

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 18 April 2023

**Public Authority:** Reading Borough Council  
**Address:** Civic Offices  
Bridge Street  
Reading  
RG1 2LU

### **Decision (including any steps ordered)**

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1. The complainant has requested information from Reading Borough Council ("the Council") in relation to independent complaints investigator sourcing, pay rates and the numbers involved per investigation. The Council explained that it did not hold some of the requested information, some information was withheld under section 40(2) of FOIA – personal information and for the remainder, it provided the information/explanation to answer the question.
2. The Commissioner's decision is that the Council is correct to withhold the remaining information it holds under section 40(2) of FOIA and, on the balance of probabilities, it does not hold any further recorded information in relation to the request beyond that already provided which is not exempt.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

### **Request and response**

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4. On 19 December 2022, the complainant wrote to the Council and requested information in the following terms:  
"...Please provide information for each year to date, beginning 2018:

1. Which department is responsible for and the names of employees carrying out this task:
    - A. Independent stage 2 complaints investigator sourcing, procurement, selection, employ?
    - B. Independent witness to stage 2 complaints investigator – sourcing, procurement, selection, employ?
    - C. Stage 3 panel member sourcing, procurement, selection, employ?
  2. Pay rate for A,B and C above (please state relevant mode of payment calculation, e.g. per hour, per day, per investigation etc?)
  3. Number of individuals employed as Q.1 A, B and C?
  4. Name of company or group for Q.1 A, B and C?
  5. Duration of stage 2 investigations as mean average and duration of ten longest investigations?
  6. Number of investigations carried out/witnessed/reviewed per person in Q.3?
  7. Results for each investigation as per Q6, recorded as previous status being and followed by status as result of (not upheld, upheld, no finding)?
5. The Council responded on 18 January 2023. It stated the following:
- 1...A. The Customer Relations Team commission independent investigators on behalf of the local authority. Independent investigators are not employees.
  - B... As above, the Local Authority does not employ independent witnesses.
  - C. ...Customer Relations Team commissioner independent panel members on behalf of the local authority. Independent panel members are not employees.
- 2...£25 – £40 per hour.
  - 3...Zero.
  4. The following are listed as limited companies: [Council provides list of companies]. "Due to the low numbers this response involves, we are unable to break this information down any further for you, as to do so may lead to the

possibility of an individual being able to be identified. This therefore means that the information is exempt under section 40(2) and 40(3)(a)(i) of the Act, as to disclose it would breach the First Data Protection Principle.”

5. Information not held.

6...Analysis not held.

7. This information is exempt under section 40 as stated above.”

6. Following an internal review the Council wrote to the complainant on 17 February 2023. It stated that it upheld its previous position. However, it did provide additional explanations for its responses, including the application of section 40(2). The Commissioner notes that the complainant did not ask the Council to review its responses to questions 5, 6 and 7 when asking for an internal review, however, the Council advised that its responses remained the same.

## Scope of the case

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7. The complainant contacted the Commissioner on 19 February 2023 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of this investigation is to determine if, on the balance of probabilities, the Council holds any further recorded information within scope of the request beyond that already provided and if it is correct to apply section 40(2) to the information that it does hold but has exempted from disclosure.

## Reasons for decision

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### Section 1 – information not held

9. Section 1 of FOIA states that anyone who requests information from a public authority is entitled to be told if the authority holds the information and to have the information communicated to them if it is held.
10. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complaint believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.

11. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
12. The Commissioner's role is not to consider whether a public authority should hold information that has been requested but whether, on the balance of probabilities, it does or does not hold it.
13. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that the public authority holds no further relevant information.
14. In his guidance, the Commissioner recognises that FOIA applies to information that a public authority already holds in a recorded form at the time of a request.
15. In other words, in order to determine such complaints, the Commissioner must decide whether on the balance of probabilities a public authority holds any – or additional – information which falls within the scope of the request (or was held at the time of the request).
16. The Council has explained that it does not hold information for the duration of stage 2 investigations as a mean average, nor does it hold the duration of the ten longest investigations. It also explained that it does not hold the information for the number of investigations carried out/witnessed/reviewed per person.
17. While the complainant may consider that the Council would hold such information, making a request under FOIA is for information that is already held at the time of the request. The Council is not under an obligation to provide information that has not been recorded prior to the information request.
18. The Commissioner considers that, from the information provided, on the balance of probabilities, the Council does not hold the information requested in points 5 and 6 of the complainant's request.

### **Section 40(2) – personal information**

19. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.

20. Section 3(2) of the Data Protection Act 2018 defines personal data as:

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

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

22. 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.

23. 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.

24. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.

25. The Council has explained to the Commissioner that the Customer Relations Team commission the independent investigator/panel members on behalf of the Council and that the Information Governance Team administers any work relating to data protection and information governance. It has also explained that it does not appoint independent witnesses for the purposes of its complaints process.

26. The Council has explained that the individuals commissioned to the panel are not employees of the Council.

27. In this case, the complainant has requested names of employees carrying out specific tasks and for the names of companies employed to do the same roles. The Commissioner is satisfied that the information relates to and identifies individuals. The name of an individual quite obviously is information that both relates to and identifies that individual. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

28. 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.

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

## **Would disclosure contravene principle (a)?**

30. Article 6(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".*

31. 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.

32. 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**

33. 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"<sup>1</sup>*

34. 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:

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

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<sup>1</sup> 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".

- 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.
35. 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**

36. 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.
37. The Commissioner accepts that there is a legitimate interest in the accountability of public authorities as a general principle. There is also the legitimate interest of the requester, the complainant.
38. The Council has explained that in relation to the personal data of the staff members, there is a legitimate interest in ensuring fairness of process in the selection of independent investigators/panel members, but this does not require the disclosure of names, merely an explanation of process. It does not consider that there is a legitimate interest in the names being disclosed.
39. The Council has also explained that in the case of the names of the independent investigators/panel members, there is a legitimate interest in knowing who is performing services on behalf of the Council, but information about the names of these individuals could prove intrusive and/or impact their ability to be independent, particularly in the hands of a motivated enquirer, who may wish to learn more about their whereabouts and make direct contact.
40. The Commissioner is satisfied that there is a legitimate interest in disclosure of the information.

### **Is disclosure necessary?**

41. '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.

42. As disclosure under FOIA is disclosure to the world at large, it is rare that such processing will be necessary to achieve a legitimate interest.
43. The Council has already provided some information in response to the complainant's request, including but not limited to the process steps for complaints and explaining how the panel members have been sourced. As such, the Commissioner is satisfied that the Council has already fulfilled the legitimate interest.
44. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest identified, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it would be unlawful. It therefore does not meet the requirements of principle (a) (lawful processing).
45. The Commissioner's decision is that the Council is entitled to rely on section 40(2) of FOIA to withhold the requested information.



## Right of appeal

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46. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

47. 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.
48. 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 .....**

**Michael Lea**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**Cheshire**  
**SK9 5AF**