

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 February 2020

Public Authority: Guildford Borough Council
Address: Millmead House
Guildford
GU2 4BB

Decision (including any steps ordered)

1. The complainant has requested from Guildford Borough Council (the Council) information in relation to the Council's planning department and planning enforcement team. The Council disclosed the organisational charts but refused to provide the names of the position holders, citing section 40(2) of the FOIA (third party personal data) to do so.
2. The Commissioner's decision is that the Council has correctly applied section 40(2) to withhold the information.
3. The Commissioner has also decided that the Council has breached section 10 of the FOIA for failing to respond to the complainant's request within the required twenty working day compliance period.
4. The Commissioner does not require any further steps as a result of this decision notice.

Background information

5. On a previous occasion, the complainant requested from the Council the names of the senior managers that report into the Council's Corporate Management Team.

6. The Council initially disclosed the organisational chart of the Council's Corporate Management team, but decided to withhold some of the names of position holders, citing section 40(2) of the FOIA for doing so.
7. The complainant submitted a complaint to the Commissioner in relation to that request. In the meantime, he also submitted a new request which is the subject matter of the present case.
8. During the course of the investigation of the previous complaint, the Council decided to disclose the initially withheld information. This information comprised of names of 31 management team senior members of the Council. It also included the names of senior managers in the Planning & Regeneration Department:
 - Director of Planning and Regeneration;
 - Building Control Manager;
 - Development Control Manager;
 - Major Projects Portfolio Manager; and
 - Planning Policy Manager.
9. The complainant was satisfied with the subsequently disclosed information in relation to the previous complaint and that case was concluded as informally resolved.

Request and response

10. On 18 June 2019, the complainant wrote to the Council and requested information in the following terms:

"...could you supply me with an organisational structure chart for the Planning Department and Planning Enforcement Team showing how many employees there are in each team, the reporting lines for each team and the names of the team members."

11. The Council provided the complainant with a response on 9 September 2019. It stated *"Under the Council's duty to deal fairly with personal data, it should not be disclosed without consent being given."* Thus, the Council decided to withhold the information requested citing section 40(2) of the FOIA as the basis for doing so.
12. On the same date the complainant wrote back to the Council expressing his dissatisfaction. For the purposes of the FOIA any expression of

dissatisfaction following a response to an information request should be considered as a request for an internal review.

13. Following the Commissioner's involvement, the Council provided to the complainant the outcome of its internal review on 14 October 2019. This correspondence included attachments consisting of two charts showing the structure for Planning Policy & Building Control and Development Control & Business Management by job titles only. The Council explained that it decided to withhold the names of position holders. It stated that this information *"is personal data, therefore the s40(2) Freedom of Information Act 2000 exemption applies."*

Scope of the case

14. The complainant contacted the Commissioner on 24 September 2019 to complain about the way his request for information had been handled. He was not satisfied with the Council's decision to withhold the names of position holders and considered that section 40(2) did not apply in this case.
15. During the investigation the Council engaged section 38(1) of the FOIA (health and safety) as well, because it considered that due to the nature of their work, *"disclosure of certain officers' names could therefore make staff vulnerable to violence or abuse and/or lead to traumatic experiences among the employees affected."*
16. The following analysis covers whether the Council relied on section 40(2) correctly when it decided to withhold the names of the position holders in its Planning Policy & Building Control and Development Control & Business Management departments.
17. This decision notice will also address the timeliness of the response to the complainant's initial request.

Reasons for decision

Section 40 - personal data

18. Section 1(1) of the FOIA states 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.

19. 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.
20. 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 General Data Protection Regulation ('GDPR').
21. 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.
22. 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 DP principles.

Is the information personal data?

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

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

24. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
25. 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.
26. 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.

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

27. The withheld information in this case comprises the names of officers below senior management level. The Council has disclosed their job title on the organisational structure chart, but withheld the names of the officers in question. The Commissioner accepts that the individuals in this case would be identifiable from the information and that this information would relate to them. Therefore, she finds that the information in the context of this request would fall within the definition of 'personal data' in section 3(2) of the DPA.

Would disclosure contravene principle (a)?

28. 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.

29. The most relevant DP principle in this case is contained in Article 5(1)(a) of the GDPR which states that:

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

30. 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.

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

31. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.

32. The Commissioner considers that the lawful basis most applicable here 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.

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".

33. 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.
34. 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

35. 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.
36. 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.
37. The complainant is of the opinion that the Council planning and enforcement officers "*are responsible for shaping and protecting the*
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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".

landscape/build up environment we live in i.e. their decisions have a direct impact on the residents of the borough. As such I would argue that there is genuine and legitimate interest in knowing who these people are."

38. The Commissioner accepts that there is a legitimate public interest in disclosure of information which would promote accountability and transparency. In the circumstances of this case, the Commissioner recognises that there is a legitimate interest in knowing who the people who participate in certain stages of decision making in planning matters are, since those decisions may have an impact on the lives of members of the public. The Commissioner also appreciates that the complainant may have a personal interest in disclosure of the withheld information based on the representations he has made.

Is disclosure necessary?

39. '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.
40. The Council did not submit any specific arguments as to why it would or would not consider it necessary to disclose the names of the position holders in the organisational charts provided.
41. Nevertheless, the Commissioner refers to her guidance on personal information³, which states that when determining necessity, consideration must be put on "*whether disclosure under FOIA or the EIR is necessary to achieve these needs or interests, or whether there is another way to address them that would interfere less with the privacy of individuals.*"
42. The Commissioner has also published special guidance on requests for personal data about public authority employees⁴ which is relevant in the circumstances of this case. This guidance states that:

"Organisational structure charts are also routinely made available. For example, government departments publish organograms or structure

³ <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-regulation-13.pdf>

⁴ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

charts on www.data.gov.uk showing the job titles and reporting lines for all their posts.

This does not mean that there is a requirement to publish the names of all the post holders; usually only the names of senior managers are published. If a request is received for names below this level, the issue in terms of section 40 is whether it is reasonable to disclose these in the context of the specific request. It is not possible to establish a single cut-off point for all authorities, below which names will never be disclosed."

43. Further, this guidance provides that *"If a request concerns the reasons for a particular decision or the development of a policy, there may be a legitimate interest in full transparency, including the names of those officials who contributed to the decision or the policy."*
44. In the present case, since the request was not in relation to a policy but rather for an organisational structure, the Commissioner considers that it is not necessary to disclose the names of Council officers who are not in senior management roles.
45. In addition, the Commissioner notes that the Council, as described in paragraph 8 when dealing with a previous request, disclosed the names of the senior managers responsible for decision-making processes related to planning matters. The Commissioner does not consider that disclosure of names of all Council officers would significantly contribute to the Council's transparency on how their decision making process and the accountability lines are designed and organised.
46. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
47. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in transparency, she does not need to go on to conduct the balancing test and has not done so.
48. Therefore, the Commissioner finds that section 40(2) of the FOIA is engaged in respect of the withheld information.
49. Having decided that the withheld information is exempt under section 40(2) of the FOIA, the Commissioner did not deem it necessary to also consider the application of section 38(1).

Section 10– Time for compliance with request

50. Section 10 (1) of the FOIA states that a public authority must respond to a request promptly and “no later than the twentieth working day following receipt”.
51. The complainant made his request for information on 18 June 2019. The Council gave its response on 9 September 2019, stating that it deemed the request as responded to since it considered it to be similar to the previous request.
52. As noted in the background information part of this decision notice, the Commissioner received two complaints about the handling of two different requests submitted by the complainant to the Council at different times. The second request, which is the subject matter of this complaint, did not receive a proper response from the Council until 9 September 2019.
53. Therefore, the Commissioner therefore finds that the Council breached section 10(1) of the FOIA by failing to respond to the request within 20 working days.

Right of appeal

54. 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

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

55. 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.
56. 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

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