

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 20 November 2019

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

**Address:** Kings House  
Grand Avenue  
Hove  
BN3 2LS

#### Decision (including any steps ordered)

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1. The complainant has requested information from Brighton and Hove Council ("the Council") regarding parking permits. The Council disclosed some information but stated that it was unable to provide the rest due to issues with obtaining the information from its systems.
2. The Commissioner has used her discretion to apply section 40(2) – third party personal data, to the remainder of the information which it holds. The Commissioner considers that this information is exempt from disclosure under section 40(2) and does not require the public authority to take any steps as a result of this decision notice.

#### Request and response

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3. On 26 April 2019, the complainant wrote to the Council and requested information in the following terms:

*"I am local resident doing some analysis on parking and I would like a copy of the current resident parking permit register (I do not need the name of the holder just the address and number of permits if more than one in a house hold)."*

4. The Council responded on 1 May 2019. It stated that it could not provide the requested information as it is "too specific and sensitive". However, the Council offered to provide information which related to the number of permits issued per zone.
5. On 2 May 2019, the complainant asked for their request to be provided to the FOIA team within the Council.
6. The Council responded on 20 May 2019 and advised that it held the information but it was withholding it under section 40(2) of the FOIA.
7. Following an internal review the Council wrote to the complainant on 21 June 2019. It stated that it upheld its original position.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 24 June 2019, to complain about the way his request for information had been handled.
9. The Council originally applied section 40(2) of the FOIA to the requested information. However, during the Commissioner's investigation, the Council provided some of it to the complainant.
10. It explained to the Commissioner that it held further information but that this could not be extracted from its systems, without considerable manual resource.
11. Whilst alluding to the potential difficulties of obtaining the remaining information, the Council did not specifically apply a further exemption nor did they retract the initial reliance on section 40. As such, the Commissioner has considered whether the rest of the information that the Council holds is exempt from disclosure under section 40(2) of the FOIA – third party personal data.

### **Reasons for decision**

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#### **Section 40 - personal information**

12. 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.

13. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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').
14. 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.
15. 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 DPA principles.

***Is the information personal data?***

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

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

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. The Commissioner's guidance on what is personal data<sup>2</sup> states that if information 'relates to' an 'identifiable individual' it is 'personal data' regulated by the DPA.
18. 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.
19. 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.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf> & [https://ico.org.uk/media/fororganisations/documents/1549/determining\\_what\\_is\\_personal\\_data\\_quick\\_reference\\_guide.pdf](https://ico.org.uk/media/fororganisations/documents/1549/determining_what_is_personal_data_quick_reference_guide.pdf)

20. The withheld information comprises partial addresses (house number and first line of the address) and some full postcodes. In determining whether this is personal data, the Commissioner is guided by the Tribunal Decision for *Dundas v ICO & the City of Bradford* (EA/2007/0084)<sup>3</sup>. In that case, the request concerned the addresses of those involved in a consultation exercise on proposed changes to a parish boundary. The public authority had disclosed the addresses of some organisations but had withheld the house numbers and last two letters of the postcodes of residential properties. The Tribunal found *"that the full postcode, that is the last two letters, would be sufficient for a living individual to be identified and we consider that the postcodes, in this instance, fall within...the definition of personal data."*
21. In this case, the Council has not provided a detailed argument regarding whose personal data it is. However, in the circumstances of this case, the Commissioner is satisfied that the information relates to the residents of the relevant properties. In light of the tribunal decision set out above, the Commissioner considers that the information is sufficient to identify specific properties. She is satisfied that the information provided relates to and could identify the data subjects concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
22. 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.
23. The most relevant data protection principle in this case is principle (a).

***Would disclosure contravene principle (a)?***

24. 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"*.

25. 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.

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<sup>3</sup> <http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i128/Dundas.pdf>

26. 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***

27. 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"<sup>4</sup>.*

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 subjects.

29. 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*

30. 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

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<sup>4</sup> 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".*

accountability and transparency for their own sakes, as well as case specific interests.

31. 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.
32. The Commissioner understands that the complainant is attempting to obtain information regarding parking permits issued by the Council, in order to determine if permits are being issued in a fair and valid way. She considers that the complainant has a legitimate interest in investigating this information. The Commissioner also recognises that there are legitimate interests in the Council's transparency and accountability.

*Is disclosure necessary?*

33. 'Necessary' means more than desirable but less than indispensable or of 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.
34. 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*

35. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects 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.
36. 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 individuals expressed concern to the disclosure; and
  - the reasonable expectations of the individuals.
37. 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.
38. The Council has not provided detail of the individuals' expectations in this case. However, the Commissioner considers that they would have a reasonable expectation that their address and parking permit numbers would not be made public. The Commissioner accepts that it is the general expectation of the data subjects concerned that their personal data will remain private and confidential and will not be disclosed to the world at large.
39. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
40. Disclosure under FOIA is tantamount to publication to the world at large. The Commissioner must therefore balance the legitimate interests with the data subjects' interests when determining whether the information can be disclosed into the public domain and not just to the complainants.
41. She considers disclosure of the information would reveal details of the data subjects' home and private lives. Disclosure under the FOIA would confirm to the world at large information of a personal or private nature and the Commissioner considers this would be an unwarranted intrusion into the lives of the data subjects.
42. The Commissioner accepts that the complainant has a private interest in the withheld information; however, she does not consider that this private interest outweighs the rights and freedoms of the third parties identified in the information requested. Whilst there is also a general public interest in transparency with regard to the Council's operations, she again does not consider that this justifies the disclosure of the report.
43. 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.

44. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
45. The Commissioner has therefore decided that the remainder of the information held by the Council, falling within the scope of the complainant's request, is exempt from disclosure under section 40(2), by way of section 40(3A)(a).



## Right of appeal

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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: 0300 1234504

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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