C. Please provide me with specific policies and procedures around recruitment of staff from abroad at RBKC. If there are any of these, the information should include guidance on interview process and scoring of candidates.

2. Information and questions around Social Workers' recruitment at RBKC.

A. Please provide me with specific policies and procedures around recruitment of Social Workers at RBKC, if there are any.

B. Please provide me with the information around Social Workers recruitment at RBKC since 01/01/2019. Please include the below information and reference numbers of all Social Workers vacancies and do not limit the information to a specific field, such as Adult Social Work

- How many people applied for each vacancy and their ethnic origin?
- How many people were invited for an interview and their ethnic origin?
- How many people attended the interview and their ethnic origin?
- How many people were offered the job and their ethnic origin?

C. Please provide me with specific policies and procedures around recruitment of Social Workers from abroad at RBKC. If there are any of these, this information should include guidance on interview process and scoring.

D. Please provide me with the information about the number and ethnic origin of all Social Worker recruited directly from abroad at RBKC during the last 10 years, if any of them were recruited. Please include the information for all Social Workers' roles and do not limit the information to a specific field, such as Adult Social Work.

3. Information and questions around Adult Social Workers' position at RBKC with the reference number RBKC51251

A. Please provide me with the information below relevant to Adult Social Workers' recruitment for the position RBKC51251:

- How many people applied for the role and their ethnic origin?

- How many people were invited for an interview and their ethnic origin?
 - How many people attended the interview and their ethnic origin?
 - How many people were offered the job and their ethnic origin?
- B. Please provide me with information on the minimum and maximum score points for the Adult Social Worker's Post RBKC51251. This information should include separate data on the minimum and maximum score points which could be given for each part of the application process, for example score for the submitted application, score for the individual interview etc.
- C. Please provide me with interview questions used for the Adult Social Worker's role RBKC51251.
- D. Please provide me with detailed information on guidance documents around scoring of applicants for the Adult Social Worker's role RBKC51251.
- Please provide me with the guidance followed by the interview panel on what standards an applicant should meet to achieve each range of score.
 - Please provide me with the guidance followed by the interview panel around theoretical topics which should be covered by applicants during the interview.
 - Please provide me with dates when the guidance documents were released.
- E. Please provide me with detailed information around induction and around training a successful candidate usually receives at RBKC if they are employed in an Adult Social Worker's role. Please clear distinguish between mandatory and volunteer training.
4. Information and questions around chances of employment at RBKC for people from Eastern Europe
- A. Please provide me with the total number of current employees at RBKC.
- B. Please provide me with general information about job grades and salary ranges at RBCK.

- C. Please provide me with information about how many people from Eastern Europe in total are employed at RBKC. For each of these employees, please specify their job grades and salary ranges. Please also specify the number of employees from Eastern Europe identified for each job grade.
 - D. Please also provide me with the total number of employees employed directly at RBKC for each job grade in which employees from Eastern Europe identified.
 - E. Please provide me with information about how many Social Workers from Eastern Europe are employed within the RBKC. For each of those employees please specify to which Social Work team they are allocated and how long they have worked for the council.
 - F. Please also provide me with the total number of employees employed directly at RBKC for each Social Work team at RBKC.”
7. On 20 August 2021, the Council provided the complainant with an initial response and attached nine relevant policies and procedures in relation to recruitment. They provided a response to questions or referred the complainant to the attached policies with regard to the requested information. Their response included a breakdown of social work posts. The Council applied exemptions under section 40(2) under FOIA to the following questions: 2B, 2D, 3A, 4C, 4D, and 4E, including some sub-sections of those questions.
 8. On 25 August 2021, the complainant requested an internal review.
 9. On 28 October 2021, the complainant contacted the ICO as the internal review response had still not been received. The case was accepted for investigation without an internal review.
 10. Following the involvement of the Commissioner, on 5 November 2021 the Council provided their internal review. They clarified some questions, provided more information but continued to rely upon section 40(2) of FOIA in relation to those questions as stated above.
 11. On 7 November 2021, the complainant contacted the ICO to complain about how the Council handled their complaint and confirmed they were not content with the outcome of the internal review.

Scope of the case

12. The Council issued a further updated response to the complainant on 24 June 2022. They provided more information relating to the information request, this included the answers to 2B, 2D, and 3A, which they had previously withheld.
13. Following receipt of this response, the complainant stated they remained dissatisfied as parts of question four of their initial request remained outstanding. The complainant offered to alter their request as follows:

“Questions 4C and 4D should be answered in full. The answer to question 4E could be limited to the number of Social Workers employed at the Council. The specific information about Social Work teams could be omitted.”
14. The Council responded again, they further confirmed the number of staff at the Council who identified as Eastern European at the time of the request. They stated they would continue to withhold information relating to 4D and 4E due to the very low numbers in this data set. They stated the individuals would be identifiable if considered alongside other information that could be available to the complainant, which they considered would be a breach of the DPA under section 40 of FOIA.
15. The scope of this decision notice is to consider if section 40(2) was appropriately applied to the withheld information in question four, as the remainder of the request has been provided.

Reasons for decision

Section 40 (personal information)

16. 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.
17. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the

¹ As amended by Schedule 19 Paragraph 58(3) DPA

processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').

18. 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.
19. 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. Section 3(2) of the DPA defines personal data as:

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

Is the information personal data?

20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. 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.
22. 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.
23. The Council has confirmed that the information withheld was given voluntarily by employees, to the Council, as their employer. The data provided about ethnicity only includes those members of staff willing to disclose their ethnicity. The information is reliant upon self-identification and is collected in questionnaires at the time of recruitment, it is not mandatory.
24. The Council has provided overall numbers for the whole Council as they accept without further information, this number would not make individuals identifiable. However, they believe by reducing this pool further by grade or job title, it would make individuals identifiable, especially if additional information was gathered by the requester.
25. The Commissioner accepts that different members of the public may have different degrees of access to the 'other information' needed for identification to take place. A test used by both the Commissioner and the First-tier Tribunal in cases such as this, is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she

was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify an individual, or individuals, but begins without any prior knowledge.

26. The ICO's Code of Practice on Anonymisation² notes that The High Court in *R (on the application of the Department of Health) v Information Commissioner* [201] EWHC 1430 (Admin)³ stated that the risk of identification must be greater than remote and 'reasonably likely' for information to be classed as personal data under the DPA.
27. In summary, the motivated intruder test is that if the risk of identification is 'reasonably likely', the information should be regarded as personal data.
28. In this case, the Commissioner believes the complainant could potentially gather additional information and knowledge about individuals employed at the Council and seek to identify them.
29. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to a small number of individuals who are employed by the Council in social work teams. The data relates to individuals who chose to identify themselves as eastern European when invited to record their ethnicity by the Council.
30. The Council considers it is possible given the very specific nature of the remaining questions, that identification could be made by someone who wished to do so. This information would therefore fall within the definition of 'personal data' in section 3(2) of the DPA.
31. The Complainant disagrees, and does not believe that by being provided with a figure, even if a low number, would make the individuals identifiable.
32. The Commissioner agrees with the Council. He accepts that the information when considered in context, and alongside other information that might easily be sought, would allow individuals to be identified. Particularly if the person seeking the information was motivated to do so and had additional knowledge or connections.
33. 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.

34. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

35. 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."

36. 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.

37. 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

38. 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"².

39. 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:-

- a. **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

² 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".

- b. **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - c. **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
40. 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

41. 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.
42. 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.
43. The complainant has outlined that they have a personal interest in the information being disclosed. They have indicated in their complaint that they believe the Council is withholding information to:
- "hide their discrimination against Eastern Europeans".
44. The Commissioner accepts the complainant has a legitimate interest in obtaining the information.
45. The Council have acknowledged the legitimate interest in relation to the requested information in terms of transparency. They have gone some way in providing a large amount of information, both in terms of policies and procedures, as well as data which has broadly answered the majority of a large request.

Is disclosure necessary?

46. '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.

47. The Commissioner is satisfied that disclosure of the requested information would be necessary to achieve the legitimate aims identified and that there are no less intrusive means of achieving these aims.

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

48. 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.
49. 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.
50. In the Commissioner's view, a key issue is whether the individual(s) concerned have a reasonable expectation 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.
51. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
52. The Council has confirmed that the information they hold is numerical. However, alongside the more specific points requested, and information potentially already available in the public domain, this could be used to identify the employees by name. Based upon the information the Council has shared with the Commissioner, he would agree with this perspective.
53. It is the Commissioner's view that it is unlikely the individuals would have any expectation for information to be disclosed in a way that might

make them identifiable. It is likely that such disclosure would cause them distress.

54. The Commissioner is aware that the Council does provide data about the ethnic identity of their staff in their annual report. This report is in the public domain. However, the data within the report reflects the Council as a whole and does not go into specific detail. The annual report confirms the information about ethnicity is given voluntarily for the purposes of monitoring diversity and staff may decline to provide the information. The reported data is anonymous and contains large numbers and percentages. Importantly, whilst it is in the public domain, the report does not make individuals identifiable.
55. The Commissioner believes it is unlikely the individuals concerned in the much smaller dataset would have any expectation for their data to be shared on a wider basis, particularly where other information could make their identity known.
56. The law provides that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate.
57. Whilst the Commissioner understands the complainant's need for obtaining this information, he is mindful that disclosure under the FOIA is disclosure to the world at large and not just to the requester.
58. The Commissioner therefore considers that disclosure of this information would be disproportionately intrusive to the data subjects in this situation and interference with their rights to privacy would not be proportionate.

Commissioner's conclusion

59. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms in this case. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
60. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that it is not necessary to go on to separately consider whether disclosure would be fair or transparent.
61. The Commissioner has therefore decided that the Council was entitled to withhold the information under section 40(2) of FOIA by way of section 40(3A)(a).

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: 0300 1234504

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.

Signed

Phillip Angell
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