

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 November 2022

Public Authority: London Borough of Hounslow
Address: Hounslow House
7 Bath Road
Hounslow
Middlesex
TW3 3EB

Decision (including any steps ordered)

1. The complainant has requested the addresses of properties which were vacant and how long they were vacant.
2. The Commissioner's decision is that London Borough of Hounslow (the Council) was entitled to rely on section 40(2) of the FIOA.
3. The Council did breach section 10(1) of FOIA by failing to provide a valid response to the request within the statutory time frame of 20 working days.
4. The Commissioner does not require the public authority to take any further steps.

Request and response

5. On 23 October 2021, the complainant wrote to the Council and requested information in the following terms:

 "The addresses of the ground floor properties which were vacant between 8 March 2017 and April 2021: and

 For how long they were vacant during this time period."

6. The Council responded on 20 January 2022. It provided some of the information within the scope of the request, but advised the rest of the information would be exempt under section 40(2)

7. Following an internal review the Council wrote to the complainant on 15 March 2022. It provided the address for the properties which were located on the ground floor, however it did not provide any information regarding how long the properties were vacant for.

Scope of the case

8. The complainant contacted the Commissioner on 23 December 2021 to complain about the way their request for information had been handled.
9. During the Commissioner's investigation, the Council revised its original response to the complainant, it provided partial addresses for the ground floor properties and the dates these properties were vacant. The Council explained that it was no longer providing the full address as this would constitute personal data and be exempt from disclosure under section 40(2).
10. The Commissioner considers that the scope of his investigation is to consider whether the Council is entitled to rely on Section 40(2) of FOIA as a basis for refusing to provide the withheld information.

Reasons for decision

11. Section 40(2) of FOIA states 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 (4A) is satisfied.

12. 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').
13. 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.
14. 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?

15. Section 3(2) of the DPA defines personal data as:
 - a. "any information relating to an identified or identifiable living individual."
16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.
18. 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.
19. In the circumstances of this case and having considered the withheld information, the Commissioner is satisfied that if the information requested (the full addresses of ground floor Council owned properties and the length of time these properties were vacant) were disclosed, it could identify individuals.

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

20. The Commissioner further advises that those individuals may not only be identifiable from the requested information, but when combined with other information (such as the number of occupiers) the complainant is 'reasonably likely'² able to use the electoral roll data and establish the identity of the occupants. 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 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.
22. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

23. 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."
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 UK 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:

² The ICO's Code of Practice on Anonymisation notes that:

"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and 'reasonably likely' for information to be classed as personal data under the DPA."

In summary, the motivated intruder test is that if the risk of identification is 'reasonably likely', the information should be regarded as personal data.

[Anonymisation: managing data protection risk code of practice \(ico.org.uk\)](https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/individuals/anonymous-data/)

“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.

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:-
- a. **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - b. **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - c. **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.

Legitimate Interests

29. 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.
30. 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

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) 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”.

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.

31. In this case, the complainant indicated that they have a personal interest in the information being disclosed. The requested information was needed to evidence their claim that the Council unnecessarily tried to [temporarily] move the complainant over 20 miles away, when there were alleged properties available in the area. Therefore, the Commissioner can appreciate that there may be a legitimate interest in ensuring the Council is operating legally and fairly.
32. The Commissioner has to take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public. He must therefore consider the wider public interest issues and fairness to the persons involved when deciding whether or not the information is suitable for disclosure.
33. The Commissioner does consider that there is a legitimate interest in disclosing the requested information. The withheld information may demonstrate the unfair treatment of the complainant.

Is disclosure necessary?

34. '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.
35. The Council has already disclosed the partial addresses of the properties which were vacant between 8 March 2017 and April 2021, along with the total amount of days the properties were vacant between 8 March 2017 and April 2021.
36. The complainant requested the information to find out if; the Council had asked the complainant to move over 20 miles away to temporary accommodation when the Council did in fact hold vacant properties within the area the complainant lived
37. The Commissioner recognises that some of the requested information would support the complainants dispute with the Council. However, the Commissioner is satisfied that this information has already been disclosed by the Council and would satisfy the legitimate interest for the information.

38. The complainant can now see the amount of time the properties were vacant as requested, giving the full addresses of the properties would not add any value to the concerns raised by the complainant.
39. The Commissioner has therefore considered whether disclosure under the FOIA is the least intrusive means of achieving the legitimate aim in question, the Commissioner is not satisfied that this would be the least intrusive means of achieving the complainants aim in question.

The Commissioner's Decision

40. As the Commissioner has decided in this case that disclosure to the world at large 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 is unlawful. It therefore does not meet the requirements of principle (a)
41. The Commissioner has therefore decided that the Council was entitled to withhold the information under section 40(2) FOIA.
42. The Commissioner has considered both sides of the request and has decided that the Council was entitled to withhold information under section 40(2), by way of section 40(3A)(a).

Procedural Matters

43. Section 1(1) of 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."
44. Section 10(1) of FOIA states that a public authority must respond to a request promptly and "not later than the twentieth working day following the date of receipt".
45. In this case the request was made on 23 October 2021 and a response was not provided until 20 January 2022. The Commissioner finds that the Council has breached section 10(1) by failing to respond to the request within 20 working days and it is now required to respond to the request in accordance with FOIA.

Other matters

46. The Commissioner would like to mention that in the future the Council should try and work on their timeliness regarding responding to these matters when approached by the Commissioner.

Right of appeal

47. 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

48. 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.
49. 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

Catherine Fletcher
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF