

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 19 December 2011

Public Authority: London Borough of Waltham Forest
Address: Waltham Forest Town Hall
Forest Road
Walthamstow
E17 4JF

Summary

The complainant requested a list of all council-owned properties in two postcode areas. The Council refused this request on the basis of section 40(2) (personal information) of the Freedom of Information Act 2000. The Commissioner finds that the Council incorrectly applied the exemption and requires the Council to disclose the information which is held .

The Commissioner's Role

1. 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 Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant wrote to the Council on 24 September 2010 with the following request:

"Please can you provide me with a list of all the council owned properties in the CM11 and CM12 postcodes".

3. The Council responded on 22 October 2010, confirming that it held the requested information. However, it withheld the information, citing the exemption in section 40(2) in conjunction with 40(3)(a)(i) of the Act (personal information).

4. The complainant requested an internal review on 22 October 2010. The Council provided the complainant with the outcome of its internal review on 19 November 2010, upholding its decision not to disclose the list of council-owned properties. The Council explained that it had entered into an arrangement with a company to manage the Council's housing stock. It provided the complainant with the number of properties within the two postcode areas that that company manages and confirmed that all of those properties were occupied.

The Investigation

Scope of the case

5. The complainant contacted the Commissioner on 22 November 2010 to complain about the way his request for information had been handled.
6. Although the Commissioner understands from the complainant that some councils would appear to have complied with similar requests, he does not consider that this sets an automatic precedent for disclosure under the Act. In the Commissioner's view, each case must be considered on its merits.
7. In this case, the Council has interpreted the request for a "list" of all its properties to mean the addresses of such properties. In the context of the request, the Commissioner considers it not unreasonable to interpret "list" in this way.
8. As a result of the further correspondence between the Council and the complainant, as outlined in the *Chronology* section below, the Commissioner considers the scope of his investigation to be whether the Council was correct to apply section 40 to the requested information relating to the postcode area CM11.

Chronology

9. The Council wrote to the Commissioner on 4 February 2011, providing him with a copy of the withheld information. It told him that, although it was aware of previous Decision Notices in relation to requests for similar information, it considered that the context of the request in this case differs significantly from those cases.
10. On 20 May 2011, the Commissioner wrote to the Council asking it for further explanation of its reasons for citing section 40 in relation to the request.
11. The Council provided a comprehensive response on 8 July 2011.

12. During the course of the Commissioner's investigation the Council wrote to the complainant to confirm that it does not own properties with a CM12 postcode. It also clarified that it was withholding the addresses of council-owned premises in the CM11 postcode area occupied by housing tenants. However, it provided him with details of other council-owned properties within that postcode that fell within the scope of his request, for example a derelict depot building, and apologised for failing to provide this information at the time of his request.

Analysis

Exemptions

Section 40 Personal information

13. Section 40(2) of the Act is an absolute exemption which relates to the personal information of persons other than the requestor.
14. Section 40(2) together with the condition in section 40(3)(a)(i) or 40(3)(b) provides an absolute exemption if disclosure of information falling within the definition of personal data contained in section 1(1) of the Data Protection Act 1998 (the DPA) would breach any of the data protection principles. A full copy of the section can be found in the Legal Annex at the end of this Decision Notice.
15. In this case the Council is citing section 40(2) in conjunction with section 40(3)(a)(i).

Is the requested information personal data?

16. The Commissioner is satisfied that the address of a residential property constitutes personal data as outlined below. This is consistent with the Information Tribunal's decision in the case of *England and London Borough of Bexley v Information Commissioner* (EA/2006/0060 & 0066), and consistent with his decision in his Decision Notice referenced FS50292926,
17. In the Commissioner's view, the two main elements of personal data are that the information must 'relate to' a living individual and that person must be identifiable. 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, has them as its main focus or impacts on them in any way.
18. With respect to an address, if the address of a property is known, it is generally possible to identify the owner or tenant from other information

which is in the public domain: for example, the Land Registry, the electoral roll or talking to neighbours of that property. In the case of the specific addresses in question it is clear that the tenants can be identified..

Would disclosure contravene a data protection principle?

19. The fact that the information constitutes personal data does not automatically exclude it from disclosure. The second element of the test is to determine whether disclosure would contravene any of the data protection principles.
20. The Council has argued that the disclosure of a list of addresses of its properties would contravene the first principle of the Data Protection Act (DPA) which states that:

“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.”

