

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 October 2020

Public Authority: Conwy County Borough Council

Address: Bodlondeb Council Offices

Bangor Rd

Conwy LL32 8DU

Decision (including any steps ordered)

1. The complainant has requested information relating to a Leasehold Interest at Units 5-8 Mochdre Commerce Park. Conwy County Borough Council disclosed some information and withheld other information under the exemption for personal data – section 40(2) of the FOIA.
2. The Commissioner's decision is that Conwy County Borough Council correctly withheld information under section 40(2) but that it disclosed some information outside the statutory time limit and breached section 10(1).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 1 October 2019 the complainant wrote to Conwy County Borough Council (the "council") and requested information in the following terms:

"1 You have previously informed me that the amount paid to the lessor of units 5-9 Mochdre Industrial Park was €665,000. I would request that the updated amount now paid to the Lessor is provided, with the amount forecast to be paid, up to 5 April 2020.

2 Confirmation that the lease is still in existence with the Lessor still in a position to enforce the terms and conditions of the lease. If, however the lease has to an end you are required to provide documentation setting out the financial, legal and contractual basis, of how the matter was ended.

3 You have set out previously that the Public Body have paid a sum of €84,000 in legal fees arising out of entering the lease. It is excepted that legal advice which has been paid for is privileged, but you are required to confirm or deny that after external Solicitors and Barristers were instructed that as is the normal course of events that they provided the Public Body with a written opinion, setting out the chances of success, or failure based on the evidential documentation provided.

The answer to the question is what such opinion provided, with the documentation in possession of the Public Body. If not confirmation that no documentation exists In addition, after receiving such opinion, did the Public Body, proceed to engage Solicitors/ Barristers, about the matter, irrespective of the opinion provided.

4 The same confirmation as to the receipt of the legal opinion, on the case involving the Farmer on the Great Orme, together with the failed attempt to obtain costs on Colwyn Bay Pier. Were such opinions obtained, prior to instructing the proceed, irrespective of the opinion provided, with the documentation of the opinion provide in possession of the Public Body

Again if no such (sic) documentation exists' confirmation that the Public Body is not in possession of such opinions."

5. The council responded on 28 October 2019 and responded to parts 1-3 of the request. It withheld the information in part 4 of the request under the exemption for legal professional privilege – section 42 of the FOIA.
6. The complainant submitted a request for review on 4 November 2019 and the council provided an internal review on 14 January 2020. The

internal review confirmed that the information withheld under section 42 (part 4 of the request) was an independent fact-finding review to consider matters relating to lease arrangements. The report constituted a comprehensive report setting out the findings of the review. The council confirmed that, in addition to section 42 it also wished to rely on the exemption for prejudice to the effective conduct of public affairs – section 36(2)(b) (i)(ii) and s36(c) to withhold this information.

Scope of the case

7. On 9 January 2020 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. During the course of the Commissioner's investigation the council reconsidered its position and dropped its reliance on the exemptions in section 42 and section 36(2)(b) (i)(ii) and s36(c) to withhold the information in part 4 of the request. The council disclosed the information to the complainant, redacting a small amount of personal data under the exemption in section 40(2) of the FOIA.
9. The complainant confirmed that they wished the Commissioner to consider whether the exemption in section 40(2) had been correctly applied, whether the council had disclosed the information in part 4 of the request in full (save for the information withheld under section 40(2)) and whether the council had carried out a proper internal review. In relation to this latter matter, as internal reviews are not a statutory obligation this issue is addressed in the 'other matters' section of this decision notice.

Reasons for decision

Section 1 – duty to provide information held

10. Section 1 of the FOIA states that

“(1) 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.”*

11. Section 10(1) of the FOIA states:

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

12. In response to part 4 of the request the council provided the complainant with a copy of a "Fact Finding Investigation Report" (the "Report"). Parts of the disclosed Report were redacted by the council, namely information considered to be the personal data of third parties, withheld under section 40(2). However, notwithstanding the information withheld, the complainant has raised concerns that the disclosed version of the Report does not constitute the full Report held by the council.
13. The complainant has observed that the pagination of the disclosed Report begins on "page 18" and suggested that pages 1-17 are, therefore, missing.
14. In order to establish the facts in this matter the Commissioner referred to her own, unredacted, version of the information which was provided to her by the council as part of her investigation. She observed that the pagination of this version of the Report also begins on page 18.
15. In order to determine whether additional pages to the Report were held by the council or whether the Report starting on page 18 represents nothing more than a quirk of pagination, the Commissioner approached the council.
16. The council confirmed to the Commissioner that the Report does indeed begin on the page reflected in the disclosed version because "...it was part of a larger agenda which went to Members in 2019". In other words, the pages preceding page 18 do not form part of the Report and do not, therefore, fall within the scope of the request.
17. Having considered the council's explanation and referred to the withheld information the Commissioner is satisfied that the council has (save for the information withheld under section 40(2)) disclosed the full version of the Report and provided the relevant information it holds in relation to part 4 of the request.
18. However, in disclosing this information during the Commissioner's investigation and outside the 20 working day statutory limit, the Commissioner finds that the council breached section 10(1) of the FOIA.

Section 40 – personal information

19. The council withheld some information from the Report disclosed in response to part 4 of the request under section 40(2) of the FOIA.
20. 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.
21. 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').
22. 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.
23. 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?

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

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

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

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

27. 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.
28. The council confirmed that the personal data redacted within the report is that of the officers who were involved in the initial project and were interviewed as part of the fact finding investigation.
29. The council explained that the Report focused on all those officers involved in the project and identified the roles they fulfilled. It confirmed that their full names and/or their initials means they could be identifiable especially given the service area that the project relates to which, in itself, could be categorised as location data, hence increasing the likelihood of identification.
30. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that this information both relates to and identifies individuals. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
31. 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.
32. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

33. 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".

34. 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.
35. 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

36. 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.

37. 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.

38. 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

39. In considering any legitimate interests in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.

40. 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.

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 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".

41. The complainant has argued that, where council officers act in such a way that results in Council Tax Payers suffering losses they should be dismissed and there is a public interest in identifying the officers involved.

Is disclosure necessary?

42. '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.
43. The Commissioner is mindful that disclosure under the FOIA is disclosure to the world at large and not just to the requestor. It is the equivalent of the Council publishing the information on its website.
44. The Commissioner notes that the council's actions in relation to the lease which is the subject of the Report has been widely reported in the media³. She is also mindful that the disclosed version of the Report identifies shortcomings in the council's practices in relating to the lease and sets out remedies to address these.
45. The Commissioner considers that, in essence, the complainant has a legitimate interest in knowing that the council as a public authority is accountable for its decision making, particularly where its decisions have fallen short of accepted standards. They also have a legitimate interest in knowing that errors, particularly those which have an impact on public funds, are acknowledged and that appropriate responsibility acknowledged and remedies identified.
46. The Commissioner does not consider that knowing the names of officers involved in this process will assist in serving the legitimate ends identified above.
47. The Commissioner is satisfied in this case that there are less intrusive means of achieving the legitimate aims identified and that the information disclosed meets these aims.
48. Based on the above factors, the Commissioner has determined that as disclosure of the information is not necessary. The Commissioner

³ See, for example: <https://www.bbc.co.uk/news/uk-wales-51910200>

, therefore, considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

49. Given disclosure would not be lawful, the Commissioner does not need to go on to separately consider whether disclosure would be fair or transparent.
50. The Commissioner is therefore satisfied that the council has correctly applied section 40(2) to the request.

Other matters

51. Although they do not form part of this decision notice, the Commissioner wishes to note the following matters.

Section 45 code of practice – internal reviews

52. The code of practice issued under section 45 of the FOIA (the “Code”) provides guidance for public authorities on best practice in meeting their responsibilities under Part I of the Act⁴. It sets the standard for all public authorities when considering how to respond to Freedom of Information requests.
53. Public authorities are obliged, under section 17(7) of the FOIA, when responding to a request for information, to notify applicants of whether they have an internal review process and, if they do, to set out the details of their review procedures, including details of how applicants request an internal review.
54. In relation to the timeframe for carry out an internal review, paragraph 5.1 of the Code states:

“Requests for internal review should be acknowledged and the applicant informed of the target date for responding. This should normally be within 20 working days of receipt.”

⁴ The Code is published online here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

55. The Code allows for authorities to take an additional 20 working days in the case of complex cases (a total of 40 working days) but in the majority of instances, reviews should be completed within 20 working days.
56. In this case the complainant requested an internal review on 4 November 2019 and the council provided its internal review response on 14 January 2020. As this exceeded 40 working days the Commissioner considers that the council's practice in this instance did not conform to the recommendations of the Code.
57. The Commissioner expects that in its future handling of requests the council's practice will comply with its statutory obligations and conform to the recommendations of the Code.

Right of appeal

58. 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

59. 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.
60. 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
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