

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 December 2020

Public Authority: Corby Borough Council

Address: Deene House
New Post Office Square
Corby
Northants
NN17 1GD

Decision (including any steps ordered)

1. The complainant requested from Corby Borough Council ("the Council") information relating to its Covid-19 grants paid to local companies. The Council provided information to a part of the request and withheld the remaining information under sections 31(1)(a) (prevention or detection of crime) and 40(2) (third party personal data) of the FOIA.
2. The Commissioner's decision is that the Council correctly applied the exemptions to the information relating to parts 1 and 2 of the request. Therefore, the Commissioner does not require the Council to take any steps as a result of this decision.

Request and response

3. On 29 July 2020 the complainant wrote to the Council and requested information in the following terms:

"Under the FOI, I would like to know which local companies were paid Covid 19 grants, how much they were paid, and what criteria you used to make these decisions. I applied and did not even get a response from CBB, so I am very intrigued regarding the process and decision making."

4. On 31 July 2020 the Council responded. It considered the first two parts of the request and determined that they are exempt under section 31(1)(a) (prevention or detection of crime) of the FOIA, and explained its reasons for applying the exemption to these parts of the request.

With regards to the other part of the request, the Council provided its response to this.

5. On the same day the complainant asked the Council for an internal review. He disagreed that the release of the information (at parts 1 and 2 of the request) is exempt under section 31(1)(a) of the FOIA.
6. On 3 August 2020 the Council provided its internal review response. The Council maintained its position to withhold the information requested at parts 1 and 2 of the request under section 31(1)(a) of the FOIA. The Council also considered that the information requested constitutes personal data and cited section 40(2) (third party personal data) of the FOIA to the information. It stated that such disclosure would be likely to breach principle 1 of the FOIA (fair and lawful processing).

Scope of the case

7. The complainant contacted the Commissioner on 3 August 2020 to complain about the way his request for information had been handled.
8. During the Commissioner's investigation of this case, the Council was asked about its response to the third part of the complainant's request – the criteria used in the decision-making regarding Covid-19 grants. The Council subsequently (on 25 November 2020) provided the complainant with information to this part of his request. This was a copy of its guide to Grant Funding Schemes (Small Business Grant Fund and Retail, Hospitality and Leisure Grant Fund guidance) which the Council confirmed to the complainant was the criteria that was used when applying for grant funding. Therefore, the Council considered that information to this part of the request – the process and decision-making was disclosed.
9. The complainant confirmed to the Commissioner receipt of this information by the Council (a copy of the guide/criteria used to award Covid-19 business grants). However, he considered his request as only partly completed and the complainant stated that he would still like information to the remaining parts of his request as follows:
 - Which companies were awarded a grant?
 - How much they received?
10. The complainant stipulated that he does not require information which relates to any personal data about the individuals that own the businesses etc. The complainant said that "*such information is freely accessible via Companies House.*"

11. The following analysis focuses on whether sections 31(1)(a) and 40(2) of the FOIA were cited correctly to parts 1 and 2 of the request.

Reasons for decision

Section 31(1)(a) – (prejudice to the prevention or detection of crime)

12. Section 31(1)(a) of FOIA states that:

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) the prevention or detection of crime”

13. In order for a prejudice based exemption, such as section 31(1)(a), to be engaged there must be likelihood that disclosure would cause prejudice to the interest that the exemption is designed to protect. The Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed, has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. whether disclosure “would be likely” to result in prejudice or disclosure “would” result in prejudice. In relation to the lower threshold (would be likely), the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner’s view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

14. Consideration of section 31(1)(a) of the FOIA is a two-stage process; even if the exemption is engaged, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

The Council's position

15. The Council confirmed the sub-section it had relied on was section 31(1)(a) (the prevention or detection of crime) to withhold the requested information.
16. The Council considers that supplying the information requested may lead to criminal activity. It stated that supplying the information may lead to the Council being targeted by cyber criminals. It also believes that the publication of these details could lead to local businesses becoming the victims of criminal activity.

The applicable interest

17. The first step in considering whether this exemption is engaged is to address whether the prejudice predicted by the public authority is relevant to the prevention or detection of crime.
18. In its submission to the Commissioner, the Council explained that release of the requested information could encourage criminal activity. It provided examples of this; releasing the information could lead to fraudulent/fictitious claims, it could be used for potential fraud whereby an individual could target a company, set up a bank account and fraudulently receive a grant.
19. The Commissioner is satisfied that the prejudice the Council is envisaging in this case, is relevant to the particular interests which section 31(1)(a) is designed to protect. Accordingly, the first limb of the three part test outlined above is met.

The nature of the prejudice

20. The Commissioner considered whether the Council demonstrated a causal relationship between the disclosure of the information at issue and the prejudice that section 31(1)(a) of the FOIA is designed to protect.

21. With regard to harm being caused by disclosure, having viewed the withheld information, the Commissioner is satisfied that it contains details of the local companies, amounts paid, and criteria used to make the decisions regarding the Covid-19 grants. If disclosed, this could promote criminal activity such as fraud. This could have a detrimental effect on the prevention or detection of crime. The Commissioner is satisfied that the resultant prejudice can be correctly categorised as real and of substance.
22. The Commissioner is also satisfied that there is a causal relationship between the disclosure of the requested information and the prejudice which the exemption is designed to protect.

Likelihood of prejudice

23. The Council confirmed to the Commissioner that it considered disclosure of the withheld information "would be likely" to have a prejudicial effect. In order for the Commissioner to accept that disclosure would be likely to result, there must be a real and significant likelihood of this prejudice occurring, rather than this outcome being of remote likelihood.

Is the exemption engaged?

24. It is not sufficient for the information to relate to an interest protected by section 31(1)(a) of the FOIA. Its disclosure must also be at least likely to prejudice that interest. The onus is on the public authority to explain how that prejudice would arise and why it would be likely to occur.
25. The Commissioner accepts the Council's arguments that releasing the information would be likely to incite criminal behaviour, for example, the information could be used to target companies, and set up a bank account to make fraudulent claims to receive a Covid-19 grant.
26. The Commissioner recognises that the chance of prejudice occurring is more than a hypothetical possibility; there is a real and significant risk that disclosure of the information in question could result in the outcomes predicted by the Council.
27. The Commissioner is satisfied that disclosure of the information would be likely to represent a real and significant risk of prejudice to the prevention or detection of crime. As she accepts that the outcome of disclosure predicted by the Council would be likely to occur, the Commissioner is therefore satisfied that section 31(1)(a) of the FOIA is engaged.

Public interest test

28. Section 31(1)(a) of the FOIA is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption at section 31(1)(a) outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

29. The Council stated that it *"cannot see any public accountability or transparency arguments for disclosing this information. Therefore, there is no likely benefit to the wider public in releasing this information."*
30. The complainant argued that the Council *"needs to demonstrate transparency regarding how money is spent."* He said that as it is tax payers' money, he believes that there should be some degree of transparency regarding how it is spent/allocated. The complainant also argued that it must be in the public interest to know that *"a fair and due process has been conducted when council grants were awarded."* He further argued that the public should know the criteria used and which organisations received grants. He is of the view that *"lack of transparency could create opportunities for possible corruption and irregularities."* With regards to the Council's internal review outcome in which it stated that disclosure could have a detrimental effect on the prevention or detection of crime, the complainant argued that *"this is not a state of fact but purely conjecture and assumption."*
31. Some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
32. The Commissioner notes that the Council deems in this case, that there are no public accountability or transparency arguments that enable it to consider the public interest arguments for disclosing the requested information, and that the Council believes there is no benefit to the public in releasing the information.

33. The Commissioner however, considers that there is a general public interest in public authorities being open and transparent with regard to the information they hold, and that disclosure of the withheld information would serve that particular interest. She accepts that there is local and national interest in Covid-19 grants that were paid to businesses by the Council. The Commissioner also understands the importance of public authorities being able to demonstrate how tax payers' money is being spent or allocated. Disclosure of the information would reveal whether or not the Council conducted a fair process in awarding the Covid-19 grants to local companies.

Public interest arguments in favour of maintaining the exemption

34. The Council argued that the release of the information is "*likely to prejudice various law enforcement purposes, including preventing crime and administering justice*". It said that the Council has a duty to its business owners to protect the information it holds and chooses to impart.
35. The Council reiterated its argument that disclosure would be likely to encourage criminal activity, this, it said, could result in fraudulent or fictitious claims for Covid-19 grants. The information could be used for potential fraud, a company could be targeted and the individual could open up a bank account and receive a grant fraudulently. Therefore, the Council argued that this could have a detrimental effect on the prevention or detection of crime. The Council provided the Commissioner with details of its Grant Funding Schemes assurance, to show that this was part of a verification framework which the Council followed.

Balance of the public interest arguments

36. In reaching a view on where the public interest lies in this case, the Commissioner has taken into account the withheld information and the arguments of both the complainant and the Council.
37. The Commissioner has weighed the public interest in avoiding prejudice to the prevention or detection of crime against the public interest in openness and transparency. She notes that there is a presumption within the FOIA that openness is, in itself, to be regarded as something which is in the public interest.
38. The Commissioner considers that it is important that the general public has confidence in the Council awarding these Covid-19 grants to local companies. Accordingly, there is a general public interest in disclosing information that promotes accountability and transparency in order to maintain that confidence and trust.

