

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 July 2022

Public Authority: London Borough of Southwark
Address: 160 Tooley Street
London
SE1 2QH

Decision (including any steps ordered)

1. The complainant has requested information from the London Borough of Southwark ("the Council") regarding switching heating at a specific property to prepay from May 2018 onwards. The Council withheld some of the information citing section 40(2) of FOIA – personal data and section 42 of FOIA – Legal Professional Privilege. Upon review of the complaint, the Commissioner advised the Council that the second part of the complainant's request (which was submitted during the request for an internal review) should have been handled as a new request for information, as it was not part of the original request.
2. The Commissioner's decision is that the Council was entitled to rely on section 40(2) of FOIA to withhold the requested information in relation to the complainant's original request.
3. The Commissioner does not require the public authority to take any further steps.

Request and response

4. On 18 February 2021, the complainant wrote to the Council and requested information in the following terms:

"This is a request for all information on decisions and discussions regarding heating at Sylvan Grove till date."

5. On the same date, the Council asked the complainant to provide their full name and a contact address so that the request could be processed. The complainant provided the information later the same day.
6. On 27 April 2021, the Council wrote to the complainant, advising that it had clarified the complainant's request as the following:

"I require information on the decision to switch the heating at Sylvan Grove to prepay between May 2018 till date. This will involve the company -Switch 2."
7. On the same date, the Council advised the complainant that it does not hold the information as the decision to change was made by Hyde House Association and their equipment was in place before the Council acquired the block.
8. The complainant contacted the Council on 15 June 2021, stating the following:

"My request was This is a request for all information on decisions and discussions regarding heating at Sylvan Grove till date.

Your response completely ignores this. I am aware of several correspondences regarding the heating at sylvan grove. I am not only asking for when the decision was made.

Where is the contract? when was the contract signed? why was there a delay between contract being signed and tenants being made aware. Are there emails, minutes, documents, letters, etc where references to heating at sylvan grove are noted?

I do not agree to that response that the council holds no such information as this is not possible. I request a review."
9. On 5 August 2021, the complainant sent an email to the Council asking for a response to their request.
10. The Council responded on 23 September 2021, advising that another response had been sent to the complainant on 10 August 2021 and that this response would further advise of the actions taken since.
11. The Council explained to the complainant (in the letter dated 10 August 2021 and which is considered to be the internal review), that the information requested is withheld under section 40(2) of FOIA – personal information and section 42 of FOIA – legal professional privilege. Some information was provided to the complainant, which consisted of a chain of emails, with personal data redacted.

Scope of the case

12. The complainant contacted the Commissioner on 23 August 2021, to complain about the way their request for information had been handled.
13. The Commissioner considers that the scope of the case is to determine if the Council is correct to withhold the information under section 40(2) of FOIA. As the information that section 42 of FOIA was applied to is being handled as a separate request, it is not subject to this investigation and, therefore, the Commissioner is only looking at the application of section 40(2).
14. The Commissioner has also considered if the request should have been handled under the Environmental Information Regulations (EIR). However, the withheld information is personal data and, as such, regardless of if this was considered under FOIA or the EIR, the outcome would be the same. The Commissioner reminds the Council that it should consider which legislation a request for information should be handled under carefully.

Reasons for decision

Section 40 personal information

15. Section 40(2) of 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.
16. 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 UK General Data Protection Regulation ('UK GDPR').
17. 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 FOIA cannot apply.

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

18. 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.

Is the information personal data?

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

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

20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. 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.
22. 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.
23. In this case, the complainant has requested information regarding a specific property, such as emails, meeting minutes etc between the Council and a third party company called Switch 2. The withheld information requested contains the personal information of Council employees (names, telephone numbers and email addresses), as well as personal information (names, telephone numbers and email addresses) of staff at the third party company.
24. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects. The names and email addresses of the data subjects quite obviously is information that both relates to and identifies those concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
25. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
26. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

27. 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".

28. In the case of a 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.
29. 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

30. 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.

31. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under 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.

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".

32. 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

33. In considering any legitimate interest(s) in the disclosure of the requested information under 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.
34. 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.
35. In this case, the complainant has not provided a reason why they want to view this information. However, they have advised that the decision made by the Council/third party company has affected around 80 households. Therefore the Commissioner considers that there is a legitimate interest centred on whether the Council's decision making is robust, as well as general principles of transparency about a local authority's conduct.

Is disclosure necessary?

36. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
37. In the circumstances of this case, the Commissioner notes that the complainant has been provided with the majority of the requested information; the only outstanding information in relation to the emails, are the names and email addresses of the employees of both the Council and the third party company.
38. The Commissioner considers, therefore, that the legitimate interests centred on the Council's decision making have already been met by the disclosure of the redacted emails. The names and email addresses add nothing further in terms of context.
39. As the Commissioner has decided in this case that further disclosure is not necessary to meet the legitimate interests identified in paragraph 35, he has not gone on to conduct the balancing test. As disclosure is

not necessary, there is no lawful basis for this processing. It therefore does not meet the requirements of principle (a).

40. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
41. As disclosure would have breached one of the data protection principles, the Council was entitled to rely on section 40(2) of FOIA to withhold the redacted information.

Right of appeal

42. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

43. 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.
44. 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

Michael Lea
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