

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 July 2022

Public Authority: Royal Borough of Kingston upon Thames

Address: Guildhall 2
High Street
Kingston Upon Thames
Surrey
KT1 1EU

Decision (including any steps ordered)

1. The complainant requested information from the Royal Borough of Kingston upon Thames ("the Council") about its relationship with a property guardianship company, Global Guardians. The Council initially refused to provide any of the requested information, citing the commercial interests exemption under section 43(2) of FOIA as its basis for doing so. Subsequently, during the course of the Commissioner's investigation, the Council disclosed some of the requested information. However, it continued to withhold some information citing the commercial interests exemption under section 43(2) of FOIA and the personal information exemption under section 40(2) of FOIA.
2. The Commissioner's decision is that the Council has correctly relied on section 43(2) and that the balance of the public interest favours maintaining this exemption. In addition his decision is that the Council has correctly relied on section 40(2) to withhold a copy of the signature of the Head of Housing but that the Council cannot rely on this exemption to withhold the name of the Head of Housing who signed the agreement with Global Guardians.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.

- Disclose the name of the Head of Housing who signed the agreement with Global Guardians.
4. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Request and response

5. On 26 March 2021, the complainant wrote to the Council and requested information in the following terms:

"1) I would like all the details of any agreements between Kingston Council and Global 100 Ltd , Global Guardians Management Ltd or any other company associated with Global Guardians, and also the details of any properties involved within the borough.

2) Can it be confirmed that [redacted] (Head of Housing) was the Kingston Council's signatory to the Property Protection Proposal document with Global Guardians Management Ltd or Global 100 Ltd, or any other Global Guardians company. Please confirm which company the agreement was made with.

3) Can it be confirmed that Global Guardians Management Ltd or Global 100 Ltd, or any other company associated with Global Guardians, was given sole responsibility for the maintenance, health and safety and fitness for habitation of Roupell House under their maintenance plan. Please confirm the company the agreement was made with.

4) How much money has Kingston Council received from Global Guardians (or any associated company) for a) the management of Roupell House b) any other properties within the borough (please name them).

5) What role did [redacted] have in the transaction process between Kingston Council and Global Guardians Management Ltd or Global 100 Ltd or any other associated Global Guardian company?"

6. The Council responded on 27 April 2021. It refused to provide the requested information. It cited the commercial interests exemption under section 43(2) of FOIA as its basis for doing so.

7. Following an internal review the Council wrote to the complainant on 20 May 2021. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 27 May 2021 to complain about the way their request for information had been handled.
9. Subsequently, during the course of the Commissioner's investigation, the Council disclosed information in response to each part of the request. In response to part 1 of the request it disclosed an agreement between the Council and Global Guardians in relation to Roupell House, it redacted financial information within the agreement which it withheld on the basis of the commercial interests exemption under section 43 of FOIA and the name and signature of the Head of Housing who signed the agreement which it withheld on the basis of the personal information exemption under section 40 of FOIA. In response to part 2 of the request it confirmed that the agreement was signed by the Head of Housing, however, withheld their name on the basis of the personal information exemption under section 40 of FOIA.
10. The complainant believes the information withheld under sections 43(2) and 40(2) of FOIA should be disclosed.
11. The following analysis focuses on whether the Council has correctly relied on section 43(2) of FOIA to withhold the financial information within the agreement and on section 40(2) to withhold the name of the Head of Housing who signed the agreement and the signature on the agreement.

Reasons for decision

Section 43(2) – prejudice to commercial interests

12. Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

13. In order for a prejudice-based exemption, such as section 43, to be engaged the Commissioner believes 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., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring 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.

Does the information relate to a person's commercial interests?

14. The Council argues that disclosure of the financial information within the agreement between the Council and Global Guardians would be likely to prejudice the commercial interests of Global Guardians and its own commercial interests.
15. The term 'commercial interests' is not defined in FOIA; however, the Commissioner has considered his guidance on the application of section 43¹, which clarifies that: "A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent."
16. The Commissioner accepts that the interests in question are the commercial interests of the Council and of Global Guardians.

The causal relationship

17. Regarding the commercial interests of Global Guardians, the Council argues that disclosure of the information would be likely to provide Global Guardian's competitors with commercial advantage and therefore

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

prejudice the commercial interests of Global Guardians. The Council also states that Global Guardians have advised the Council that it considers this information to be a confidential, negotiated figure.

18. Regarding its own commercial interests, the Council argues that disclosure of the withheld information would be likely to prejudice its ability to achieve best value for money in future negotiations.
19. The Commissioner is satisfied that a causal relationship exists between the disclosure of the information and the prejudice to commercial interests that the council described.

The likelihood of the prejudice occurring

20. The Council argued that a disclosure of the information 'would be likely' to cause the prejudice it had foreseen. The Commissioner has therefore considered whether the chance of prejudice occurring meets the threshold of being a real and significant risk.
21. The Commissioner has considered the commercial interests of each relevant party and considers that the Council's arguments are persuasive. He accepts that the prejudice foreseen by it would be likely to occur at points in the future if this information were to be disclosed.
22. The Commissioner considers that the Council's argument is strong in identifying a likely issue which would arise from a disclosure of the withheld information. Disclosure of the financial information within the agreement would be likely to affect its commercial negotiations in the future, and as a result, would be likely to be detrimental to its ability to achieve best value for money in future negotiations.

The Commissioner's conclusions

23. The Commissioner has decided that the Council is correct in that section 43(2) is engaged by the withheld information. Since it is a qualified exemption, he must therefore go on to consider the public interest test required by section 2 of the FOIA.

The public interest

24. The test, as set out in section 2(2)(b), is whether "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".

The public interest in the disclosure of the information

25. The Council recognises that there is a general public interest in transparency regarding its activities and spending.

The public interest in the exemption being maintained

26. The Council argues, however, that disclosure of the information would be likely to be detrimental to its ability to achieve best value for money in future negotiations and that the public interest is therefore best served by withholding the information.

The Commissioner's analysis

27. The Commissioner recognises that there is a general public interest in the disclosure of information in order to provide transparency to the public about the activities of public authorities.
28. However, the Commissioner has already acknowledged that the envisaged prejudice would be likely to occur. This would not be in the public interest.
29. For this reason, the Commissioner's decision is that the public interest in the exemption being maintained outweighs that in the information being disclosed on this occasion. The council was not, therefore, obliged to disclose the financial information within the agreement.

Section 40 personal information

30. 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.
31. In this case the relevant condition is contained in section 40(3A)(a)². 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 UK General Data Protection Regulation ('UK GDPR').
32. 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.
33. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

² As amended by Schedule 19 Paragraph 58(3) DPA.

Is the information personal data?

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

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

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

36. 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.

37. 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.

38. In this case the information withheld under section 40(2) of FOIA is the name and signature of the Head of Housing, who signed the agreement with Global Guardians.

39. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied this information both relates to and identifies the Council employee concerned. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.

40. 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.

41. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

42. Article 5(1)(a) of the UK GDPR states that:

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

43. 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.

44. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

45. 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”³.

46. In considering the application of Article 6(1)(f) of the UK 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.

³ 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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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”.

47. 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

48. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
49. The Commissioner accepts that an interest in transparency and accountability regarding how the Council makes decisions to partner with other organisations, including which individual members of senior Council staff were involved in those decisions, constitutes a legitimate interest.

Is disclosure necessary?

50. '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.
51. The Commissioner is satisfied that the disclosure of the name of the Head of Housing who signed the agreement is necessary in meeting the legitimate public interest in providing transparency and accountability regarding how the decision to work with Global Guardians was made. He notes that disclosure that it was the Head of Housing who signed the agreement goes some way to meet the interest in transparency around this, however, he considers that, in order to ensure the accountability of this senior member of Council staff, disclosure of the name of the Head of Housing who signed the agreement is necessary.
52. The Commissioner, however, does not consider that it is necessary to disclose a copy of the Head of Housing's signature in order to meet the interest in accountability and transparency. As disclosure of the signature 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). The following balancing test will therefore consider only disclosure of the name of the Head of Housing.

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

53. 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.
54. 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.
55. 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.
56. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
57. The Commissioner has been unable to identify any specific harm or distress that disclosure may cause. Scrutiny may be unwelcome but senior staff should be accountable for their decisions and actions.
58. The name of the Head of Housing at the date on the agreement is already in the public domain, as the role with dates is listed on their public LinkedIn profile.
59. The Council has not indicated whether the individual has been consulted about the disclosure, and so the Commissioner is not able to ascertain their views, but given their seniority he does not consider that they would have any reasonable expectation of privacy in such a matter as it clearly concerns their actions in their role as a senior public official.

60. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of the information would be lawful.

Fairness and transparency

61. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).

62. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.

63. The requirement for transparency is met because as a public authority, the Council is subject to the FOIA.

The Commissioner's view

64. In this instance, the Commissioner has decided that the Council has failed to demonstrate that the exemption at section 40(2) is engaged with regard to the name of the Head of Housing who signed the agreement. At paragraph 3 above the Council is now required to disclose this information.

Right of appeal

65. 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

66. 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.
67. 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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