

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 February 2023

Public Authority: London Borough of Enfield
Address: Civic Centre
Silver Street
Enfield
Middlesex
EN1 3XF

Decision (including any steps ordered)

1. The complainant has requested information regarding the number of Member Enquiries (MEQ) submitted per Elected member.
2. The Commissioner's decision is that the London Borough of Enfield (the Council) has failed to demonstrate that the exemption at section 40(2) is engaged with regard to the number of MEQs submitted by each Councillor and the names of these Councillors.
3. The Commissioner finds that the Council has correctly relied on section 40(1) to withhold the requester's on personal data and does not require an further steps.
4. The Commissioner decision is that the Council has breached section 10(1) of FOIA as it has not responded to the request within the required timescale.
5. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the amount of MEQs submitted by each Councillor and the names of these Councillors.
6. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Request and response

7. On 8 February 2022, the complainant wrote to the Council and requested information in the following terms:

"Can you please provide a breakdown of the number of MEQ submissions per each Elected Member for the period between 1st February 2021 and 31st January 2022."
8. The Council responded on 10 March 2022. It stated that the requested information is exempt under section 40 of FOIA.
9. Following an internal review, the Council wrote to the complainant on 12 April 2022. It stated that it was upholding its decision.

Reasons for decision

Section 40 personal information

10. 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.
11. 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 processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
12. 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.
13. 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?

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

14. Section 3(2) of the DPA defines personal data as:
“any information relating to an identified or identifiable living individual”.
15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. 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.
18. The Council provided the Commissioner with the withheld information for consideration. A key factor in this case is determine whether individuals are identifiable from the withheld information.
19. The Council advised that in order to comply with the request it would have to provide the names of each councillor, which would therefore be the personal data of the councillor.
20. The Council also explained that the withheld information relates to councillors’ performance, it further explained that it would be unable to satisfy any part of the request without identifying the individuals concerned.
21. Having reviewed the withheld information, the Commissioner is satisfied that the withheld information is personal information as it directly identifies numerous living individuals.

Would disclosure contravene principle (a)?

22. 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”.
23. In the case of a 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.
24. 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 UK GDPR

25. 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

26. 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;

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.

27. 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

28. 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.

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".

29. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
30. The Commissioner acknowledges that there is a general public interest in the conduct of the public's elected councillors, ensuring the councillors are representing their residents effectively and also in gaining an insight into the working of the Council.
31. The complainant advised that they requested the information as elected members are expected to represent and be answerable and accountable to the electorate. The complainant further stated that a significant way to demonstrate this would be through the number of members enquiries (MEQs), submitted by the elected councillors on behalf of the Council's residents.
32. The complainant finally advised that combining the amount of MEQs with the number of meets attended would allow the public to see how much work their elected representatives do on their behalf.
33. The Council advised the Commissioner that there is always a general public interest in holding elected representatives to account for their actions, however the Council did not believe the requested information would address these interests in anyway.
34. The Commissioner recognises that there is a legitimate interest that would be served by disclosure of the personal data, he has therefore gone on to consider the necessity test.

Is disclosure necessary?

35. The ICO guidance³ on the necessity test advises that when considering the question of necessity, you must consider whether there is a pressing social need for the disclosure of the information in question.
36. '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

³ [s40 Personal information \(section 40 and regulation 13\) version2.3 \(ico.org.uk\)](https://ico.org.uk/for-organisations/guide-to-the-data-protection-legislation/section-40-and-regulation-13/)

FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

37. In the Council's internal review, it informed the complainant that the total number of MEQs, along with the Council's performance in responding, is already part of the Council's annual publication schedule via public Committee reports.
38. The Council went on to state that it cannot see a pressing social need in disclosing the withheld information, as the number of MEQs submitted would not infer whether councillors are representing their residents effectively.
39. The complainant advised that "elected members... are expected to represent, and be answerable, and accountable to the electorate. One significant way of demonstrating this is through the submission of Members Enquiries (MEQs) on behalf of residents."
40. The complainant further advised that the number of MEQs submitted would give "a quantitative gauge" of the amount of work they undertake. The complainant further advised that knowing the amount of MEQs combined with the number of meetings attended over the same period, would act as a benchmarking system for the public to see how much work their elected representatives are undertaking on their behalf.
41. The Commissioner reviewed the annual Committee report, and although it did provide a total number of MEQs submitted to the Council, this report did not provide a full breakdown of the amount of MEQs were submitted by each councillor.
42. The Commissioner therefore does not agree that this annual report provides the complainant with all of the requested information in a less intrusive way.
43. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims of the request for the complainant and therefore will consider the balancing test.

