



**First-tier Tribunal  
General Regulatory Chamber  
Information Rights**

**Appeal Reference: EA/2020/0215 P**

**Decided without a hearing  
On 2 December 2020**

**Before**

**JUDGE HAZEL OLIVER  
PIETER DE WAAL  
MICHAEL JONES**

**Between**

**PETER CLEASBY**

Appellant

**and**

**INFORMATION COMMISSIONER**

Respondent

## **DECISION**

The appeal is upheld in part.

## **SUBSTITUTE DECISION NOTICE**

Exeter City Council did not act correctly in withholding the information requested by Mr Peter Cleasby under section 40(2) of the Freedom of Information Act 2000 in relation to names of individual suppliers who received payments from the Council in excess of £500, because disclosure would not contravene any of the data protection principles. Names of individual suppliers who received payments of £500 or below can be withheld under section 40(2). Exeter City Council is to either disclose this information or explain its basis for relying on an alternative exemption to disclosure by 20 January 2021.

# REASONS

## Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 15 June 2020 (FS59823461, the “Decision Notice”). It concerns information about the names of individual suppliers contracted to provide goods and services to Exeter City Council (the “Council”).

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. The appellant made a request for information under the Freedom of Information Act 2000 (“FOIA”) on 21 October 2019 (the “Request”), as follows:

*“I attach a spreadsheet showing payments made by the Council where the supplier name has been redacted on personal data grounds. It has been derived from the quarterly lists of payment published by the Council, and I have sought to limit those items of payment for commercial services. I request that the redacted supplier names be published on the grounds that there is a clear public interest in knowing who is being paid from public funds for commercial services.”*

4. The Council responded on 13 November 2019. It updated five entries on the spreadsheet with details of companies that had received payments. It refused to release the names of individuals in reliance on section 40 FOIA (personal information) (the “Withheld Information”).

5. The appellant requested an internal review on 18 November 2019. The Council provided a response on 13 December 2019 which maintained its position that the names of individuals would not be disclosed, and provided more detailed information about why the Council believed the exemption in section 40 FOIA applied.

6. The appellant complained to the Commissioner on 20 December 2019. The Commissioner decided that section 40(2) applied:

- a. The information is personal data, as it consisted of individuals’ first and last names.
- b. The lawful basis for processing most applicable is Article 6(1)(f) GDPR.
- c. There is a legitimate interest in the information being disclosed, being greater accountability and transparency in the Council’s expenditure of public funds.
- d. However, disclosure was not necessary as the published information contains sufficient details on payments processed by the Council, and publication of names would not significantly contribute to transparency without unwarranted intrusion into the privacy of the named individuals.

## The Appeal and Responses

7. The appellant appealed on 10 July 2020. His grounds of appeal are:

- a. Article 6(1)(c) applies as a lawful basis for processing, as the Local Government Transparency Code 2015 (the “Code”) requires publication of the beneficiaries of payments for goods and services.
  - b. The absence of consent from the suppliers is of little merit, as they should have made themselves aware of the disclosure requirements when entering into a commercial relationship with a public body and/or the Council should have drawn their attention to this in contractual documentation.
  - c. Without supplier names, there is no way of knowing how many times the same supplier is being used, and if the Council is favouring particular suppliers. Or whether the Council is using local suppliers. The press and public cannot ask the right questions without knowing who the suppliers are.
8. The Commissioner’s response can be summarised as follows:
- a. The individual suppliers had not consented to disclosure of their names.
  - b. The Code is not a legal obligation which would override the Council’s disclosure considerations under FOIA.
  - c. Disclosure is not necessary for the legitimate interest put forward by the appellant, applying the test of pressing social need and the ability to meet the legitimate interest by another less intrusive means.
  - d. If the balancing test needs to be applied, it is reasonable for the suppliers to expect their names would not be disclosed, and this would not significantly contribute to transparency on spending of public funds.
9. The appellant’s reply says that there is a legal obligation to publish information as set out in part 2 of the Code, and this can be done in compliance with data protection requirements. There is a pressing social need for the information as part of concerns about counter-fraud and transparency of tendering, and this required details of the beneficiary of the payments. There is no less intrusive way of achieving this objective. The balancing test favours disclosure for the same reasons.

**Applicable law**

10. The relevant provisions of FOIA are as follows.

**1 General right of access to information held by public authorities.**

- (1) 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.

.....

**2 Effect of the exemptions in Part II.**

.....

- (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
  - (a) the information is exempt information by virtue of a provision conferring absolute exemption, or

- (b) *in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

.....

**40 Personal information.**

- (1) *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.*
- (2) *Any information to which a request for information relates is also exempt information if –*
- (a) *it constitutes personal data which do not fall within subsection (1), and*
- (b) *the first, second or third condition below is satisfied.*
- (3A) *The first condition is that the disclosure of the information to a member of the public otherwise than under this Act—*
- (a) *would contravene any of the data protection principles, or*
- (b) *would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.*

.....

**58 Determination of appeals.**

- (1) *If on an appeal under section 57 the Tribunal considers—*
- (a) *that the notice against which the appeal is brought is not in accordance with the law, or*
- (b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
- the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
- (2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

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*”. The “processing” of such information includes “*disclosure by transmission, dissemination or otherwise making available*” (s.3(4)(d) DPA), and so includes disclosure under FOIA.

12. The data protection principles are those set out in Article 5(1) of the General Data Protection Regulation (“GDPR”), and section 34(1) of the DPA. The first data protection principle under Article 5(1)(a) GDPR is that personal data shall be: “*processed lawfully, fairly and in a transparent manner in relation to the data subject*”.

13. To be lawful, the processing must meet one of the conditions for lawful processing listed in Article 6(1) GDPR. These include:

- a. Where “*processing is necessary for compliance with a legal obligation to which the controller is subject*” (Article 6(c)).
- b. Where “*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*” (Article 6(f)). The GDPR goes on to

state that this condition shall not apply to processing carried out by public authorities in the performance of their tasks, but section 40(8) FOIA omits this provision, meaning that Article 6(1)(f) can be used as a lawful basis for the disclosure of personal data under FOIA.

14. The balancing test in Article 6(f) involves consideration of three questions (as set out by Lady Hale DP in ***South Lanarkshire Council v Scottish Information Commissioner*** [2013] UKSC 55):

- (i) Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
- (ii) Is the processing involved necessary for the purposes of those interests?
- (iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

The wording of question (iii) is taken from the Data Protection Act 1998, which is now replaced by the DPA and GDPR. This should now reflect the words used in the GDPR – whether such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data.

15. Even where a lawful condition for processing applies, the data must still be processed fairly and transparently in order to comply with the first data protection principle. This involves considering whether: the processor has considered how the processing may affect the individuals concerned and can justify any adverse impact; data is processed in ways that the data subjects may reasonably expect; and data subjects are not deceived or misled about the collection of their personal data.

16. Section 40(2) is an absolute exemption, and so not subject to the public interest test where the first condition in section 40(3A) applies (disclosure would contravene any of the data protection principles).

### **Issues and evidence**

17. The issue in the case is whether the exemption in section 40(2) applies to the Withheld Information, based on whether the processing of the individual suppliers' personal data would breach the data protection principles. This can be broken down into the following issues:

- a. Is the Withheld Information personal data?
- b. Does Article 6(c) GDPR provide a lawful basis for processing the data?
- c. Does Article 6(f) GDPR provide a lawful basis for processing the data?
- d. If there is a lawful basis for processing the data, would disclosure under FOIA be fair and transparent?

18. In evidence we had an agreed bundle of open documents, which included the appeal, Commissioner's response, and appellant's reply. We also had a closed bundle which showed the Withheld Information in the spreadsheets of supplier payments.

### **Discussion and Conclusions**

19. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review

any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.

