

Our reference RM/ESB

18 January 2010

E S Bhatti
sent Via email to request-25259-
xxxxxxxx@xxxxxxxxxxxxxxxxxxx.xxx

Direct line 0844 798 8802
Email r-mauler@audit-
commission.gov.uk

Dear E S Bhatti

Request for Information RFI 1224

Thank you for your request for information, once again please accept my apologies that our acknowledgement had been overlooked.

In your email of 31 December, you asked for:

- the latest version of the role and responsibilities for a CAAL (Comprehensive Area Assessment Lead); and,
- a summary of how the CAAL covering Luton Borough Council has performed in 2008/2009 and 2009/2010 up to the point of this request.

Please find attached a copy of the Job Description which sets out the role and responsibilities of a CAAL.

I can confirm that the Commission holds performance information relating to the CAAL for Luton Borough Council. However, you have asked for a summary and have clarified that you do not expect it to contain personal information.

The Commission does not have a summary of performance information and so to fulfil this part of your request we would need to create a record which, under the Freedom of Information Act, we are not obliged to do.

I have considered whether we could release wider performance information on the specific CAAL and have concluded that this is exempt from disclosure under section 40 (2) and section 40 (3) of the Freedom of Information Act. The Commission concludes that public disclosure of this information would constitute unfair processing in breach of the first data protection principle. The data protection principles are set out in the Data Protection Act 1998 (DPA) in Schedule 1.

The Commission is satisfied that the first principle would be breached by reason of public disclosure, namely that to do so would not be fair and lawful. The Commission also considers that the second principle, that personal data shall be obtained only for one or more specified and lawful purposes and shall not be further processed in any manner incompatible with that purpose or those purposes, would also be breached by disclosure. However, because the Commission is of the opinion the first principle is breached, the Commission does not need to give further consideration to the second principle.

Section 40(2) provides an absolute exemption to disclosure, if any of the data protection principles would be contravened by disclosure to the public.

Turning to the requirements of the first principle, in order for processing, such as disclosure of personal data, to be fair and lawful, a condition set out in Schedule 2 of the DPA must apply. The Commission believes that the only condition which might be satisfied for the purpose of complying with the first principle is paragraph 6 of Schedule 2, which reads as follows:

'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.'

This condition essentially contains an inbuilt public interest test, weighing up the interests of the individual ('the data subject') against the interests of the public as a whole when considering disclosure under FoIA. It has been recognised in applying this condition that there must be a legitimate public interest in disclosure, which is necessary to meet that public interest and the disclosure must not cause unwarranted harm to the interests of the individual. (The Tribunal recommended this test in the case of The Corporate Officer of the House of Commons EA/2007/0060).

As has been stated in recent case law (the Tribunal in London Borough of Camden v Information Commissioner EA/2007/0021) 'FoIA provides the right to information. DPA conversely protects the right to privacy'. The Tribunal noted how different the section 40 exemption is to other exemptions under FoIA. It implicitly acknowledged that where section 40(2) is engaged, the interests of the data subject are the 'weightiest consideration' and further acknowledged that the right to privacy under Article 8 of the European Convention on Human Rights may be breached.

The disclosure of the information would no doubt allow you to measure the targets and objectives of the individual and whilst the CAAL concerned is an employee of a public body in receipt of public funding, all employees are entitled to expect some degree of privacy in relation to the measurement of their performance.

There would not have been an expectation on the part of those individuals that their performance data would be used for purposes other than within the context of a confidential appraisal process. This is balanced against the fact that these are senior employees who are engaged to work for a public body, the published objectives of which are to assist public bodies to deliver better value for money and to promote high standards of accountability. That said, there must be more than just public curiosity in the information. The expectation of privacy in relation to their perceived strengths and weaknesses as employees is a weighty factor, because of the prejudice that may result from disclosure. For that reason, the Commission has concluded it would not be fair and lawful to make the disclosure of wider performance related information.

In the event you are unhappy with this decision, please let me know and I will refer the matter to a nominated official, who will review it. Further information on our complaints process is contained in our Access to Information Complaints Procedure which is attached.

Yours sincerely

Rob Mauler

Robert Mauler
Public Enquiries Manager