Balancing Test

44. 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.

45. 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.
46. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that 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.
47. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual. The Commissioner also notes that there must be a strong argument to show that disclosure of the personal data would have adverse consequences.
48. The law provides that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate.
49. The Council advised that if the requested information was disclosed, Council officers would be concerned that the information would be utilised for party political purposes. The Council also suggested that if the requested information was disclosed, it may imply that particular Members did not represent their residents effectively.
50. The Council explained it takes the view that the individual(s) involved in the request would not want their data to be available to other Councillors necessarily, particularly not those of opposing parties.
51. The Commissioner references his guidance when considering the potential harm or distress that disclosure may cause to employees of a Public Authority. He notes that an "employee may regard the disclosure of personal information about them as an intrusion into their privacy,

often this may not be a persuasive factor on its own, particularly if the information is about their public role rather than their private life”⁴

52. The Commissioner is satisfied that the requested information does relate to individual(s) public role and does not directly relate to their private life. As the requested information relates to individual(s) public life, the Commissioner advises that there is more likely to be interest in releasing the information.
53. Whilst the Commissioner notes that disclosure of the data will likely cause some of the individual(s) involved a certain degree of inconvenience – in that they may be asked to justify the amount of MEQs they have submitted – he also notes that these individuals would, by definition, be familiar with (and are likely to have had training to deal with) press/public enquiries by virtue of the position they hold. Therefore the Commissioner considers that additional scrutiny be relatively modest.
54. Based on the above factors, the Commissioner has determined that there is a sufficient legitimate interest which outweighs the data subjects fundamental rights and freedoms in this case. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of the information would be lawful.
55. Given the above conclusion that disclosure would be lawful, the Commissioner considers that he does need to go on to separately consider whether disclosure would be fair or transparent.

Would disclosure be fair and transparent

56. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
57. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons
58. The requirement for transparency is met because, as a public authority, the Council is subject to the FOIA.
59. In these circumstances the Commissioner has decided that the Council has failed to demonstrate that the exemption at section 40(2) is

⁴ [Requests for personal data about public authority employees \(ico.org.uk\)](https://ico.org.uk)

engaged with regard to providing the number of MEQs submitted by each Councillor. He has determined that the amount of MEQs submitted by each councillor and the names of those members of Councillors (who hold senior roles) should be disclosed. His decision is based on the greater level of accountability attributable to particular roles in terms of decision making and expenditure of public money.

The Commissioner's View

60. The Commissioner has reached the conclusion that the Council was not entitled to rely on section 40(2) of FOIA to withhold the requested information, by way of section 40(3A)(a) and need to provide the withheld information to the complainant with appropriate redactions in line with Section 40(1).

Section 40(1) – personal data of the requester

61. Section 40(1) of FOIA provides an exemption from disclosure for any information which is the personal data of the person who has requested it. This is because a right of access to this information already exists via the Subject Access (SAR) provisions of the DPA and UK GDPR. Disclosure under SAR is disclosure of a person's data to them alone – rather than the disclosure to the world at large required by FOIA.
62. The Commissioner notes that some of the withheld information relates directly to the complainant and that they could be identified from it. It therefore follows that the information is the personal data of the complainant.
63. Section 40(1) is an absolute exemption, with no requirement to consider the complainant's wishes. Given his dual role as the regulator of data protection legislation, the Commissioner has a responsibility to prevent personal data being inadvertently disclosed under FOIA. He has therefore proactively applied section 40(1) of FOIA to the personal information of the complainant, to prevent any possibility that the information might be disclosed under FOIA.

Right of appeal

58. 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

59. 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.
60. 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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