

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **20 September 2023**

Public Authority: **Brighton and Hove City Council**

Address: **Hove Town Hall
Norton Road
Hove
BN3 3BQ**

Decision (including any steps ordered)

1. The complainant has requested information from Brighton and Hove City Council ("the Council"), in relation to a Home of Multiple Occupancy (HMO) licence for a specific property. The Council refused to provide the requested information, citing section 40(2) of FOIA – personal information.
2. The Commissioner's decision is that the Council was entitled to rely on section 40(2) of FOIA.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 10 March 2023, the complainant wrote to the Council and requested information in the following terms:

"I am writing to request the licence condition in plain English as they are listed in a summary short hand none specific form on the list of HMO licences on the council website.

The HMO : [ADDRESS]

Licencing conditions are listed as follows;-

Electrical Works, Electrical Works, Enlargement of bedrooms, Enlargement of bedrooms, HMO - Elec Mandatory conds, HMO - Elec Mandatory conds, HMO - Fire Mandatory conds, HMO - Fire Mandatory conds, HMO - Furniture Mandatory conds, HMO - Furniture Mandatory conds, HMO - Gas Mandatory conds, HMO - Gas Mandatory conds, HMO - Property Chges Mandatory conds, HMO - Property Chges Mandatory conds, HMO - Property Maint Mandatory conds, HMO - Property Maint Mandatory conds, HMO - RubbishRecyc Mandatory conds, HMO - RubbishRecyc Mandatory conds, HMO - Tenant Agrmnt Mandatory conds, HMO - Tenant Agrmnt Mandatory conds, Management / Disrepair, Management / Disrepair, Management / Repairs, Management / Repairs, Notes, Notes, Other Fire Works, Other Fire Works, Structural Fire Works, Structural Fire Works."

5. The Council responded on 12 April 2023. It stated that it holds the information, however, it refused to provide this information, citing section 40(2) of FOIA.
6. Following an internal review the Council wrote to the complainant on 4 May 2023. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 3 July 2023, to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of this complaint is to determine whether the Council was correct to cite section 40(2) of FOIA.

Reasons for decision

Section 40 personal information

9. 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.
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

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

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').

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 the 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, 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.
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 withheld information, the Commissioner is satisfied that the information relates to the data subjects. Whilst the landlord has not been named, the requested information relates to them and their property. 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 the 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)(f) of the UK GDPR

23. 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"².

24. In considering the application of Article 6(1)(f) of the UK 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.
25. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

² 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 UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".

Legitimate interests

26. 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.
27. 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.
28. The Commissioner acknowledges that there is a wider legitimate interest in the release of the requested information, as it will impact the other properties surrounding the one in question.

Is disclosure necessary?

29. '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.
30. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

31. 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 the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
32. 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.
33. 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.
34. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

Council's position

35. The Council has explained that it processes the information about Homes of Multiple Occupancy (HMO), pursuant to the Housing Act 2004. It advised that one of the duties that it must uphold is that of providing a register of all HMOs that it is responsible for licencing under the conditions of the Housing Act 2004. It added that this is necessary for the purpose of the legitimate interests pursued by the Council as the data controller for this information.
36. The Council has argued that the requested information is personal data, as failure for a landlord to carry out any requirements can lead to legal action, which can result in fines or a prosecution.
37. The Council explained that HMOs are treated as private residences by the Council and, as such, the contents of the licences issued are not treated as a public document.
38. The Council advised that it is aware that there is a legitimate interest to the public in knowing that the Council undertakes its duties regarding HMOs.
39. The Council also does not consider that there would a wider legitimate interest in individual licence conditions being published. It acknowledged the concerns of the complainant but added that the licences are issued at a point in time and are not an accurate reflection of the current state of the licence conditions.

The complainant's position

40. The complainant has explained that they consider that HMO licencing departments have a duty of care for those in the HMO and to the

general community in which they are situated. They consider that by withholding the information under section 40(2) they are excluding themselves from accountability to communities around them and are making themselves above scrutiny.

41. The complainant has explained that their property has been damaged; there is damp within the property due to the way a fixture has been placed in the HMO.
42. The complainant has advised that they want the information so that it can be fed back to the Council so that they can improve their inspection policies and procedures. They add that they want to ensure that compliance with the regulations for the safety of the occupants and the local community are being adhered to.

The Commissioner's position

43. The Commissioner acknowledges the complainant's concerns and that they consider there is a wider public interest in disclosure of the licences. He also notes the complainant's specific concerns regarding the damage to their property.
44. The Commissioner recognises that there is a legitimate public interest in ensuring that the Council does review the points made when a licence is issued and that such works are carried out.
45. Whilst the Commissioner notes these concerns, he must balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms.
46. The Commissioner is satisfied that the landlord of the property would have a reasonable expectation that their personal data would not be disclosed to the wider-world. If information were released and it was found out that the landlord had been fined or prosecuted, this would mean that personal information about the individual had been released to the world at large.
47. 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.
48. 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.

49. To the extent that any information within scope of the request is environmental in nature, it is exempt under regulation 13 of the Environmental Information Regulations 2004 (EIR) in the alternative to section 40 of FOIA.

Right of appeal

50. 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

51. 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.
52. 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

Michael Lea
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF