

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

### **Decision notice**

**Date:** 2 August 2022

**Public Authority:** London Borough of Enfield  
**Address:** Civic Centre  
Silver Street  
Enfield  
Middlesex  
EN1 3XF

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

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1. The complainant requested information from the London Borough of Enfield ("the Council") about parking complaints relating to a specific postcode. The Council disclosed some of the information requested but refused to provide the majority of the information citing the personal information exemption under section 40(2) (personal information) of FOIA.
2. The Commissioner's decision is that the Council has correctly relied on section 40(2).
3. The Commissioner does not require the Council to take any steps.

## Request and response

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4. On 24 May 2021, the complainant wrote to the Council and requested information in the following terms:
  - 1) "How many complaints were made to Enfield Council relating to the parking causing inconvenience to neighbours relating to the postcode [redacted] between 2018 and now?
  - 2) What date(s) were these complaints made on?
  - 3) What method(s) were these complaints made in?
  - 4) How many individuals made these complaints?
  - 5) How many households made these complaints?
  - 6) What was Enfield Council's response to these complaints? Please let me know all of the dates and methods of contact (i.e. letter, email or phone call) for the occasions when you contacted whomsoever was the cause of these complaints."
5. On 28 June 2021 the complainant brought a complaint to the ICO about the Council's failure to respond to their request.
6. On 1 March 2022 the ICO issued a decision notice under case reference IC-154367-H8Z3. The Commissioner's decision was that the Council had breached section 10(1) of FOIA in that it failed to provide a valid response to the request within the statutory time frame of 20 working days. The Commissioner ordered the Council to provide a substantive response to the request within 35 calendar days.
7. On 5 April 2022 the Council provided a substantive response. It provided some information within the scope of the request (that requested in part three of the request) but refused to provide the remainder. It cited the personal information exemption under section 40 of FOIA as its basis for doing so.
8. The complainant requested an internal review on 5 April 2022. The Council informed them that it would provide a response by 19 May 2022. The Commissioner understands that no internal review was provided to the complainant.

## Scope of the case

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9. The complainant contacted the Commissioner on 31 May 2022 to complain about the way his request for information had been handled.
10. The following analysis focuses on whether the Council has correctly relied on section 40(2) of FOIA to withhold the information requested in parts 1,2,4,5 and 6 of the request.

## Reasons for decision

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### Section 40 personal information

11. 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.
12. 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 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:

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

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

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 or 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 this case the information withheld under section 40(2) of FOIA relates to parking complaints received by the Council in a particular postcode.
20. The Council considers the withheld information to be the personal data of both the individual(s) who made the complaints and the individual(s) about whom the complaints were made.
21. The Council has argued that the disclosure of the information it holds may lead to the identification of the individuals about whom the parking complaints were made, due to the very small number of cases.
22. As is explored in his guidance on determining what is personal data, the Commissioner considers that it is necessary to consider whether individuals would be identifiable "by a determined person with a particular reason to want to identify individuals" <sup>2</sup>.
23. In this case, the Council has argued that, because of the very small number of relevant parking complaints, members of the public with related knowledge may be able to link that knowledge with the information being requested, and be able to identify specific individuals.
24. In his guidance on anonymisation<sup>3</sup>, from page 31 onwards, the Commissioner explains that "removing numbers relating to five or 10 individuals or fewer may be a reasonable rule of thumb for minimising

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<sup>2</sup> <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/what-is-personal-data/can-we-identify-an-individual-indirectly/#pd4>

<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>

the risk of identification". This is particularly the case with regard to a known geographical location.

25. The Commissioner has examined the withheld information in this case and is satisfied that the Council holds information relating to a small number of relevant parking complaints: fewer than five.
26. The Commissioner considers that the individuals about whom the parking complaints were made could potentially be identified by "a determined person" from the requested information, owing to the very small numbers involved. This could be, for example, a local resident who has existing awareness of the parking issues in this area and the identity of the individuals involved.
27. He is satisfied that the risk of identification is sufficient that the information falls within the definition of "personal data" in article 4(1) of the UK GDPR.
28. 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.
29. The most relevant DP principle in this case is set out at Article 5(1)(a) of the UK GDPR and is known as principle (a).

Would disclosure contravene principle (a)?

30. 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".

31. 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.
32. 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

33. 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>4</sup>.

34. 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, therefore, 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.

35. 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

36. 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

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<sup>4</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 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".

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.

37. The Council argues that the request is motivated by a private interest and as a result there is no legitimate interest within the meaning ascribed by FOIA.
38. The Commissioner accepts the Council's argument that the request is motivated by a private interest, however, as he recognises that a requester's own interests may be legitimate interests, he considers that gathering information about parking complaints in that location is a legitimate interest. However, in cases where the requester is pursuing a purely private concern unrelated to any broader public interest, this will be taken in to account in the balancing test.

#### Is disclosure necessary?

39. '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.
40. The Commissioner is satisfied that the disclosure of the withheld information is necessary to meet the legitimate interest in gathering information about parking complaints in that specific location.

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

41. 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 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.
42. 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.

43. 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.
44. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
45. The Council argues that there is no wider interest in disclosure of the information and that the request appears to be motivated by an ongoing private legal matter.
46. In addition, the Council argues that disclosure would jeopardise the integrity of the private legal case and that disclosure may potentially lead to altercations or anti-social behaviour between the parties.
47. The Council argues that the withheld information relates to the data subjects' private life and that, in the case of those persons accused of antisocial behaviour issues, in this case specifically parking issues, they would reasonably assume that their personal data would be kept confidential.
48. The Commissioner's established position is that where a requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate.
49. The Commissioner accepts the Council's arguments regarding the limited legitimate interest in disclosure, the reasonable expectations of the data subject(s) and the potential harm or distress that disclosure may cause.
50. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject(s)' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
51. 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.

**The Commissioner's decision**

52. The Commissioner has therefore decided that the Council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

## Right of appeal

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53. 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) <mailto:GRC@hmcts.gsi.gov.uk>

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

54. 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.
55. 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 .....**

**Victoria James**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**