

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 30 May 2022

**Public Authority:** London Borough of Redbridge  
**Address:** Lynton House  
255 - 259 High Road  
Ilford  
IG1 1NY

#### **Decision (including any steps ordered)**

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1. The complainant requested information from the London Borough of Redbridge ("the Council") relating to the removal of items belonging to the complainant by the Council.
2. Whilst the Council provided the complainant with some information within the scope of the request, it denied holding information which recorded the condition of the complainant's items at the time of their removal. The Council also withheld the name of the Council staff member who removed the items citing section 40(2) (personal data) of the FOIA as its basis for doing so.
3. The Commissioner's decision is that the Council does not hold information which records the condition of the complainant's items at the time of their removal. The Commissioner is also satisfied that the Council is entitled to rely on section 40(2) of the FOIA to withhold the name of the Council staff member who removed the items.
4. The Commissioner does not require the council to take any steps.

## Request and response

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5. On 28 June 2021, the complainant wrote to the Council and requested information in the following terms:

"On Tuesday the 3rd July 2018 council housing caretaking staff attended the above property, as ordered by the head of the council housing caretaking service [name redacted], and unlawfully removed my property.

I submit a Freedom [sic] of Information Request / Subject Access Request as follows..

What is the procedure for removing items?

What is the policy for safe keeping and care of removed possessions?

How was the condition of my items recorded at the time of removal?

Please provide records of details recorded, noting the condition of my items at time of removal?

What is the policy for safe and careful transport of items removed to storage?

What training is provided to caretaking staff to ensure care and safe removal of my possessions?

When was this training most recently provided to staff?

The name of the officer who observed the stored items?

The name of the officer who authorised the removal of the items?

Did this officer know who the items belonged to?

Why this officer made no attempt to contact the resident the items belonged to?

How many operatives attended the above address and unlawfully removed my property?

The exact date and time the operatives attended the property?

The names and positions held by those attending council staff?

The vehicle registration number, description and taxation class of the vehicle used in the unlawful removal of my property?

How many other premises were visited that day by the vehicle and operatives for property removal?

What time the vehicle operatives returned to the [name of Housing Office redacted] to unload the daily items collected?

The exact date and time my unlawfully removed property was transferred from the vehicle to the storage area underneath one of the tower blocks on the [estate name redacted]?

The number of visits to the property from the date of initial removal and to the current date to inspect the area where my possessions [sic] were previously stored?

The names of those officers who have attended the property from the date of initial removal, to the current date to inspect the area where my possessions were previously stored?"

6. The Council responded on 2 August 2021 and refused to provide the requested information citing section 12 (cost limit) of the FOIA as its basis for doing so.
7. On 20 August 2021, the complainant wrote to the Council to request an internal review.
8. Following an internal review, the Council wrote to the complainant on 26 August 2021. It maintained its reliance on section 12 of the FOIA.
9. The complainant contacted the Commissioner on 31 August 2021 to complain about the way their request for information had been handled.
10. During the course of the Commissioner's investigation, the Council withdrew its reliance on section 12 of the FOIA and provided the complainant with a further response to their request.
11. The Council provided the complainant with some information within the scope of their request but refused to provide the names of Council staff who removed the complainant's items (question 14) citing section 40(2) (personal data) of the FOIA as its basis for doing so.
12. The Council also denied holding information which recorded the condition of the complainant's items when removed (question 4). It stated that whilst photographs were taken of the complainant's items at the time of their removal, the photographs have since been deleted and therefore, are no longer held.

## Scope of the case

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13. The complainant contacted the Commissioner on 21 April 2021 to complain about the way their request for information had been handled.
14. The scope of this case and the following analysis is to determine whether the Council has correctly cited section 40(2) of the FOIA to refuse to provide the names of Council staff who removed the complainant's items.
15. This case will also determine whether the Council is correct when it says it does not hold information which records the condition of the complainant's items at the time of their removal.

## Reasons for decision

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### Section 1 – general right of access to information

16. Section 1(1) of the FOIA states that:

“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.”

17. Section 1(1) requires that any person making a request for information to a public authority must be informed in writing by the public authority whether it holds information relevant to the request, and if so, to have that information communicated to them. This is subject to any exclusions or exemptions that may apply.
18. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
19. In other words, in order to determine such complaints, the Commissioner must decide whether on the balance of probabilities a public authority holds any or additional information which falls within the scope of the request (or was held at the time of the request).

### **The complainant's position**

20. In their complaint to the Commissioner, the complainant stated that they believe the Council to hold information which records the condition of their items at the time of their removal, specifically photographs that were taken of the complainant's items at the time of their removal.
21. The complainant explained that the Council had previously provided them with a copy of one of the photographs. The photograph was provided to the complainant on 16 August 2018 as part of the Council's response to a complaint which the complainant submitted to the Council about the condition of their items when they were returned.
22. The complainant considers the fact that the Council provided with them with a photograph of their items as part of its response to their complaint to be evidence that the Council still holds the photographs that were taken of their items at the time of their removal.

