

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2017

Public Authority: London Borough of Sutton ("LBS")
Address: Civic Offices
St Nicholas Way
Sutton
Surrey
SM1 1EA

Decision (including any steps ordered)

1. The complainant requested information relating to a particular recruitment process including a copy of the interview notes for each candidate for a job for which he was unsuccessful.
2. LBS provided the complainant with some information but refused to disclose the remainder of the information on the basis that it was the personal data of the other candidates and was therefore exempt under section 40(2) of the FOIA. LBS also applied the exemption at section 41 of the FOIA on the basis that the information contained within the withheld information was provided to it in confidence.
3. The Commissioner finds that LBS was correct in its application of section 40(2) of the FOIA and did not therefore go on to consider the application of section 41.
4. The Commissioner requires no steps to be taken by LBS.

Request and response

5. On 20 October 2016, following an unsuccessful job application, the complainant wrote to LBS and requested information in the following terms:

"Thanks for your voice message on the interview outcome of the above position and offer of a feedback.

A feedback would not be necessary. Could I please get the written notes of my interview. I also want to peruse the interview notes of the other candidate(s). In order to comply with the Data Protection Act (DPA), please delete/redact any information that would identify the other candidate(s) bar myself.....”

6. LBS responded on 11 November 2016 by providing the complainant with a copy of the interview scoring sheet and the notes from his own interview, however it refused to disclose the interview notes from the other candidates.
7. On the same day the complainant asked LBS to explain the reason for the refusal to provide the other candidates' interview notes. LBS wrote to the complainant on 15 November 2016 explaining that it had applied the exemption under section 41 of the FOIA to the withheld information on the basis that the information had been provided in confidence by the other applicants.
8. LBS has explained to the Commissioner during the course of her investigation that in addition to disclosing the interview scores for the complainant in its response, it later went on to provide him with a redacted copy of the score sheet for the other candidates.
9. On 15 November 2016 the complainant requested an internal review of LBS's decision to refuse to supply copies of the other candidate's interview notes.
10. Following its review, LBS contacted the complainant on 16 November 2016. The review upheld its original decision to refuse to disclose the withheld information and informed the complainant that it also relied upon the exemption under section 40(2) of the FOIA on the basis that the information requested was the personal information of the other candidates.

Scope of the case

11. The complainant contacted the Commissioner on 18 November 2016 to complain about the way his request for information had been handled. He asked the Commissioner to encourage LBS to respond to his request fully, arguing that he was prepared to accept a redacted version of the interview notes with the personal data of the other candidates removed. He considered that by making necessary redactions LBS could release the interview notes without breaching the provisions of the Data Protection Act 1998 (DPA).

12. The Commissioner considers that the scope of the case is whether LBS has correctly applied sections 40(2) and 41 of the FOIA in respect of the withheld information.

Reasons for decision

13. The Commissioner began her investigation by contacting LBS on 16 January 2017. LBS responded providing a copy of the withheld information and making a number of points in relation to the Commissioner's letter.

Section 40(2)

14. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and, by virtue of section 40(3)(a)(i), its disclosure under the FOIA would breach any of the data protection principles of the DPA.

15. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

"personal data" means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."

16. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA. The Commissioner notes in this case that LBS said that disclosure would breach the first data protection principle.

Is the withheld information personal data?

17. LBS has explained to the Commissioner that the interview notes contain detail about the candidate's experience, qualifications and employment history. In a structured interview the interview questions require the

candidates to provide examples of when they have dealt with particular issues, handled situations or demonstrated a particular skill.

18. The Commissioner has viewed the withheld information and agrees that information provided during the recruitment interview is by its very nature the personal data of the other candidates. In this case the Commissioner considers that the information in the interview notes is either personal data in its own right, or for example in the case of specific scenarios described by the candidate, when combined with other information known about the individual. From the Commissioner's reading of the withheld information, and from explanations provided by LBS, it is apparent that the majority of answers given by candidates during an interview contain personal data in that their answers contain "life story" details about the person's previous work and employment history.
19. The complainant has indicated that he is happy for the information to be redacted as he does not require the individual candidates to be identified. However, the Commissioner considers that an individual could still be linked to the information even where direct identifiers, such as names, are removed. For instance, the interview notes detail the candidate's responses to questions about how they have dealt with a particular situation. Even though the notes do not provide the name of the organisation they work for, or the exact nature of the task under discussion, the Commissioner considers that coupled with other information that a motivated third party could find out about a candidate, such as employment history, disclosure could still provide sufficient clues to identify the candidate.
20. This is particularly the case as LBS has explained that the community of qualified professionals in the relevant field is reasonably small and therefore the likelihood of being identified becomes more likely. Accordingly the Commissioner agrees that the extent to which significant personal data is embedded within the interview notes would prevent the meaningful disclosure of an anonymised version of the information.

Does the disclosure of the information contravene any of the data protection principles?

21. LBS considers that the disclosure of the information would contravene the first data protection principle.
22. The first data protection principle states that:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

*(a) at least one of the conditions in schedule 2 is met, and
(b) in the case of sensitive personal data, at least one of the
conditions in Schedule 3 is also met."*

23. In deciding whether disclosure of the other candidates interview notes would be unfair, the Commissioner has taken into account:

- the nature of the information;
- the reasonable expectations of the data subjects of what would happen to their personal data; and
- the consequences of disclosure on those data subjects.

The Commissioner has also balanced the rights and freedoms of the data subjects with the legitimate interests in disclosure.

24. LBS's position is that the candidates would have a strong expectation that the information supplied would be held in confidence by LBS and would only be used in connection with the recruitment process. They were not notified about processing for any purpose other than for the job application itself.

25. The Commissioner was advised by LBS that whilst one of the other candidates was appointed following the recruitment process, the level of seniority of the advertised vacancy was not one which would attract a higher degree of scrutiny in terms of the effective use of public funds. Whilst the successful candidate's details may appear on case files and will be public facing to a degree in dealing with customers and in meetings, details published on LBS's external website do not extend to an employee at this particular level nor in externally facing structure charts. Hence a candidate at this position would not reasonably expect their personal data to be disclosed even in circumstances where their application was successful.

26. LBS has provided the Commissioner with the Role Profile and Job Description for the post advertised. The qualifications essential to the advertised position, and without which an application could not proceed, are detailed within these documents and so it is reasonable for the complainant to assume that all applicants offered an interview held this level of qualification as a minimum. Any detail above and beyond this as provided by the candidates during the interview itself, and upon which the final scores are assessed, are in the Commissioner's opinion personal to the candidate.

27. Whilst some of the questions required a largely technical response to a practical exercise, LBS's position in relation to those particular questions is that candidates attending for interview did so with the reasonable expectation that their individual experience and personal level of skill in replying to those questions would not be discussed or disclosed to other candidates.
28. The Commissioner's guidance on section 40 of the FOIA suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life.
29. The Commissioner considers that a candidate's information contained in the withheld information can reasonably be described as information about their personal life in the context of a job application rather than an undertaking in an official or work capacity.
30. LBS informed the Commissioner that to disclose the withheld information would cause distress to the candidates if placed in the public domain. The Commissioner agrees that if the interview notes were to be disclosed it could cause considerable damage. For example, it could become clear to current employers who the candidates were and that they were seeking alternative employment, a fact which may not necessarily be within the current employer's knowledge, and thus jeopardise a candidate's current position.
31. The Commissioner accepts that members of the public may wish to understand the circumstances surrounding the decision to appoint a particular candidate during a recruitment exercise. She also accepts that there is a legitimate interest in understanding more clearly the processes and criteria used by a public body when recruiting staff and to ensure that the process is fair and transparent. However, such legitimate interests must be weighed up against the distress disclosure would cause and the intrusion into the private lives of those data subjects. It is the Commissioner's view in this case that disclosure would cause significant distress and intrusion and any legitimate interest in this type of information is outweighed by these effects.
32. The Commissioner has concluded that to disclose the interview notes, even in redacted form, would be unfair and in breach of the first principle of the DPA. The Commissioner therefore finds that LBS has correctly applied section 40(2) of the FOIA to the withheld information by virtue of section 40(3)(a)(i) and accordingly requires LBS to take no steps.

33. In view of her findings above, the Commissioner has not gone on to consider LBS's application of section 41 of the FOIA to the withheld information.

Right of appeal

34. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.
36. 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

Alun Johnson
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