

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 October 2023

Public Authority: London Borough of Bexley
Address: Bexley Civic Offices
Broadway
Bexleyheath
Kent
DA6 7LB

Decision (including any steps ordered)

1. The complainant has requested information regarding exclusions from the duty to register financial interests. The London Borough of Bexley (the Council) relied on section 44 (statutory prohibition) and 40(2) of FOIA (third party personal data) to withhold the information.
2. The Commissioner's decision is that the Council was entitled to rely on section 40(2).
3. The Commissioner does not require any further action.

Background

4. Section 31 of the Localism Act 2011 requires councillors to declare any financial interests that they may have that relate to their work. It also prohibits them from participating in discussions or decisions affecting matters in which they have a financial interest. For transparency, these interests are usually made public.¹
5. Section 32 of the Localism Act allows a local authority to not publish details of a particular interest if the councillor is concerned that

¹ <https://www.legislation.gov.uk/ukpga/2011/20/section/31>

publishing would leave them or their families subject to violence or intimidation. Any such application must be approved by the local authority's monitoring officer.²

Request and response

6. On 29 March 2023, the complainant wrote to the public authority and requested information in the following terms:

"As a follow-up to FOI request 13609782, where the monitoring officer confirmed that in 2022, she reviewed and approved requests for Section 32 exemptions for councillors [names redacted], can you please

1. Share suitably anonymised justifications for the exemption, proposed by the councillors.

2. Advise how many Section 32 applications (if any) were rejected in 2022."

7. The Council responded on 27 April 2023. It advised that for the first part of the request, the information was exempt under section 40(2). For the second part of the request the Council explained that no section 32 application had been rejected.

Scope of the case

8. The complainant contacted the Commissioner 29 June 2023 to complain about the way his request for information had been handled.
9. During the Commissioner's investigation the Council revised its response to the complainant. The Council's final position was that some of the requested information could be disclosed regarding one Councillor who was also a member of the House of Lords. The remaining information was exempt under section 44(1)(a) and section 40(2). The Council explained that, under the House of Lords code of conduct, full property addresses should not be published. This reasoning is known to the public and therefore would not be exempt under section 40(2) or section 44(1)(a).

² <https://www.legislation.gov.uk/ukpga/2011/20/section/32>

10. The Commissioner considers the scope of his investigation is to establish whether the public authority is entitled to withhold the requested information under section 40(2) or, if required, under section 44..

Reasons for decision

Section 40 personal information

11. 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.
12. In this case the relevant condition is contained in section 40(3A)(a)³. 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').
13. 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.
14. 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?

15. Section 3(2) of the DPA defines personal data as:
"any information relating to an identified or identifiable living individual".
16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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

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

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

18. 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.
19. The withheld information contains details of the perceived threat and the individuals involved. It also contains information that the Commissioner considers would be special category personal data about identifiable individuals.
20. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
21. 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 DP principles.
22. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

23. 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".

24. 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.
25. 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

26. 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"⁴.

27. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires one of the ten conditions for processing set out in Article 9 of the UK GDPR, to be met.
28. 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;
 - 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.
29. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Is the information special category data?

30. Information relating to special category data is given special status in the UK GDPR.
31. Article 9 of the UK GDPR defines "special category" as being personal data which reveals racial, political, religious, or philosophical beliefs, or trade union membership; and genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health, or data concerning a natural person's sex life or sexual orientation.

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. Although the wording of the request does not explicitly seek special category data, having reviewed the withheld information, the Commissioner is satisfied that some of it would be considered special category data as it would reveal information falling into one or more of the categories listed in the previous paragraph. The Commissioner cannot go into further detail on this point without revealing the information that has been withheld.
33. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the ten stringent conditions of Article 9 can be met.
34. The Commissioner considers that the only Article 9 conditions that could be relevant to a disclosure under the FOIA are condition (a) (explicit consent from the data subject) or condition (e) (data made manifestly public by the data subject).
35. The Commissioner has seen no evidence that individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request, or that they have deliberately made this data public.
36. As there is no legal basis for its disclosure, processing this special category data would be unlawful and therefore would breach principle (a).
37. The Commissioner will now consider the information which is not special category data.

Legitimate interests

38. In considering any legitimate interest(s) in the disclosure of the requested information under the 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.
39. 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.
40. The complainant explained that they were concerned about the perceived lack of enforcement surrounding Councillors' register of interest disclosures. They indicated that this could be an abuse of the

section 32 exemption. In the last Council term only two Councillors out of 45 had sought an exemption, whereas there were now 10 out of 45.

41. The complainant explained that disclosing the requested information would "shed light on 'rubber stamping' of section 32 applications" and therefore curb any abuse, whilst improving compliance with the legislation.
42. The Commissioner accepts that the complainant has a legitimate interest in disclosure of this information.

Is disclosure necessary?

43. '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.
44. The Commissioner is not satisfied in this case that there are less intrusive means of achieving the legitimate aims identified. If the complainant is concerned over the conduct of the Council, they could file a corporate complaint and ask for the matter to be investigated. If they remained dissatisfied, it could be referred to the independent Local Government and Social Care Ombudsman.
45. The Commissioner further notes that as the majority of the requested information is special category information, once such information has been removed, the remaining information would only provide a partial picture of how the process operated.
46. Finally, the Commissioner notes that, although section 32 of the Localism Act allows for a particular interest not to be published, all councillors, whether they have applied for an exemption or not, are still subject to section 31 of the same Act. They are prevented from discussing or voting on matters in which they have a financial interest – irrespective of whether the interest is or is not published. The Monitoring Officer, who has a duty to ensure that the Council is run in accordance with the law, is responsible for ensuring that interests are properly declared and that councillors recuse themselves where appropriate.
47. Whilst the precise interests themselves may have been withheld from publication, each councillor's entry shows where the exemption has been applied – which, for most of the councillors within the scope of the request, relates to any land they may own or lease within the borough.

48. Therefore, if a person suspected that a particular councillor had taken advantage of an interest not being published and taken part in a decision in which they had a financial interest, that person would be able to raise the matter with the Monitoring Officer and, if necessary with the Ombudsman. This still allows councillors to be held to account without revealing their personal data to the world at large.
49. Based on the above factors, the Commissioner has determined that disclosure would not be necessary. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
50. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
51. As the Commissioner is satisfied that the requested information is exempt under section 40(2), he does not need to consider section 44.

Other matters

52. The Commissioner would like to remind the Council that while Internal Reviews are not a statutory requirement under FOIA, he still considers them to be an example of good practice. In this case the Council did not conduct an internal review.

Right of appeal

53. 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

54. 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.
55. 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

Roger Cawthorne
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