### **The Council's position**

23. As is the practice in a case where there is some dispute over the amount of information located by a public authority and the amount of information that a complainant believes the public authority to hold, the Commissioner asked the Council to provide him with a detailed explanation of the searches it had conducted for information within the scope of the request.
24. Specifically, the Commissioner asked the Council to explain what searches it has undertaken for any information it holds which records the condition of the complainant's items at their time of their removal.
25. In its submissions to the Commissioner, the Council explained that whilst it did hold photographs of the complainant's items which recorded the condition of the items at the time of their removal, the photographs are no longer held.
26. The Council explained that the photographs were taken by the caretaker who removed the complainant's items from the property using the caretaker's personal mobile device. The photographs were then deleted approximately two years after they were taken when the caretaker's mobile device was upgraded.
27. The Council explained that it had searched for the photographs using the date the photographs were taken. The Council stated that it also asked the caretaker who removed the items to search his mobile device, cloud storage and deleted files for the photographs. However, no photographs were located. The caretaker did not make any backups of the

photographs in line with data minimisation and accuracy principles. The photographs were not uploaded onto the Council's network.

28. The Council explained that its record management policy does not specifically state how long photographs should be held. However, the photographs are considered to be part of housing management files. Housing management files are kept for six years following the termination of a relationship with a tenant or after the last action.
29. The Council confirmed that it does keep a record of items it has removed, where those items are stored, instructions for removal and the date of the removal. However, it stated that the records do not include photographs of the removed items.
30. The Council stated that it has no business purpose for holding the photographs. The Council explained that it photographs items that have been removed from Council property to record their condition when removed. However, once those items have been returned to their owner, there is no reason for the Council to retain the photographs. In the complainant's case, the complainant collected their items from the Council on 14 August 2018. Once the items were collected, the Council had no reason to keep the photographs.
31. The Council confirmed that there are no statutory requirements for it to retain the photographs.

### **The Commissioner's position**

32. The Commissioner has considered the Council's position in relation to whether the Council holds photographs which record the condition of the complainant's items when removed by the Council.
33. Whilst the Council has stated that it usually considers photographs of removed items to be part of housing management files which are held for six years, in this case, the Council has clearly stated that the photographs are no longer held. The Council has also provided the Commissioner with a detailed explanation as to why the photographs are no longer held.
34. Therefore, the Commissioner considers that the Council has carried out adequate searches for the photographs and is satisfied that on the balance of probabilities, the photographs are not held by the Council.

### **Section 40 - personal information**

35. 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.

36. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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').
37. 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.

### **Is the information personal data?**

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

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

39. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
40. 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.
41. 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.
42. In this case, the complainant has requested the names of the Council staff members who removed their items. The Commissioner is satisfied that the information relates to and identifies those individuals. The name of an individual quite obviously is information that both relates to and identifies that individual. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
43. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA

the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

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

### **Would disclosure contravene principle (a)?**

45. 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”.

46. 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.

47. 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**

48. 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”<sup>2</sup>.

49. 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:

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<sup>2</sup> 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”.*



- 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.
50. 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**

51. 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.
52. The Commissioner accepts that there is a legitimate interest in the accountability of public authorities as a general principle. There is also the legitimate interest of the requester, the complainant.
53. The Council stated that whilst the complainant is pursuing a private concern, there is a legitimate interest in the information. Specifically, the Council stated that there is a legitimate interest in understanding if items were lawfully removed by the Council and whether Council staff followed Council policy and procedure when removing the items.
54. Therefore, the Commissioner considers that there is a legitimate interest in disclosure of the information.

### **Is disclosure necessary?**

55. '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.
56. As disclosure under the FOIA is disclosure to the world at large, it is rare that such processing will be necessary to achieve a legitimate interest.

57. The Council stated that it considers there to be less intrusive ways to demonstrate accountability and transparency, and to confirm that the correct procedures were followed when removing their items.
58. The Council explained that it has previously disclosed the name of the manager who authorised the removal of the complainant's items and provided the complainant with information on how and why the items were removed.
59. The Commissioner has considered whether disclosure of the identity of the Council staff member who removed the complainant's items is necessary to meet the legitimate interest identified above.
60. In this case, the Commissioner considers that by disclosing the name of the manager who authorised the removal of the items, and by providing the complainant's with information about the Council's policies and procedures for removing items, the Council has already fulfilled the legitimate interest.
61. Therefore, the Commissioner does not consider that disclosure of the withheld information is necessary to meet the legitimate interest in this case.
62. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it would be unlawful. It therefore does not meet the requirements of principle (a) (lawful processing).
63. The Commissioner's decision is that the Council was correct to withhold the name of the Council staff member who removed the complainant's items under section 40(2) of the FOIA.

## Right of appeal

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64. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

65. 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.
66. 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 .....**

**Ben Tomes**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**