

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 December 2017

Public Authority: Lancashire Fire and Rescue Service
Address: Headquarters
Garstang Road
Fulwood
Preston
PR2 3LH

Decision (including any steps ordered)

1. The complainant requested fire safety information relating to a named business premises at a specified address. Lancashire Fire and Rescue Service ultimately refused to disclose the information citing section 40(2) of the FOIA (personal information).
2. The Commissioner's decision is that Lancashire Fire and Rescue Service was entitled to rely on that section to withhold the requested information.
3. The Commissioner requires no steps to be taken as a result of this decision.

Background

4. The Regulatory Reform (Fire Safety) Order 2005 was introduced in October 2006. Fire and rescue authorities and other bodies ('enforcing authorities') have a duty to enforce fire safety in non-domestic premises¹.

¹ <https://www.gov.uk/government/publications/regulatory-reform-fire-safety-order-2005-guidance-note-enforcement>

5. The request in this case relates to a specified business premises. The Commissioner notes that, in some instances, there is a discrepancy in the name of the premises when it is referred to in the correspondence between the complainant and Lancashire Fire and Rescue Service. However, she is satisfied that it amounts to a minor inconsistency in the correspondence and is content that both parties are in fact referring to the same business premises.

Request and response

6. Following earlier correspondence, on 19 March 2017 the complainant wrote to Lancashire Fire and Rescue Service and requested information in the following terms relating to a named business premises at a specified address:

"... it is my reasonable expectation that as the café is open and licensed the arrangements have been inspected by your officers as required by Article 26 of the Fire Safety Order; I will therefore be grateful if you will provide me with the associated report for this area of the building".

7. On 7 April 2017 the complainant wrote to Lancashire Fire and Rescue Service and requested information in the following terms relating to the same business premises:

"...will you please forward copies of any duty officer's diaries which contain a reference to the advice given relating to the [named business premises] and/or the properties at [specified address] (I do not require the copies of the full diaries, just the related pages)? This is a formal FOI request".

8. The complainant followed these up with further correspondence on 11 April 2017:

"Please be aware that I submitted an FOI Request to [name redacted] Head of Service Development, on 19 March 2017 In a response to my letter, [name redacted] did not supply the requested details so this request is outstanding. Having read [name redacted]'s response to my letter I then submitted a further FOI request to him on 7 April 2017..."

I understand the formal deadline for these FOI requests has not been exceeded, but this e-mail is sent to this e-mail address as notice that two FOI requests have been made".

9. The Fire and Rescue Service responded on 10 May 2017, advising that it had aggregated the two requests. It refused to provide the requested information citing the following exemption as its basis for doing so:
 - section 41 of the FOIA (information provided in confidence).
10. Following an internal review the Fire and Rescue Service wrote to the complainant on 31 May 2017 maintaining its reliance on the section 41 exemption.

Scope of the case

11. The complainant contacted the Commissioner on 4 June 2017 to complain about the way his request for information had been handled.

12. He told the Commissioner:

"This request was for the Local Fire Authority to provide details of two documents that it has produced relating [to] the Regulatory Reform (Fire Safety) Order 2005. The documents are a copy of the Duty Inspector's Diary demonstrating that he/she visited [the named business premises] ... and also a copy of the inspection that the Local Fire Authority conducted on the ground floor of the same premises".

13. In correspondence with the Commissioner, the complainant explained his reasons for requesting the information. His correspondence raised a number of issues which are outside the scope of the Commissioner's remit.
14. The Commissioner acknowledges that fire safety is a sensitive issue. However, in a case such as this, she may only consider the provisions of the FOIA when reaching a decision on complaints brought to her.
15. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA.
16. During the course of the Commissioner's investigation, the Fire and Rescue Service revisited its handling of the requests. It revised its position, no longer citing section 41 of the FOIA. Instead it stated that it considered that section 40(2) (personal information) of the FOIA applied.
17. Public authorities can claim an exemption or exception for the first time before the Commissioner or the Tribunal. The Commissioner does not have discretion as to whether or not to consider a late claim.

18. Accordingly, the analysis below considers the Fire and Rescue Service's application of section 40(2) of the FOIA to the information withheld by virtue of that exemption.
19. The Commissioner has reviewed the withheld information which comprises:
 - a copy of the record of inspection (form FO1);
 - a letter generated as a result of the inspection; and
 - a copy of the relevant entry within the duty officer's notebook.

Reasons for decision

Section 40 personal information

20. Section 40(2) of the 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(3) or 40(4) of the FOIA is satisfied.
21. In this case, the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (DPA).
22. The first step for the Commissioner to determine is whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 cannot apply.
23. 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.

Is the information personal data?

24. The definition of personal data is set out in section 1 of the DPA. Section 1 defines personal data as:

"...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 intention of the data controller or any other person in respect of the individual."

25. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable.
26. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
27. From the definition above it follows that information, or a combination of information, that does not relate to and identify an individual, is not personal data.
28. In this case, Lancashire Fire and Rescue Service told the complainant:

"... to explain our position, it is our contention that the duty officer's notebook previously referred to amounts to an undertaking given by an individual and therefore comes within the definition of personal data. With regards to the other information requested, given that the business venture in question is a small business relating to a single, readily identifiable individual, we believe that the ICO guidance also classes this as personal data. As such, the absolute exemption within section 40 applies".

29. Lancashire Fire and Rescue Service told the Commissioner:

"It is relevant that the business is a small business ... and therefore any information about the business is equally about the owner. The owner is likely to be readily identifiable, certainly by local people..."

30. Lancashire Fire and Rescue Service confirmed that it considered that all the withheld information comprised personal data.
31. The Commissioner has published guidance '*Determining what is personal data*'². In that guidance, she considers the meaning of 'relates to' as follows:

"Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?"

Yes *The data is 'personal data' for the purposes of the DPA".*

² <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

32. It is a well-established view of the Commissioner that information relating to sole traders is the personal data of that individual. Information about the business of a sole trader will amount to personal data, as information about the business will be about the sole trader.
33. The Commissioner is mindful that while the business owner is not named in the request, the business is named and its address cited in the request for information.
34. The Commissioner also considers that context is important here.
35. In her guidance, the Commissioner recognises that there are examples of data which 'relate to' a particular individual because it is linked to that individual and informs or influences actions or decisions which affect an individual. For example,

"Information about a house is often linked to an owner or resident and consequently the data about the house will be personal data about that individual".

36. Having considered all the above, the Commissioner is satisfied that the withheld information in this case comprises personal information. She has reached this conclusion on the basis that the information relates to a living and identifiable individual and is clearly linked to them.
37. 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 data protection principles.

Would disclosure contravene the first data protection principle?

38. The first data protection principle states:

"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."

39. In the case of a 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 fair, lawful and would meet one of the DPA Schedule 2 conditions (and one of the Schedule 3 conditions if relevant). If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

Would disclosure be fair?

40. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.
41. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
 - the data subject(s) reasonable expectations of what would happen to their information;
 - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual(s) concerned); and
 - the balance between the rights and freedoms of the data subject(s) and the legitimate interests of the public.

Reasonable expectations

42. In the Commissioner's view, a key issue to consider in assessing fairness is whether the individual concerned has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals and the purpose for which they provided their personal data.
43. In this case, Lancashire Fire and Rescue Service confirmed that the data subject had not consented to disclosure.
44. In the circumstances, the Commissioner is satisfied that the individual concerned would have had a reasonable expectation that the withheld information, which constitutes their personal data, would not be disclosed to the public at large.

Consequences of disclosure

45. As to the consequences of disclosure upon the data subject, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
46. The Commissioner considers that disclosure in this case has the potential to cause damage and distress, particularly as she has found that disclosure of the information would not have been within the reasonable expectation of the individual concerned.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

The legitimate public interest

47. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to provide the information if there is an overriding legitimate interest in disclosure to the public. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public and the private interests of the requester.
48. Lancashire Fire and Rescue Service provided the Commissioner with a copy of the withheld information. The Commissioner has considered the nature and content of that information.
49. The Commissioner acknowledges that the information at issue is of particular interest to the complainant. However, in reaching a decision in this case, the Commissioner must consider whether there is a legitimate interest in the public or the requester having access to the information and the balance between this and the rights and freedoms of the data subject.
50. The Commissioner recognises that there is increased public and media interest in fire safety following recent events. In her blog published in the wake of the Grenfell Tower tragedy, the Commissioner recognised that people in many parts of the country are looking for reassurance that appropriate fire safety measures are in place to prevent further tragedies elsewhere.
51. However, the Commissioner is also mindful of her role both as regulator of the FOIA and of the DPA. She recognises that as the independent regulator of the FOIA, her role is to ensure people have easy access to records they are entitled to see. However, as regulator of the DPA, she recognises the rights of individuals to confidentiality.
52. Acknowledging the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) of the FOIA has been cited is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling and legitimate interest in disclosure and that disclosure is necessary to serve that interest.
53. In the circumstances of this case, while the Commissioner accepts that the specific information requested may be of interest to the complainant, she is not satisfied that its disclosure is of sufficient wider

public interest to warrant overriding the rights and expectations of privacy of the individuals to whom that information relates.

54. As the Commissioner has determined that it would be unfair to disclose the requested personal data, it is not necessary for her to go on to consider whether disclosure would be lawful or whether one of the conditions in Schedule 2 of the DPA would be met.
55. Accordingly she is satisfied that Lancashire Fire and Rescue Service correctly applied section 40(2) to the withheld information.

Right of appeal

56. 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

57. 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.
58. 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

Jon Manners
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