21. The information requested by the complainant is clearly not “sensitive personal data” as defined in the DPA. The Commissioner is therefore satisfied that schedule 3 of the DPA is not relevant in this case.
22. In considering whether a disclosure is fair under the first principle of the DPA, the Commissioner considers it useful to balance the consequences of any disclosure and the reasonable expectations of the data subject with the general principles of accountability and transparency.

The reasonable expectations of the data subjects

23. In correspondence with the complainant, the Council argued that release of the requested information would breach the first data protection principle:

“in particular the requirement of fairness because the property owners would have an expectation of privacy”.

24. In support of this argument, it provided the Commissioner with a copy of the application form prospective tenants are required to complete. In this respect, the Council told the Commissioner:

“There is no notification given that postal addresses of tenanted properties are disclosed to the public at large”.

25. The Commissioner understands the Council's view to be, therefore, that council tenants would not normally have the expectation that their identity as council tenants would be disclosed by the local authority and would expect that the addresses of council properties would be used solely for administration purposes. The Commissioner accepts that there is a general expectation of privacy about information provided during the application process and that certain information will not be disclosed associated with an address but it does not follow that this extends to disclosure of the address alone.
26. In correspondence with the Commissioner, the Council pointed out that, when individuals register for the purposes of being placed on the Electoral Register:

"they are given the opportunity to tick to indicate where they do not wish their details to appear on the Edited version of the Register".
27. It explained that the Edited version contains the details of anyone who has not "opted out" and can be sold or used for any purpose. In contrast, there are statutory prohibitions on who can receive the Full Register, which contains the details of all electors including their addresses, and what it can be used for. The Commissioner does not agree that the parallel between the information held on the register and the address information provided by responding to the request is persuasive.
28. However, the Council did not provide the Commissioner with any information about how many, if any, of the tenants whose addresses are at issue in this case are on the edited version of the Register.
29. The Council also argued that publishing the addresses of tenanted-occupied council accommodation is contrary to tenants' rights of privacy, a right which, it argues, is afforded to others who do not house themselves via council-owned premises.
30. In this respect, the Commissioner notes that the Council publishes details of "recent lets" on its website on a regular basis and that this information contains address details including postcode.

Would disclosure cause any unnecessary damage or distress to the data subjects?

31. In looking at the consequences of disclosure, the Commissioner has considered whether disclosure would cause any unnecessary damage or distress to the data subjects.

32. The Council told the Commissioner that it has concerns about companies targeting tenants of council properties. It argued that:

"disclosing tenanted property information is likely to result in those addresses being targeted by organisations seeking to sell services. The information will provide an address and that the occupant is a tenant of the Council. Some of those tenants will be vulnerable adults".

33. The Commissioner notes that the Council has not provided any evidence in support of this argument. Nor has it provided any explanation as to why it considers that the tenants of properties within the postcode concerned are 'vulnerable'.
34. The Commissioner accepts that, as council housing homes are normally offered to the people who need them most, some of the tenants may well be vulnerable individuals. However, the Commissioner has taken into account that the request in this case was for a list of all the council-owned properties in a specified postcode area and not for a sub-set of information which may have allowed the complainant to deduce additional information about the data subjects from the list.

Would it be fair to disclose the requested information?

35. In deciding what is fair, the Commissioner considers it useful to balance the possible consequences of disclosure for the data subjects, along with their reasonable expectations, with the more general principles of accountability and transparency and any legitimate interests which arise on the specific circumstances of the case.
36. The Commissioner recognises that there is an important legitimate public interest in transparency surrounding council owned properties.
37. Although he accepts that there would be unfairness to individuals if they were publicly identified as members of a vulnerable group, the Commissioner does not consider that there would be any general unfairness to individuals in being identified as council tenants. In taking this view, he is mindful of the low inherent sensitivity of the data, and of the fact that knowledge of whether a particular property is, or is not, owned by the Council will often be available (for example, to neighbours, or because a property is part of a known council housing estate).
38. Although the Commissioner accepts that the Council's tenants may not have had a clear understanding that the details of their addresses would be disclosed, he does not consider that this automatically makes disclosure unfair. Nor is he satisfied that there would be any unnecessary harm or distress to the data subjects from disclosure of the

information in this case. He is also mindful of the significant legitimate public interest in disclosure.

Lawfulness

39. In the context of freedom of information requests, the Commissioner considers it is likely that it will be unlawful to disclose personal information where it can be established that the disclosure would be a breach of a statutory bar, a contract or a confidence. In this case he has seen no evidence that any of these breaches would occur and he has consequently concluded that disclosure would not be unlawful.
40. As the Commissioner has concluded that disclosure would not in fact be unfair or unlawful he has gone on to consider Schedule 2 of the DPA. Although there are six conditions in schedule 2, he only considers condition 1 (consent) and 6 (legitimate interests) to be relevant in this case.

Schedule 2 condition 1 of the DPA

41. In the Commissioner's view, this condition will not be met unless all individuals whose personal data falls within the scope of the request have consented to the release of their information.
42. In considering the question on consent in this case, the Commissioner has taken into account the fact that he has not been provided with any evidence that the tenants concerned have been approached with respect to consenting to the disclosure of their addresses.
43. In the absence of any evidence from the Council that it has sought and obtained the consent of the tenants whose addresses are in scope of this case, the Commissioner has gone on to consider Schedule 2 condition 6.

Schedule 2 condition 6 of the DPA

44. The sixth condition states that:

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

45. The sixth condition therefore establishes a three-part test which must be satisfied:
 - there must be legitimate interests in disclosing the information;

- the disclosure must be necessary for a legitimate interest of the public; and
 - even where the disclosure is necessary it nevertheless must not cause unwarranted interference (or prejudice) to the rights, freedoms and legitimate interests of the data subject.
46. The Council argued that the context of the request in this case “differs significantly” from other cases in which the Commissioner has issued a Decision Notice and which it considers concern similar information to the information requested in this case. In particular, it brought to the Commissioner’s attention the fact that, unlike those other cases, the complainant in this case had not put forward any public interest arguments.
47. The Commissioner does not accept that this is a relevant argument. The general principle embodied in the Act is that public authorities should not have regard to the identity or circumstances of a requester. The release of information to the requester should be regarded, in other words, as the equivalent of disclosure to the world at large. When considering disclosure against schedule 2 condition 6, ‘the parties’ to whom the data will be disclosed will be the public. Whilst public interest arguments of the complainant should be considered they are not a requirement.
48. The Commissioner has already addressed the public interest question when considering the question of fairness.
49. In considering the issue of necessity, the Commissioner has considered whether there are any alternative means of meeting the identified legitimate interests and the extent to which those alternative regimes meet those legitimate interests. However, in this case, the Commissioner is not satisfied that there are other means of meeting the legitimate interests of accountability and transparency.
50. In the Commissioner’s view, even where disclosure is necessary to address the legitimate public interest, it may still be unwarranted if there is a disproportionate detriment to the rights and interests of the individual concerned.
51. In this case, the Commissioner has already concluded, when considering fairness above, that there would not be any unnecessary harm or distress caused to the data subjects from disclosure of the information.
52. For all of the above reasons, the Commissioner has concluded that section 40(2) of the Act is not engaged.

Procedural Requirements

53. The Commissioner notes that in this case, during the course of his investigation, the Council accepted that some of the requested information was not held. Similarly, it accepted that some of the requested information was not exempt and accordingly released that information to the complainant. He believes that some credit should be given to the Council for having recognised, albeit belatedly, that its response to the request was incorrect.
54. However, the Commissioner finds the Council in breach of section 1(1)(b) of the Act in failing to provide, until after the complainant had approached the Commissioner, the withheld information which he has now concluded should have been disclosed. In addition, since the Council failed to provide the information within the statutory time limit it breached section 10(1) of the Act.

The Decision

55. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act:
- it incorrectly applied section 40(2) to withhold the information requested;
 - it breached section 1(1)(b) by not providing the complainant with the requested information by the time of the completion of the internal review;
 - it breached section 10(1) by not providing the complainant with the requested information within 20 working days of the request.

Steps Required

56. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- provide the complainant with the list of council-owned properties in the CM11 postcode.
57. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

58. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

59. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 19th day of December 2011

Signed

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
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Wilmslow
Cheshire
SK9 5AF

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

Personal information.

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

i. any of the data protection principles, or

ii. section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Schedule 2

Conditions relevant for purposes of the first principle: processing of any personal data

Condition 1 provides that –

The data subject has given his consent to the processing.

Condition 2 provides that –

The processing is necessary—

- (a) for the performance of a contract to which the data subject is a party, or
- (b) for the taking of steps at the request of the data subject with a view to entering into a contract.

Condition 3 provides that –

The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

Condition 4 provides that –

The processing is necessary in order to protect the vital interests of the data subject.

Condition 5 provides that –

The processing is necessary—

- (a) for the administration of justice,
- (b) for the exercise of any functions conferred on any person by or under any enactment,
- (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
- (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

Condition 6 (1) provides that –

The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

Condition 6 (2) provides that –

The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.