

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 May 2020

Public Authority: London Borough of Havering

**Address: Town Hall
Main Road, Romford
RM1 3BB**

Decision (including any steps ordered)

1. The complainant has requested information from the Council regarding a Penalty Charge Notice (PCN) that the Council issued against itself in respect of one of its own vehicles. The Council refused to disclose the requested information, citing section 40 of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the Council correctly applied section 40 to part of the requested information, however it is not engaged in respect of the remaining information, which is publicly available and reasonably accessible to the applicant, therefore section 21 of the FOIA should have been applied.
3. The Commissioner requires no steps to be taken.

Request and response

4. The complainant made a request for information on 24 August 2019, which was made in the following terms:-

"I would like to request a copy of all records held by the council in

relation to PCN HG24246362 and the corresponding tribunal case, reference 2170256443, subject to any personal data being redacted.

Please also confirm the amount of the tribunal fee paid, if any.”

5. The Council responded on 23 September 2019 and refused to disclose the information, citing section 40 of the FOIA (personal data of third parties) as a basis for non-disclosure.
6. On the same date, the complainant sought an internal review of the Council’s decision not to disclose the information, and the reviewer upheld the original decision, which was communicated to the complainant in the Council’s letter of 20 November 2019.

Scope of the case

7. The complainant contacted the Commissioner on 21 November 2019 to complain about the way in which the Council had handled his request for information.
8. The Commissioner has considered the Council’s handling of the complainant’s request and in particular its application of section 40 of the FOIA to the requested information. The Commissioner has also considered whether section 21 of the FOIA should have been applied to the withheld information.

Reasons for decision

Section 21 – Information accessible to applicant by other means

9. Section 21(1) of FOIA states that:

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1) -

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to

members of the public on request, whether free of charge or on payment."

10. As section 21 is an absolute exemption it is not subject to public interest considerations.
11. The purpose of this exemption is to ensure that there is no right of access to information via FOIA if it is available to the applicant by other means. The Commissioner's guidance on section 21 explains that, unlike consideration of most other exemptions in the FOIA, a public authority can take the individual circumstances of the applicant into account. In order for section 21 to apply there should be another existing, clear mechanism by which the particular applicant can reasonably access the information outside of the FOIA.
12. The Commissioner considers that it is reasonable for a public authority to assume that information is reasonably accessible to the applicant as a member of the general public, until it becomes aware of any particular circumstances or evidence to the contrary.
13. Even if the requested information is fully in the public domain, this does not mean that it is automatically exempt under section 21. Public authorities should consider an applicant's particular circumstances (if and when they become aware of them) when deciding whether publicly available information is in fact reasonably accessible to that individual. For example, the applicant may not have reasonable access to the internet.
14. Furthermore, the Commissioner considers that information, although generally available elsewhere, is only reasonably accessible to the applicant if the public authority:
 - knows that the applicant has already found the information; or
 - is able to provide the applicant with precise directions to the information so that it can be found without difficulty. When applying section 21 in this context, the key point is that the authority must be able to provide directions to the information.
15. In a telephone call and correspondence with the Commissioner, the Council indicated that all of the requested information, save for a photograph of the vehicle which was the subject of the PCN, was on the website www.londontribunals.gov.uk. The Council stated that the complainant was aware of this as he had referred to the website in previous correspondence.

16. The Commissioner considers that section 21 of the FOIA is engaged in this case and that the Council should have explicitly stated this in its refusal notice and directed the complainant to where the information could be found on the website, explaining that some had been redacted under section 40 of the FOIA.

Section 40(2) – third party personal data

17. 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(3A)(3B) or 40(4A) is satisfied.
18. The Commissioner, having discussed the matter with the Council, has ascertained that the information it holds within the scope of the complainant's request, which is not on the website, is a photograph of the vehicle in question, which clearly shows the faces of the driver of the vehicle and the children inside it. The Commissioner is satisfied that this information is personal data of individuals. The Commissioner is also therefore satisfied that it is not possible to anonymise the information in order to prevent the relevant individuals being identified.
19. In this case, the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
20. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
21. 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 DP principles.

Is the information personal data?

22. Section 3(2) of the DPA defines personal data as:

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

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

24. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
25. 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.
26. The Commissioner, having discussed the matter with the Council, has ascertained that the information it holds within the scope of the complainant's request, which is not on the website, is a photograph of the vehicle in question, which clearly shows the faces of the driver of the vehicle and the children inside it. The Commissioner is satisfied that this information is personal data of individuals. The Commissioner is also therefore satisfied that it is not possible to anonymise the information in order to prevent the relevant individuals being identified.
27. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that all of the redacted information relates to certain living individuals. She is satisfied that this information both relates to and identifies them. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
28. The fact that information constitutes the personal data of identifiable living individuals 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 DP principles.
29. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

30. Article 5(1)(a) of the GDPR states that:

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

31. In the case of an 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 lawful, fair and transparent.

32. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

33. Article 6(1) of the 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"* lawful bases for processing listed in the Article applies.

34. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"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.

35. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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;

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) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the 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".

ii) Necessity test: Whether disclosure of the information 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.

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

Legitimate interests

37. In considering any legitimate interest(s) in the disclosure of 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 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.

38. In this case, the complainant was seeking information which related to a specific PCN issued by the Council against one of its own vehicles and the resulting appeal. The Commissioner is satisfied that there is a legitimate interest to the public in seeing how the Council's appeal and decision-making processes operate in such an instance.

Is disclosure necessary?

39. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

40. In this case, the Commissioner is satisfied that the withheld information would not be available to the public other than through a freedom of information request. However, she is not satisfied that disclosure would be necessary in order to achieve the legitimate interest as all other information within the scope of the complainant's request can be found on the specified website and, in the Commissioner's view, this would be enough to satisfy the legitimate interest, namely the interest of the public in knowing that the Council is transparent about the process of issuing PCNs in respect of all PCNs it issues, even against its own vehicles, and about any ensuing appeals process.
41. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure 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

42. The Commissioner has therefore decided that the Council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

- 43. 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: 0116 249 4253

Email: GRC@justice.gov.uk

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

- 44. 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.
- 45. 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

Deirdre Collins
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