Date: 20 April 2010
Our ref: CB
Your ref:

Oldham
Council

Legal & Democratic Services
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Oldham, OL1 1UL

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By Email
request-15918-eb111609@whatdotheyknow.com

Dear M/s Berlow,

Re: REQUEST FOR INFORMATION UNDER THE FREEDOM OF INFORMATION ACT 2000 [FOIA]
Information from the Pupil Referral Unit (PRU)

I refer to the above mentioned request under FOIA and have now reviewed the file. This review has been jointly undertaken with the Association of Greater Manchester Authorities advisor/coordinator on FOIA and myself, and I would make the following comments to you:-

Chronology

The request was received on the 3rd August from yourself.

- On 5th August the request was acknowledged by Sarah Brien of Children's Services and forwarded to the relevant team. It was established that the PRU would have this information.
- On 12th August you were informed that the information would not be available until September as the Unit was operational term time although it did offer to supply some statistical information as an interim measure.
- On 3rd September 2009 you queried why there had been no response your questions or requests for an extension of time.
- On 7th September 2009 you asked for an internal review.
- On 20th September you indicated that you were unhappy with the response and believed the information could be easily collected.
- On 25th September some further information was sent to you; however some information was exempted under Section 40 of Personal Data.

- On 27th September you asked for an internal review.

Some information had been given to you and some had been withheld under personal data - Section 40 of the FOIA.

The Legislation

Within this review I have considered the applicable legislation and make the following comments on this:-.

Within the Freedom of Information Act 2000 under Schedule 1, Part IV, Section 52 maintained schools and other educational institutions fall under the Act. However, parts of the Act are split between England / Wales and Northern Ireland and there are differences in these two areas.

The PRU Unit is not mentioned directly within the Section pertinent to England and Wales, however Section 52 mentions the Governing Body of a maintained school within the meaning of the School Standards and Framework Act 1998.Within the School Standards and Framework Act 1998 Act [Section 6] new categories of maintained schools are added - it indicates the following:-

> In this Section "school" means a primary, secondary or special school including a nursery school which is a special school **but excluding** – (a) a nursery school which is not a special school; and (b) **a pupil referral unit.**

Therefore, the PRU does not in my view come under Part IV of the Schedule as mentioned above. However, this does not mean that the Unit is outside the scope of the Act, it comes in under Part II under "Local Government of England and Wales" as it is encompassed within the meaning of the Local Government Act 1972.

On the 1st January 2005, a regulation was issued which was the Freedom of Information (Time for Compliance with Request) Regulations 2004 (2004 No. 3364).This Order relaxed the 20 days period to answer a request under FOIA to extend it to 60 working days following the date of receipt and this was in respect of the governing body of a maintained school or a maintained nursery school. It was also in respect of schools which are maintained by the Secretary of State for Defence and provides primary or secondary education.
The term governing body of a maintained school or a maintained nursery school is taken to be that as given and defined by the School Standards and Framework Act 1998 as mentioned above and this does not consider the PRU as such.

Therefore in my view, the Order extending the period of days to 60 working days does **not** apply to a PRU in England and Wales.

It is easy to see why there is some confusion in this area as the Schedule within the Act also covers Northern Ireland, separately from England and Wales, and it is clear from the Northern Ireland section that a PRU is covered and there is also an Order but again this is specific to Northern Ireland and this is The Freedom of Information (Time for Compliance with Request) Regulation Number 1369 and this makes it clear that a PRU will be covered, but within Northern Ireland.

As this issue is somewhat complicated this is an easy mistake to make.However, it does mean that the request has not been complied with in respect of this time limit.

A public authority must respond to a request in accordance with Section 10 of the Freedom of Information Act and it must reply promptly and in any event not later than the 20th working day following the receipt. There are extensions to this in respect of consideration of this public interest test, fees, notices etc. Therefore by virtue of the misunderstanding as discussed above the authority is in breach of this section. A request for information was received on the 3rd August 2009 and the final response was made on the 25th September 2009.