39. The Commissioner understands that the information – names of companies awarded a grant and the amount received, is of possible interest to individuals or companies, particularly those that were not awarded a grant. However, disclosure under the FOIA is disclosure to the world at large. The Commissioner must therefore consider whether the information is suitable for disclosure to everyone.
40. In view of this, the Commissioner is mindful that the Council expressed concerns that disclosure of the information would be likely to impact on local businesses. She has taken into account the argument that release of the information would be likely to encourage criminal activities, which would have an adverse effect on the community. Having found that the exemption is engaged as disclosure would be likely to result in prejudice to the prevention or detection of crime, the Commissioner has taken into account here that this outcome would be counter to the public interest.
41. Having considered all the arguments in this case, the Commissioner's decision is that the public interest in maintaining the exemption outweighs the public interest in disclosure. Therefore, section 31(1)(a) of the FOIA was correctly applied to the withheld information and the Council was not obliged to disclose this information.

Section 40(2) – third party personal data

42. 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.
43. 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').
44. 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.

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

45. 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?

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

“any information relating to an identified or identifiable living individual”.

47. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
48. 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.
49. 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.
50. The information withheld by the Council consists of names of local companies, their full postal addresses, financial/bank account details and information relating to the Covid-19 grant funding. The Council confirmed its position that all of the information is personal data. It explained that *“businesses completed on-line claim forms of their own volition”* and that such forms are treated as confidential due to the nature of the information provided.
51. In the circumstances of this case, having considered the withheld information and the arguments presented by both parties, the Commissioner is satisfied that the information is personal data. The names of the companies that were awarded Covid-19 grants by the Council, is information that both relates to and identifies those concerned. The request does not seek the personal data of the individuals, however, the requested information could be used to identify names of the owners of the companies awarded a grant. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
52. 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.
53. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

54. 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”.

55. 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.

56. 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

57. 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.

58. 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;

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”.

iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

59. 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

60. 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.
61. 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.
62. The complainant argued that the public should know how the tax payers' money has been spent or allocated. Otherwise, he said, it creates a lack of transparency and openness, and possibly cause "*potential opportunities for financial inappropriateness.*" The Commissioner considers this to be a legitimate interest.
63. The Council however, said that it had not identified any legitimate interests in disclosure in this case.
64. 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 which local companies were awarded a Covid-19 grant from the Council and the amount they received. The Commissioner also appreciates that the complainant may have a personal interest in disclosure of the withheld information, because he had applied for a Covid-19 grant from the Council but did not receive a response. The Council explained to the complainant that it was unable to respond to each applicant that did not meet the required conditions. Therefore, it may be the case that the complainant's unsuccessful application for the grant had impelled him to seek the information. However, the Commissioner recognises that the complainant also has concerns about the broader public interest in disclosure of the information requested.

Is disclosure necessary?

65. '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.
66. The complainant argued that the public should know how the tax payers' money has been spent, and that there should be some degree of transparency regarding this. He believes that it is in the public interest to know which organisations received a Covid-19 grant.
67. The Council stated that the request is for "*confidential information regarding businesses that relate to financial requests submitted confidentially. This information constitutes personal data as defined by the Data Protection Act 2018 and such disclosure would be likely to break principle 1 of the Act (Fair and Lawful Processing).*"
68. The Commissioner is satisfied in this case, that there are no less intrusive means of achieving the legitimate aims identified than to disclose the information requested by the complainant.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

69. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject 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.
70. 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 individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.

71. 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.
72. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
73. The Council argued that the data subjects in this case are local people, and that the information relates to an individual's public life – their business/work.
74. The Council considers that the individual(s) would expect personal information to be dealt with in a confidential manner. It said that they would expect that the information would not be disclosed to the public as disclosure could result in criminal activity.
75. The Council confirmed that local companies had not been asked whether they are willing to consent to the disclosure of their personal data, and explained that the *"on-line form was submitted in complete confidentiality."*
76. The Council described the consequences of disclosure and said that *"releasing the information would be likely to encourage criminal activity, for example, it could lead to fraudulent/fictitious claims. The information could be used for potential fraud. An individual could target a company, set up a bank account and fraudulently receive a grant. This could have a detrimental effect on the prevention or detection of crime and in turn cause distress to the businesses concerned."*
77. The Council concluded that there is no likely benefit to the wider public in releasing this information. It reiterated that the request is for confidential information regarding businesses that relate to financial requests which were submitted confidentially.
78. The Council is of the view that the complainant believes that the Council is not conforming to the Government guidelines with regards to the small business grant funding. This is because the complainant had stated to the Council that other similar businesses to his had been awarded grant funding, and that he had not been awarded this Covid-19 grant.

79. 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.
80. 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.
81. The Commissioner has decided that the withheld information is exempt from disclosure under section 40(2) of the FOIA. Therefore, the Council was not obliged to disclose this information.

Right of appeal

82. 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

83. 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.
84. 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

Phillip Angell
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