

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 April 2024

Public Authority: London Borough of Sutton
Address: Civic Offices
St. Nicholas Way
Sutton
Surrey
SM1 1EA

Decision (including any steps ordered)

1. The complainant has requested copies of an educational psychologist report and related correspondence. The London Borough of Sutton ("the Council") refused to provide the educational psychologist report and correspondence, citing section 40(2) (personal data) of FOIA. During the course of the Commissioner's investigation the Council also sought to rely on section 12 (cost limits) to refuse the entirety of the request, only to later withdraw its reliance on this provision.
2. The Commissioner's decision is that the information within scope of the request does constitute third party personal data, and that disclosure of it would breach the data protection principles, therefore the Council is entitled to rely on section 40(2) to withhold the information.
3. The Commissioner does not require further steps.

Request and response

4. On 13 September 2023, the complainant wrote to the Council and requested information in the following terms:

"I am writing about the subject of the Local Government and Social Care Ombudsman. Decision in the following case
<https://www.lgo.org.uk/decisions/education/special-educational-needs/22-014-676>

I am requesting copies of all EP [Educational Psychologist] reports and all correspondence related to the EP reports relevant to this case. The EP is referred to in paragraphs 28 and 29 of the LGO report.

I believe that it would be in the public interest for this material to be disclosed after appropriate redaction in order to comply with the rules on exemptions.”

5. The Council responded on 5 October 2023. It stated that it held the requested information however it was exempt under section 40(2) of FOIA.
6. Following an internal review the Council wrote to the complainant on 30 October 2023. It stated that it was maintaining its position.

Scope of the case

7. The complainant contacted the Commissioner on 15 November 2023 to complain about the way their request for information had been handled. The complainant stated that they had asked the Council to disclose the information after appropriate redactions had been made to withhold personal data contained within the report and associated correspondence.
8. During the course of the Commissioner’s investigation, the Council amended its position and sought to rely on section 12 (cost of compliance) to refuse the complainant’s request for correspondence relating to the EP report. The Council did not notify the complainant of its change of position.
9. The Commissioner recognises that it is unsatisfactory for the Council to apply section 12 to the request retroactively as this gives the impression that the Council sought to exempt the information under section 40(2) without reviewing it first. For the avoidance of doubt, the Commissioner expects public authorities to consider the content of all of the information to which any such exemptions are being applied. It appears that the Council did not do this at either the refusal notice or the internal review stage, because if it had done so, it would have established that locating all of the information in the scope of the request would (in its view) have exceeded the cost limit. However, for technical purposes, the Commissioner’s investigation had to consider whether the Council was entitled to rely on section 12 to refuse the request in its entirety, on the basis that complying with the complainant’s request for correspondence related to the EP report would exceed the appropriate limit for responding to a request. Details of the Commissioner’s investigation of this issue are set out below.

10. In fact, following questioning from the Commissioner on the application of section 12, the Council then sought to withdraw its reliance on this provision. The decision notice therefore also considers whether the information falls to be withheld under section 40(2).

Reasons for decision

Section 12 – cost of compliance

11. The following analysis covers whether complying with the request would have exceeded the appropriate limit.
12. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the “appropriate limit” as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Fees Regulations”)
13. The appropriate limit is set in the Fees Regulations 2004 at £600 for central government, legislative bodies and the armed forces and at £450 for all other public authorities. The appropriate limit for the public authority is £450.
14. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours for the public authority.
15. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
16. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. The Commissioner considers that any estimate must be sensible, realistic and supported by cogent evidence. The task for the Commissioner in a section 12 matter is to

determine whether the public authority made a reasonable estimate of the cost of complying with the request.

17. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether there is a public interest in the disclosure of the information.
18. Where a public authority claims that section 12 of FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of FOIA.

The Council's position

19. In a letter to the Commissioner the Council explained that all of the correspondence relevant to the request is held in Cognus, an education service provider commissioned and wholly owned by the Council. Cognus itself uses an external email provider, separate to that used by the Council, and under the terms of the service level agreement (SLA) with that provider Cognus is required to allow 5 days for email searches to be conducted.
20. The Council officers conducted a search of all officers' inboxes at Cognus using the name of the subject of the education psychologist's report and contractions of their name in accordance with the Council's naming conventions. It acknowledged that the quickest method available for retrieving the requested information would be to identify and search the inboxes of specific officers that regularly engage with the child's parents, however, the Council stated that there had been significant staff turnover in the time period since the educational psychologist's report was commissioned and issued. The Council also explained that the parents of the child concerned had regular interaction with many Council officers over the years and therefore it was necessary to extend their searches across all staff inboxes to ensure that it was possible to capture all information within scope of the request.
21. The searches therefore returned a considerable volume of information. The Council explained that:

"Whilst the search results above are very broad, we may be able to rule out a lot of the information straight away. (It may be very obvious that the correspondence does not relate to [name redacted]). We would then be required to review the remaining information to see if it relates to [name redacted]'s Educational Psychology (EP) reports and advice, and not another service.

On the assumption that we can discard approximately three quarters of the emails, I have calculated below the amount of time it would take to review and consider each email. I have not included redaction time, as per the legislation, however that would add significant additional time as the information relates to an individual child and would need to be carefully redacted. Whilst some emails may take longer to review than others, I have estimated that overall scan of each email would take approximately 30 seconds to read, review and document whether it was in scope of the request.”

22. The Council estimated that it held 8231.5 emails potentially within scope of the complainant’s request, and that it would take 68 hours and 35 minutes to review each one at a rate of 30 seconds per email.
23. In accordance with its duties under section 16 to provide advice and assistance to the requester the Council stated that it was difficult to offer appropriate advice to the complainant on how to refine their request without knowing the reason for requesting the email correspondence. However, it stated that “if the complainant is seeking to establish if a clear process has been followed, they may wish to request a specific document relating to the EP process itself and not information relating to a specific child.”
24. The Commissioner wrote to the Council to query the searches it had undertaken. He considered that the search parameters the Council had used to retrieve the information in scope, as described at paragraph 20, were unnecessarily broad as they were lacking a date range and had only used the data subject’s name (or contractions thereof) as search conditions, without including the term “Educational Psychologist” or “EP”. He noted that the relevant period is 22 February 2022, from information contained within the LGO report and the Council’s own submissions, to the date of the request, and therefore it was not necessary to consider the entire correspondence history between the Council and the child’s parents. With the above in mind, the Commissioner asked the Council to perform the searches again.
25. The Council reran searches with stricter parameters which returned 289 emails within scope of the request. The Council informed the Commissioner that it was no longer relying on section 12(1) to refuse the request. However, after reviewing the correspondence held, the Council stated that all of the information within scope of the request was exempt under section 40(2) on the basis that the educational psychologist’s report and all the correspondence identified via searches outlined above related to a child’s psychological health within the context of their education plan, and therefore constitute third party special category data.

Section 40 - personal information

26. 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.
27. 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').
28. 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.
29. 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?

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

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

31. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
32. 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.
33. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the child whom the educational psychologist's report is about. He is satisfied that this information both relates to and identifies the child concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

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

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

Would disclosure contravene principle (a)?

36. 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".

37. 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.
38. 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. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

39. Information relating to special category data is given special status in the UK GDPR.
40. Article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
41. The Commissioner has seen the educational psychologist's report and finds that it does constitute special category data. He has reached this conclusion on the basis that, by definition, an educational psychologist's report conducted in order to inform an Education and Health Care Plan will include the psychological health data of a child.
42. The Commissioner has seen a sample of the emails identified as falling within scope of the request. As the emails have been retrieved using the data subject's name and the content of the emails reveal details about a child's psychological health data he is satisfied that this information includes special category data.

43. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
44. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
45. The Commissioner has seen no evidence or indication that the individual concerned has specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
46. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

Right of appeal

47. 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

48. 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.
49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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