Personal Data

On review I have considered what personal data are and whether statistical data alone could identify any person. I would set down here my comments:-

Personal data are defined in the Act, at section 1(1), as follows:-

"data which relate to a living individual who can be identified:-

from those data; or
from those data and other information which is in the possession of, **or is likely to come** into the possession of, the data controller ...."

The information in "bold" in the above definition is key, as information can be gained from other sources now and in the future.

Statistical data

Also it is an issue that statistical information is not anonymous in the hands of the data controller, there is other information in their possession and this other information is that they hold the information at least about name, address, age and may be other identifiers.

It can be argued that statistical data is not personal data as long as the data subject cannot be identified. However, this has to be considered against a background of "mosaic" requests [i.e. whether giving a sample of the information, a profile can be built-up by combining data from

another source] which could be made by requests to other authorities and organisations in order to put together a wider picture.

It is useful to look at the wording of Recital 26 of the preamble to the Directive (Data Protection (95) (46) (EC)) which indicates the following:-

"Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonable to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to the data rendered anonymous in such a way that the data subject is no longer identifiable".

Considering this, it is clear that in this case any persons in question could possibly be identified by, for example, members of families, members of the community etc.

Given that statistical/anonymous information in this case could amount to personal data, the Council has to consider whether it would be contravening the Data Protection Act 1998 if it disclosed any information whatsoever.

A recent Tribunal case considers a similar request and the view is that the information even though statistical would amount to personal data and would breach the DPA principles.

This case can be found at the following link :-

http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50203810.pdf

Section 40 FOIA

As mentioned above Section 40 has been used to exempt the information.

Section 40 of the FOIA sets out an exemption from the right to know if the information requested is personal information protected by the Data Protection Act 1998 [DPA]. The section has a fairly complex structure and refers in detail to DPA provisions and concepts.

The exemption is an absolute exemption (except in some limited circumstances). This means that if the information falls within the exemption, there is no need to consider an additional public interest test.

Section 40(2) together with the condition in section 40(3)(a)(i) or 40(3)(b) provides an absolute exemption if disclosure of the personal data would breach any of the data protection principles.

There are eight data protection principles. However, for the purposes of disclosure under the FOIA, it is only the first principle – that data should be processed fairly and lawfully – that is likely to be relevant.

In order to process both fairly and lawfully part of this requirement can be by satisfying a legitimising condition contained in Schedule 2 of the Act.

There are six legitimising conditions in Schedule 2, but only condition 1 (consent) or condition 6 (legitimate interests) should be relevant to disclosure under the FOIA.

Schedule 2 condition 1 - that the data subject has given consent

In this case none of the data subjects or parents/guardians etc has given consent.

Therefore the Council cannot satisfy this condition.

Schedule 2 condition 6 Legitimate Interest

Condition 6 requires that:

6.—(1)The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

As disclosure under the FOIA is considered disclosure to the public at large and not to the individual applicant, the Council needs to balance the legitimate public interest in disclosure against the interests of the individual whose data it is. The Council does not have a legitimate interest.

The Council cannot satisfy a schedule 2 condition therefore disclosure would breach Principle 1.

In the terms of fair processing, any of those in question have not been told that their personal data would be disclosed to the world. The Council would be in breach of the fair processing element contained in this principle.

Conclusion

My conclusion is that the Council is in breach of FOIA Section 10 and the response was not provided within the timeline base. However the confusion within the legislation would be an easy mistake to make.

In respect of Section 16 (1) which is complying with the duty to be helpful and provide advice and assistance, this seems to have been mainly complied with, however due to the misinformation around the time for response this element cannot be seen to be helpful.

As far as withholding some of the information I consider that the application of Section 40 for Personal Data is correct - those groups of low numbers have been withheld as there would be a chance of identification.

This does not mean that in the future the Council would always withhold this type of information; it is considered that in this case there is a strong possibility of identification. Cases/requests are looked at on an individual basis

Should you wish to refer the matter to the Information Commissioner's Office the details are as follows:-

The Information Commissioner,
Wycliffe House,
Water Lane,
Wilmslow,
Cheshire SK9 5AF

Yours sincerely

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