

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 July 2022

Public Authority: Liverpool City Council
Address: Municipal Buildings
Dale Street
Liverpool
L69 2DH

Decision (including any steps ordered)

1. The complainant requested information from Liverpool City Council ("the Council") relating to a specific property and an improvement notice.
2. The Commissioner's decision is that the Council is entitled to rely on section 40(1) (personal information) and 40(2) of the FOIA to refuse to provide the requested information.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 29 July 2021, the complainant wrote to the Council and requested information in the following terms:

“Could you please provide all records in connection with the complaints regarding disrepair at [address redacted] to include:

All letters and emails between Liverpool Council and the Tenant and Tenant’s representatives

All telephone notes and records including if appropriate text messages

All internal correspondence, emails, text messages etc. exchanged internally within the Housing Standards Department.

A copy of your risk assessments regarding the hazards at the property

During your most recent telephone call to me you indicated that your colleague / boss had advised you on the matter and /or made the decision or instructed you to serve the improvement notice. You should recall that I made a request to speak to him/her.

You stated that he/she was not available but you would send a message/email with my request for him/her to contact me. No call was received or contact made.

Please provide the colleague’s name and position in the department and any record why the contact was not made.”

5. The Council responded on 15 September 2021. It informed the complainant that it considered the request to be for the complainant’s own personal data and asked the complainant to provide identification.

Scope of the case

6. The complainant contacted the Commissioner on 7 October 2021 to complain about the way their request for information had been handled.
7. Specifically, the complainant wished to complain about the Council’s decision to handle their request as a request for their own personal data. The complainant stated that they do not consider the requested

information to be their personal data and therefore, they consider that their request should be handled under the FOIA.

8. The scope of this case and the following analysis is to determine whether the information requested relating to the property is the complainant's personal data and, therefore, exempt from disclosure under section 40(1) (personal information) of the FOIA.
9. This case will also determine whether the requested information which relates to a staff member at the Council is exempt from disclosure under section 40(2) of the FOIA.

Reasons for decision

Section 40(1) – personal information

10. Section 40(1) of the FOIA states that:

“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.”

11. Section 3(2) of the Data Protection Act 2018 (DPA) defines personal data as:

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

12. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
13. 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.
14. 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.
15. In this case, the complainant has requested information relating to a specific property. That property is owned by a limited company of which the complainant is the director and the sole shareholder. Therefore, the Commissioner considers that the property is owned by the complainant.

16. As the property is owned by the complainant any information relating to that property would relate to the complainant and they would be identifiable as the owner of that property. Therefore, the Commissioner considers the requested information relating to the property to be the personal data of the complainant and to fall within the definition of personal data in section 3(2) of the DPA
17. Section 40(1) is an absolute exemption and there is no requirement for the Commissioner to consider the balance of public interest. Nor is he required to consider whether or not the complainant would be happy to have his personal data published to the world at large. If the exemption applies, the information is not available via FOIA.
18. Therefore, the Commissioner's decision is that the Council is entitled to rely on section 40(1) to refuse to provide the information relating to the property.

Section 40(2) - personal information

19. 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.
20. In this case, the complainant has requested the name and job title of the Council staff member who made the decision to issue an improvement notice. The Commissioner is satisfied that this information relates to and identifies the Council staff member. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
21. The fact that information constitutes the personal data of an identifiable living individual, other than the complainant, 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.
22. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

23. 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”.

24. 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.
25. 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

26. 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”¹.

27. 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
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
28. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

¹ 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”.

Legitimate interests

29. 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.
30. 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.
31. The Commissioner considers that in this case, the complainant has a legitimate interest in knowing who made the decision to issue an improvement notice.

Is disclosure necessary?

32. '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.
33. 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.
34. In this case, the Commissioner is aware that the Council has previously provided the complainant with a copy of the improvement notice which contains the name and job title of the Council staff member who issued the notice. Furthermore, the Commissioner understands that whilst the improvement notice was issued by a particular Council staff member, it was done so on behalf of the Council.
35. The Commissioner considers that as the complainant already knows the name and position of the Council staff member who issued the notice and the notice was issued on behalf of the Council, the legitimate interests of the complainant has already been met.
36. Therefore, the Commissioner does not consider that disclosure of the name and position of the Council staff member who made the decision to issue the notice is necessary to meet the identified legitimate interest.

37. 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).
38. The Commissioner's decision is that the Council is entitled to rely on section 40(2) to withhold the name and job title of the Council staff member who made the decision to issue the improvement notice.

Right of appeal

39. 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

40. 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.
41. 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
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SK9 5AF