Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 September 2022

Public Authority: Leeds City Council
Address: Civic Hall
Leeds
LS1 1UR

Decision (including any steps ordered)

1. The complainant requested information from Leeds City Council ("the Council") about records of a named person's time as a resident at Shadwell Children's Centre. The Council refused to confirm or deny whether it held the requested information, citing the personal information exemption under section 40(5B)(a)(i) of FOIA as its basis for doing so.

2. The Commissioner's decision is that the Council is entitled to rely on the personal information exemption under section 40(5B)(a)(i) of FOIA as a basis for refusing to confirm or deny whether the information is held.

3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 25 January 2022, the complainant wrote to the Council and requested information in the following terms:

> "1 .Date, Day , Month, Year of when [name redacted] was admitted to Shadwell Children's Centre.
>
> 2. The unit in which he lived in: I.e., Martin house, Lupton house, Gott house, Fitzwilliam.

3. Date, Day, Month, Year when [name redacted] was discharged.

4. All dates of [name redacted] absconding whilst residing at Shadwell from the date of being admitted and to the date of his discharge.

5. Log and Night books to show evidence that [name redacted] was clearly in residence and visibly seen and evidenced by staff members who looked after [name redacted] in his daily routines.

6.The name of his Key Worker and Social Worker within the time of his placement at Shadwell Children's Centre."

5. The Council responded on 14 February 2022. It refused to confirm or deny that the requested information was held.

6. Following an internal review the Council wrote to the complainant on 7 March 2022. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 25 April 2022 to complain about the way their request for information had been handled.

8. The following analysis considers whether the Council is entitled to rely on the personal information exemption under section 40(5B)(a)(i) of FOIA as a basis for refusing to confirm or deny whether the information is held.

Reasons for decision

Section 40 - personal information

9. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.

10. Therefore, for the Council to be entitled to rely on section 40(5B)(a)(i) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:

- Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
- Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

11. Section 3(2) of the Data Protection Act 2018 ("DPA 2018") defines personal data as:-

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

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

13. 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.

14. In this case the action of confirming or denying whether the information is held would result in the disclosure of personal data of the person named in the request. Specifically it would disclose whether or not they were ever a resident of Shadwell Children's Centre. This information, whether or not they were ever a resident, both relates to and has biographical significance for the person named in the request.

15. For the reasons set out above the Commissioner is satisfied that if the Council confirmed whether or not it held the requested information this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.

16. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent the Council from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.

17. The Commissioner agrees that the most relevant data protection principle is principal (a).

Would confirming whether or not the requested information is held contravene one of the data protection principles?

18. Article 5(1)(a) UK GDPR states that:-

> "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"

19. In the case of a FOIA request, personal data is processed when a public authority confirms or denies that it is held, and/or it is disclosed in response to the request. This means that the information can only be disclosed – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) UK GDPR), be fair, and be transparent.

Lawful processing: Article 6(1)(f) UK GDPR

20. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before processing of the information in response to the request would be considered lawful.

21. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) UK GDPR which provides as follows:-

> "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"[1].

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[1] 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 2018) and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019)

provides that:-

22. In considering the application of Article 6(1)(f) 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 confirmation as to whether the requested information is held (or not) 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.

23. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interest test

24. In considering any legitimate interest(s) in 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. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure, or confirmation or denial, 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.

25. The complainant has not set out explicitly their motivation for seeking the information in question however the Commissioner has inferred from their correspondence that they are attempting to gather information in relation to a particular legal matter. The Commissioner accepts that this is a legitimate interest.

"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".

Is confirming whether or not the requested information is held necessary?

26. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.

27. The Commissioner's view is that other avenues are available to gather information in relation to this particular legal matter. To the extent that the information would be relevant to any planned legal proceedings, an application can be made under court discovery rules. Under this process the disclosure can be restricted if deemed necessary. As other avenues are available to gather information in relation to this particular legal matter, confirmation or denial to the world at large under FOIA is not necessary to meet the legitimate interest.

28. As the Commissioner has decided in this case that confirmation or denial is not necessary to meet the legitimate interest, he has not gone on to conduct the balancing test. As it is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's View

29. The Commissioner has therefore decided that the Council was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5B)(a)(i) of FOIA.

Right of appeal

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

31. 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.

32. 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 .....

Victoria James
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF