

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 July 2023

Public Authority: London Borough of Redbridge
Address: Town Hall
High Road
Ilford
Essex
IG1 1DD

Decision (including any steps ordered)

1. The complainant has requested information about London Borough of Redbridge (the Council) making contact with their neighbour. The Council refused to comply with the request, citing section 40(2) (personal information) of FOIA as its basis for doing so.
2. The Commissioner's decision is that the Council was entitled to refuse to disclose the requested information by virtue of section 40(2) of FOIA.
3. The Commissioner does not require the Council to take any further steps.

Request and response

4. On 16 March 2023, the complainant wrote to the Council and requested information in the following terms:

"I WOULD LIKE TO ASK YOU TO PROVIDE ME WITH THE DATES ON WHICH , AS [name redacted] SAYS IN HER EMAIL , COPY OF WHICH

YOU CAN SEE BELOW , [name redacted] OFFICERS 'have spoken to [MY] neighbours on many occasions over the past year both in person and on the telephone in relation to alleged works at the address [address redacted]'."

5. The Council responded on 13 April 2023. It refused to disclose the requested information, citing section 40(2) of FOIA as its basis for doing so.
6. On 17 April 2023 the complainant requested an internal review. As far as the Commissioner is aware, the Council did not provide the complainant with an internal review outcome so, to prevent further delay, he has used his discretion and proceeded to an investigation without one.

Scope of the case

7. The complainant contacted the Commissioner on 25 June 2023 to complain about the way their request for information had been handled.
8. The Commissioner considers the scope of his investigation to be to establish whether the Council is entitled to withhold the requested information under section 40(2) of FOIA.

Reasons for decision

Section 40 – personal information

9. Section 40(2) of 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.
10. In this case the relevant condition is contained in section 40(3A)(a)¹. 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 UK General Data Protection Regulation ('UK GDPR').

¹ As amended by Schedule 19 Paragraph 58(3) DPA

11. 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 FOIA cannot apply.
12. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, a 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.
16. 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.
17. In the circumstances of this case, having considered the information being requested, the Commissioner is satisfied that the information quite clearly relates to the individuals who have been identified within the request. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
18. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
19. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

21. 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 lawful, fair and transparent.
22. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(d) of the UK GDPR

23. Article 6(1)(d) of the UK GDPR provides a lawful basis for processing where:

“processing is necessary in order to protect the vital interests of the data subject or of another natural person”.

24. In this case the complainant argues that disclosure of the requested information is necessary in order to protect “my and my [redacted] vital interests of a peaceful enjoyment of our property without nuisance”.
25. Recital 46 provides some further guidance²:

“The processing of personal data should also be regarded as lawful where it is necessary to protect an interest which is essential for the life of the data subject or that of another natural person. Processing of personal data based on the vital interest of another natural person should in principle take place only where the processing cannot be manifestly based on another legal basis...”

26. The Commissioner’s published guidance³ further explains that it is clear from Recital 46 that vital interests are intended to cover only interests that are essential for someone’s life. So this lawful basis is very limited in scope, and generally only applies to matters of life and death, such as emergency medical care where the individual is incapable of giving their consent to the processing.
27. The Commissioner is satisfied that “peaceful enjoyment of our property” does not constitute a vital interest. He is further satisfied that the disclosure of the dates when a Council officer spoke with the complainant’s neighbour in the past year is not necessary in order to protect the life of the complainant or their spouse. Therefore, lawful basis 6(1)(d) is not applicable in this case.

² <https://gdpr-info.eu/recitals/no-46/>

³ <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/a-guide-to-lawful-basis/lawful-basis-for-processing/vital-interests/>

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

28. The Commissioner considers that the lawful basis most applicable to the processing of personal data in response to a request for information under FOIA 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”⁴.

29. In considering the application of Article 6(1)(f) of the 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 disclosure of the information is necessary to meet the legitimate interest in question;

iii) **Balancing test:** Whether to above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

30. 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

31. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.

⁴ 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”.

32. Further 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
33. In this case the complainant has stated that they require the requested information in order to pursue complaints against a neighbour in an ongoing dispute. The Commissioner is thus satisfied that disclosure would serve a legitimate interest (albeit a narrow, personal one) and therefore the first part of the three-part test has been met.

Is disclosure necessary?

34. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
35. The Commissioner is satisfied that the specific requested information in this case is not otherwise available to the public via any other means. Therefore, there are no less intrusive means of achieving the identified legitimate aims.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

36. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to a request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
37. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
38. In the Commissioner's view, a key issue is whether the individuals concerned have 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.

39. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
40. The Commissioner recognises that disclosure of information in response to a FOIA request is effectively a disclosure to the world at large. It is the equivalent of the Council publishing the requested information on its website. The Commissioner is satisfied that the data subjects would have a reasonable expectation that the Council would not disclose information about them in this way.
41. The Commissioner is satisfied that the requested information is only relevant to a private dispute and there are no compelling or weightier public interest arguments in favour of disclosure in this particular case which would warrant overriding the expectations of the data subjects concerned. The Commissioner considers disclosure would be an unwarranted intrusion into their private lives which could cause distress and upset. The Commissioner is further satisfied that the disclosure of the requested information in this case, to the world at large, on the matter of a private dispute, is neither an appropriate or proportionate step for the Council to take.
42. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
43. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go to separately consider whether disclosure would be fair or transparent.
44. The Commissioner concludes that the Council was entitled to withhold the requested information by virtue of section 40(2) of FOIA.

Other matters

45. Whilst FOIA does not impose a statutory time limit within which internal reviews must be completed, the Commissioner wishes to take this opportunity to remind the Council that he does expect public authorities to respond to internal review requests, as a matter of good practice, within 20 working days in most cases and no longer than 40 working

days for more complex cases. More guidance on the Commissioner's expectations of good practice relating to internal reviews can be found in the section 45 Code of Practice⁵.

⁵https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

46. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

47. 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.
48. 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

Carolyn Howes
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Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF