

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 December 2020

Public Authority: Brighton and Hove City Council

Address: Kings House
Grand Avenue
Hove
BN3 2LS

Decision (including any steps ordered)

1. The complainant has asked for the email correspondence concerning parking permits, which passed between Brighton and Hove City Council and the Information Commissioner's Office between 1 October 2019 and 14 February 2020.
2. The Council repeatedly failed to respond to the complainant's request until it finally disclosed information it holds which falls within the scope of the complainant's request.
3. The Commissioner has decided that the information which the complainant has asked for is comprised of his own personal data. As such, the Commissioner's decision is that the Council has breached section 17(1) of the FOIA by failing to give the complainant a refusal notice which cited section 40(1) of the Act and an explanation of why that exemption applies. No such refusal notice was given within the twenty working days compliance period provided by section 10 of the FOIA. The Commissioner has therefore decided that the Council has also breached section 10.
4. The Commissioner requires no further action in this matter.

Request and response

5. The complainant wrote to the Council on 15 February 2020 to ask for the following information:

“...all emails sent to and received from the ICO relating to Parking Permits (dates 1/10/19 to 14/2/20).”
6. The Council wrote to the complainant on 5 March 2020 to confirm that it was dealing with his request under the Freedom of Information Act and that it aimed to respond to the request by 16 March 2020.
7. On 17 March 2020, the Council wrote to the complainant to inform him that it was continuing to process his request by collating all and any emails in relation to his request prior to reviewing them. The Council gave the complainant a revised deadline for its response of 15 April 2020.
8. On 17 April 2020, the Council informed the complainant that it needed to extend its response time by a further 20 working days to 14 May 2020.
9. The complainant wrote to the Council on 22 April to ask what action it was taking in respect of his request and on 13 April the complainant submitted a complaint under the Council's complaints procedure.
10. On 12 May 2020, the Council advised the complainant that it had passed his complaint to its Information Governance Team for consideration and response.
11. On 14 May 2020, the Council wrote to the complainant to advise him that it was continuing to work on his request and that it needed to extend the deadline for response to 12 June 2020.
12. The complainant wrote to the Information Commissioner's Office on 20 May 2020 to complain about the Council's handling of his request. This complaint led to the Commissioner writing to the Council on 30 June to ask the Council to respond to the complainant's request within ten working days.
13. On 15 July 2020, the Council responded to the complainant's request. The Council advised him that it holds the information he has requested and said, “most of it is attached to this response”. The Council informed the complainant that it had redacted the names and contact details of third parties in reliance on section 40 of the Freedom of Information Act.
14. The complainant wrote to the Council on 16 July 2020, and referring to the information disclosed to him under the FOIA, he challenged the Council as to whether it has disclosed all of the emails it holds which falls within the scope of his request.

15. The Information Commissioner's Office wrote to the Council on 30 September 2020, to advise it that the complainant's complaint had been accepted for investigation. The Commissioner noted that the Council had not completed an internal review of its handling of this request.

Scope of the case

16. The complainant contacted the Commissioner to complain about the way his request for information had been handled by the Council.
17. The Commissioner advised the complainant that the focus of her investigation would be to determine whether Brighton and Hove Council has handled his request in accordance with the FOIA and to determine whether the Council should have treated his request under the subject access provisions of the Data Protection Act 2018 rather than under the FOIA.

Reasons for decision

Section 1 of the FOIA

18. 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.

Section 40(1) – requests for personal data where the applicant is the data subject

19. Section 40(1) of the FOIA states that –
 - “(1) 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.
20. The Council has provided the Commissioner with a copy of the information which was sent to the complainant in response to his request. This information is comprised of the following:

1. The Council's email of 9 October 2019, responding to the Case Officers enquiry.
2. The Council's email to the complainant of 28 October 2019.
3. The Council's email to the complainant of 29 October 2019 – a resending of email number 2.
4. Email from the ICO to the Council, 6 November 2019.
5. Email from the Council to the ICO, 7 November 2019.
6. Email of 20 November 2019, from the ICO to the Chief Executive Officer of Brighton and Hove City Council. With the Commissioner's decision notice in case FS50853047 attached.
7. Email of 19 December 2019, from the ICO to the Council concerning the contents of the bundle of documents intended for disclosure to the Tribunal.

21. The information sent to the Commissioner is a pre-redacted version of that disclosed to the complainant and it confirms that the only redacted information was the names of case officers and the contact details of the complainant.
22. The Commissioner agrees with the Council that the redacted information did not affect the substance of the correspondence.
23. The Council has confirmed to the Commissioner that it has not relied on any exemption in respect of the information requested by the complainant in this case.
24. The Commissioner has established that the Council did not correspond with any third party in respect of parking permits within the timescale specified in the complainant's request. The Commissioner is also mindful that the terms of the request are also limited to exchanges between the council and the ICO.
25. The Council has confirmed that the only correspondence it holds about parking permits during that timescale was between the Council and the ICO, specifically between the Council's Information Governance Team and the Commissioner's Case Officer responsible for the complainant's previous complaint case.
26. The Council has also confirmed that all such correspondence was associated with the management of that case.
27. On receipt of the complainant's request, the Council considered that it was likely that the only correspondence it holds within the scope of that

request would be biographical to the complainant. Having carried out its searches for relevant information, the Council has confirmed to the Commissioner that this proved to be the case.

28. In hindsight, the Council considers that the complainant's request should have been responded to under the subject access provisions of the Data Protection Act 2018 ("the DPA"), rather than under the FOIA. The Council notes that this request is clearly associated with one previously made by the complainant.
29. The Commissioner agrees with the Council that the information which falls within the scope of the complainant's request, including that disclosed to him on 15 July 2020, satisfies the definition of personal data provided by section 3(2) of the DPA.
30. Section 3(2) of the DPA defines personal data as:
"any information relating to an identified or identifiable living individual".
31. The General Data Protection Regulations states:
"Personal data only includes information relating to natural persons who:
 - a. can be identified or who are identifiable, directly from the information in question; or*
 - b. who can be indirectly identified from that information in combination with other information."*
32. The complainant's previous request was for a copy of the Council's parking permit register. This was dealt with by the Commissioner in case FS50853047, and ultimately resulted in an application being made to the First-tier Tribunal (Information Rights).
33. To date, the Tribunal is yet to make a decision.
34. The Council acknowledges that the complainant's request of 15 February 2020, is for correspondence with the ICO in the context of the representations the complainant wished to make to the Tribunal and it has confirmed that the information disclosed to the complainant on 15 July 2020, was not disclosed on the Council's FOI Disclosures Log.
35. The Council points out that Article 6,1(f) of the GDPR provides a lawful basis for corresponding with the Commissioner's office about the complainant's previous case. Nevertheless, it accepts that the complainant's request of 15 February should rightly have been dealt under the subject access provisions of the DPA.

36. Given that the requested information falls to be considered under the DPA rather than the FOIA, the Council now accepts that it should have issued a refusal notice to the complainant, citing section 40(1) as its reason for refusing this request, and it should have advised the complainant that his request would be dealt with under the subject access provisions of the DPA.
37. The Commissioner agrees with the Council that it should have responded to the complainant's request in the manner described above. The Council should now ensure that it has made a proper response to the complainant under the DPA or make such a response if it has not yet done so.
38. The Commissioner's decision is that the Council has breached section 17(1) of the FOIA. That section requires a public authority to give the applicant a refusal notice which states that it is relying on an exemption to disclosure and which explains why that exemption applies.

Section 10 – Time for compliance with request

39. Under section 10 of the FOIA, a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following its receipt of the request.
40. The Commissioner notes that an appropriate refusal notice should have been sent to the complainant within the twenty working days compliance period required by section 10 of the FOIA, and therefore the Commissioner must find that the Council breached this provision.
41. The Commissioner asked the Council to explain why it was necessary to extend the time for responding to his request on several occasions, given that it disclosed only seven documents to the complainant.
42. The Council told the Commissioner that it readily accepts it had failed to comply with the provisions of section 10 in this case. To explain this breach, the Council said it was necessary to undertake a comprehensive and independent search for information within the scope of this request and therefore the request was transferred to the Council's Information Security Team. This was done so that a search could be made using the discovery tools within exchange in Office 365 online.
43. The Council says that this was the first occasion that this technology had been used for such a task and 'some leaning was required'. This, coupled with a number of staff absences within the Information Security Team, resulted in the delayed response to the complainant.
44. In the Commissioner's opinion the Council has not acted appropriately in respect of the complainant's request. The Council was clearly not

entitled to extend the compliance period allowed for by the FOIA. The Commissioner is in no doubt that the complainant's frustration in this matter has been exacerbated by the Council's serial delays.

Section 1 – information not held

45. Ordinarily, in matters where the Commissioner has determined that the request is properly dealt with through the application of section 40(1), the Commissioner's decision notice would not go on to discuss whether the public authority holds more personal data than that which it has already disclosed. Such matters fall to be considered under the provisions of the DPA and not under those of the FOIA.
46. However, the Commissioner is mindful in this case that if the complainant's concerns were realised, then it is possible that if further information were held, then it may not constitute the complainant's own personal data. As such, the Commissioner has decided to provide the results of her investigation into whether the Council holds any further information which falls within the scope of the complainant's request which it has not disclosed.
47. When the complainant wrote to the Council on 16 July 2020, he set out a number of questions in respect of the information which the Council had disclosed to him and challenged whether the Council had disclosed all of the emails it holds falling within the scope of his request.
48. In view of the Council's failure to conduct an internal review in this matter, the Commissioner again put the complainant's challenges and assertions to the Council.
49. The first of the complainant's challenges was in respect of a statement contained in the ICO's email of 6 November 2019. That email was sent to the Council and contained the following statement:

'Thank you for your recent emails regarding the above case.'
50. The complainant noted the word 'emails' and he pointed out that there was only one relevant email included in the document which the Council had disclosed to him. He therefore asked what had happened to the missing emails?
51. Referring to the ICO case officer, the Council says it is not sure why the case officer referred to 'emails' in her email. The officer at the Council recalls speaking to the ICO case officer about the complainant's previous complaint and he believes there was likely to have been more interactions between the ICO and Council than those in writing.

52. That said, the Council asserts that its search of Office 365 was comprehensive, and it has assured the Commissioner that no records have been deleted with regard to this case. Indeed, the Council has told the Commissioner that even if documents had been deleted, they would still have been caught by the search, as backup was included within the scope.
53. The complainant also asserted that there must have been other emails within the scope of his request. The complainant noted that the last email from the Council to the ICO was sent on 7 November 2019 and the last email from the ICO was the 19 December 2019. The complainant pointed out that his request under the FOIA covered the period 1 October 2019 to 14 February 2020.
54. The Council confirmed to the Commissioner that the dates identified by the complainant coincide with the dates in its system. The Council has also confirmed that it holds two email from the ICO which were received after the period specified by the complainant in his request. Both emails relate to the complainant's appeal to the Tribunal.
55. The Council says it did not disclose these emails to the complainant because they were not considered relevant to the management of the case and neither were they considered to add anything to the information already available to the complainant.
56. The complainant referred the Council to an email sent to him by the ICO on 1 November 2019. That email contained the following:

"I can inform you that I advised the Council that it was for the Council to decide whether or not redactions should be made to the information. I also advised the Council that in my informal view, they may wish to consider whether or not they needed to redact any third-party personal data. However, I emphasized that this was not a matter on which I could provide a determination without carrying out a full investigation." None of the above seems to have been covered in the very limited number of emails provided in this document.
57. The Council has told the Commissioner that it holds no written correspondence describing the above. Again, the Council believes that the ICO case officer's statements may have occurred during a telephone conversation rather than something which was written in an email or letter.
58. Another of the complainant's enquiries was whether the Council sent additional information for the tribunal bundle. The Council answered this by informing the Commissioner that it agreed to her office providing the correspondence it held in unredacted form and did not provide anything

additional. The Council said that the complainant is well aware of this because he is in possession of the submissions from the ICO and Council on this matter.

59. The complainant questioned the Council about any emails which the Commissioner's Office or other parties had been copied in to, such as himself or internally within the Council. He asked the Council, 'Are these emails missing from this document?'
60. The Council answered this by confirming to the Commissioner that, '...no correspondence items within the scope of this request were carbon copied to third parties. The Council added that on receipt of the Information Commissioner's Office email which sought agreement to disclosure to the Tribunal, the Council sought internal advice. That internal correspondence did not include the Information Commissioner's Office and therefore was not within the scope of the complainant's request.
61. The complainant referred the Council to the number of emails which the Council had disclosed to him. Of the seven emails, the complainant identified two from Brighton and Hove Council, two to the complainant and three from the Commissioner's Office. The complainant asked the Council to confirm that there are no other emails.
62. In response to the above, the Council again confirmed that there are no additional emails other than those to and from the Commissioner's Office in which the Council affirmed that disclosure could occur in non-redacted form.
63. Finally, the complainant suggested it is strange that there were no emails sent or received by the Council during January and part of February 2020. He said, "The discussions of redacted data, and the decision not to allow the postcode as part of the data [...] raises issues about how the decisions came about (without some supporting information), also emails that may have been carbon copied in to others have not been included."
64. The Council notes that the Information Commissioner's Office communicated to the complainant alerting him to an exchange of views with the Council on the subject of the potential redaction of personal data to the parking permit, and that the Commissioner's Office had informed the complainant that the redaction approach (if the register contained personal data) was a matter for the Council.
65. Again, the Council points out that this discussion was by telephone and the Commissioner's Office issued no formal directions or suggestions in writing as to how the Council should approach this. In the Council's

opinion, it is the way in which the issue of redaction or personal data with the complainant that may have caused the complainant to expect that there would be written communications to that effect.

66. The Council has assured the Commissioner that it has checked the search criteria and made a manual search of its case management system for all incoming and outgoing correspondence to the ICO.
67. The Council has searched for emails which have used the Commissioner's casework address as well as anything that may have been sent to the case officer's own email account. These searches found only correspondence addressed to the casework address and all of that correspondence has been disclosed to the complainant.
68. The search criteria used by the Council for information relevant to the complainant's request were 'Parking permits', 'parking', 'permits', '3716665' and 'FS50853047'. The emails from the Council's case management system for Freedom of Information was compared to the sent and received items in the Records & Data Protection Manager's email account. This was done to ensure that the case system contained all correspondence pertaining to the complainant's previous request. This preceded a further search of the Council's entire O365 email estate.
69. No paper records were searched by the Council on the grounds that none of its correspondence with the Commissioner's Office had been on paper within the subject and date scope of the complainant's request.
70. When asked whether any recorded information relevant to the scope of the complainant's request had been deleted and/or destroyed, the Council confirmed that no information has been destroyed, and due to the nature of current email backup processes, any emails which had been deleted would have been discovered by the O365 search.
71. The Council has also confirmed that it retains any Freedom of Information correspondence for 6 years following the closure of a case. This is done in accordance with section 2 of the Limitation Act 1980 and for the Council's business purpose of understanding its performance in respect of the FOIA.
72. Given that the complainant has asked the Council for information which the Commissioner's Office is likely to hold, a check was made of the ICO's records in order to verify the Council's position. Having conducted her own search for information relevant to the complainant's request, the Commissioner found three sets of emails, all of which concern the consultation between the ICO and the Council about the redaction of information.

73. The findings of the Commissioner's search were relayed to the Council so that it could make further representations as it thought necessary.
74. Of the three documents identified by the ICO and sent to the Council, only one document had not been found by the Council as a result of its searches. This was an email of 18 December 2019, which alerted the Council to the complainant's appeal to the tribunal.
75. The Council told the Commissioner that it is not clear why this document had not surfaced through the search of its Exchange online system. This is now a matter which the Council has informed the Commissioner will be taken up by its Infrastructure Team.
76. The Commissioner has carefully considered the Council's representations in this matter. The Commissioner believes those representations have been made in good faith and notwithstanding the failure of the Council to find the ICO's email of 18 December 2019, she finds those representations to be credible and persuasive.
77. The Commissioner has decided that the Council has complied with the requirements of section 1 of the FOIA. This is because the Commissioner accepts that the Council does not hold information relevant to the complainant's request which falls to be considered under the provisions of the FOIA.
78. The Commissioner considers that her email to the Council of 18 December 2019, is of biographical significance to the complainant and therefore falls to be considered by the Council under the subject access provisions of the Data Protection Act. The Commissioner would urge the Council to revisit the complainant's request under those provisions and determine whether it has complied with them. It should then take any remedial steps it considers necessary to ensure compliance with the Data Protection Act.

Other matters

Internal review

79. The Code of Practice issued under section 45 of the FOIA reminds public authorities that it is best practice to have an internal review process in place.
80. The Commissioner considers that public authorities should have in place procedures for conducting internal reviews and that such reviews should be completed within an appropriate timescale. The Commissioner considers that, in all but the most complex of cases, an internal review

should be completed within twenty working days of the authority's receipt of a request.

Right of appeal

81. 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

82. 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.

83. 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
Wilmslow
Cheshire
SK9 5AF