

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 March 2023

Public Authority: The British Council
Address: Bridgewater House
58 Whitworth Street
Manchester
M1 6BB

Decision (including any steps ordered)

1. The complainant requested a copy of all reports submitted by external investigators, relating to claims of racial discrimination and unfair treatment at the British Council, the week commencing 15 November 2021.
2. The British Council withheld the requested information citing section 40(2) (personal information) FOIA.
3. The Commissioner's decision is that the Trust was entitled to withhold the requested information under section 40(2).
4. The Commissioner does not require the public authority to take any steps.

Request and response

5. On 30 March 2022, the complainant wrote to the public authority and requested information in the following terms:

"I am making this request under the Freedom of Information Act 2000 to obtain a report into claims of racial discrimination and unfair treatment at the British Council carried out by an external investigator.

An internal investigator was first assigned to conduct the investigation on 21 June 2021, but on 20 August 2021, it was announced the investigation would be carried out by an external investigator, who began work on 3 September.

Could I please be provided with:

1. Any and all reports on this issue submitted by external investigators to the British Council the week commencing 15 November 2021.”
6. The public authority responded on 29 April 2022. It stated that the requested information was being withheld on the grounds of section 40(2) of FOIA.
7. Following an internal review, the public authority wrote to the complainant on 16 June 2022. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 13 July 2022 to complain about the way his request for information had been handled.
9. The complainant argued that the British Council should redact the personal information contained in the report since the identity of those individuals referred to in the report are not relevant to the requested information. Also, that the public interest does not relate to the individuals involved but rather the conclusions of the investigation.
10. The Commissioner considers the scope of his investigation to be to establish whether the public authority is entitled to withhold the requested information under section 40(2) of FOIA.

Reasons for decision

Section 40 personal information

11. 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.
12. 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 General Data Protection Regulation ('GDPR').

13. 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.
14. 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.

Is the information personal data?

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

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

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.
18. 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.
19. The information being withheld in this instance is a report into the conduct of staff members at the British Council and so contains the personal data of the individual who raised the grievance, the Country Director who led the operation in Kenya and the individuals who were interviewed in the course of the investigation.
20. It is also likely that the people referred to in the report would be identifiable because the specific time and place of the events being investigated relate to them as individuals.
21. Because of this, the Commissioner is satisfied that the information relates to the data subjects. The names of the data subjects quite obviously is information that both relates to and identifies those concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

22. 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.
23. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

24. 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”.

25. 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.
26. 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

27. 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.

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 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”.

28. 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.
29. 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

30. In considering any legitimate interest(s) in the disclosure of the requested information under the 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.
31. 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.
32. The British Council accepts that there is a legitimate interest in the requested information due to the need for transparency about ensuring good management, governance and promoting accountability following serious allegations at the British Council.
33. The Complainant also argued that disclosure of the requested information could help them further public debate about the conduct of senior staff at the British Council's Kenya office.

Is disclosure necessary?

34. '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.

35. The requested information is not otherwise in the public domain, so disclosure would be necessary to achieve the legitimate interests in question.

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

36. 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.
37. 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.
38. The British Council explained that the findings of the investigation were published in February 2022 meaning that disclosing the incomplete report would not further aid transparency or public debate.
39. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
40. In the Commissioner's view the disclosure of incomplete information could cause distress to the data subjects involved in the investigation and to those who wish to put matters behind them now the investigation has been concluded.
41. Furthermore, the Commissioner believes that the data subjects would not reasonably expect for the information to be disclosed as the report is not a final record of the completed investigation.
42. 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.

43. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
44. The Commissioner's decision is therefore that the British Council was correct to withhold the requested information from disclosure under section 40(2) FOIA.

Right of appeal

45. 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

46. 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.
47. 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

Catherine Fletcher
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