20. **Is the Withheld Information personal data?** Yes, the closed bundle clearly shows that the Withheld Information is the first and second names of individuals who have received payments as suppliers to the Council.

21. **Does Article 6(c) GDPR provide a lawful basis for processing the data?**

22. The appellant says that part 2 of Code is a legal obligation, which requires publication of the names of beneficiaries of payments in excess of £500. Regulation 2 of the Local Government (Transparency Requirements) (England) Regulations 2015 (the "Regulations") provides as follows:

*"An authority to which the Code applies, other than a parish council whose gross annual income or expenditure (whichever is the higher) is £6.5 million or less, must publish the information specified in Part 2 of the Code in the manner and form and on the occasions specified in Part 2 of the Code".*

23. The Council and the Commissioner have both taken the position that the Code provides guidance only, and is not a legal obligation. We disagree. These statutory Regulations clearly make compliance with Part 2 of the Code a legal obligation for all public authorities to which the Regulations apply. The Council is subject to the Regulations and to the Code.

24. Part 2.1 of the Code specifies that data on expenditure exceeding £500 must be published quarterly. Paragraph 28 sets out a list of examples of items that must be published, which includes individual invoices and payments for goods and services. Footnote 15 to this paragraph states, "...local authorities should publish details of payments to individual contractors (e.g. individuals from consultancy firms, employment agencies, direct personal contracts, personal service companies etc) either here or under contract information." Paragraph 29 lists the information that must be published for each individual item of expenditure, which includes the "beneficiary". Part 2 of the Code therefore requires the Council to publish details of the "beneficiary" (i.e. the name) of all organisations or individuals who received payments over £500.

25. The appellant has also referred to paragraph 15 in part 1 of the Code - "*The Data Protection Act 1998 also does not automatically prohibit information being published naming the suppliers with whom the authority has contracts, including sole traders, because of the public interest in accountability and transparency in the spending of public money*". This anticipates that the names of sole traders may be published. Although this is subject to the requirements of the DPA, privacy right under the DPA are not an absolute bar to disclosure. The Commissioner has referred to paragraph 16 of the Code, which suggests anonymisation of datasets where information "*contains public data that cannot be disclosed in a Data Protection Act compliant manner.*" However, this paragraph refers to "other" situations than information about suppliers, which is covered in paragraph 15.

26. Paragraph 22 in part 1 of the Code states that it is at the discretion of the local authority whether or not to rely on an exemption under FOIA where applicable, or publish the data. This paragraph goes on to state, "*Local authorities should start from the presumption of openness*

*and disclosure of information, and not rely on exemptions to withhold information unless absolutely necessary.”*

27. We note the Commissioner’s point that the Code has not been updated for the GDPR. However, we can apply the GDPR in making our assessment of whether it is fair to publish the data under FOIA. The fact the Code has not been updated does not invalidate it or remove its legal force under the Regulations.

28. We therefore find that Article 6(c) does provide a lawful basis for publishing the Withheld Information, but only in relation to payments in excess of £500 – the processing is necessary for compliance with a legal obligation to which the controller is subject, namely the obligation to publish information as set out in the Regulations.

29. Although we have found there is a lawful basis for the publication of the Withheld Information (for payments in excess of £500), it is still necessary for this disclosure to comply with the remainder of the data protection principles. In particular, the disclosure must be fair and transparent.

30. “Fairness” requires an assessment of the expectations of the individuals about use of their data, and the effects of disclosure on those individuals. As put in the Commissioner’s guidance on the DPA, *“fairness means that you should only handle personal data in ways that people would reasonably expect and not use it in ways that have unjustified adverse effects on them.”* We have relatively limited information on this point, as the Commissioner’s decision relied on Article 6(f) and did not expressly consider the principle of fairness and transparency. We have considered aspects of the Commissioner’s decision and response to appeal that are relevant to this question, and also the information that was provided by the Council during the Commissioner’s investigation.

31. In relation to whether the individuals have a reasonable expectation of privacy, the Council has said that they do not have the explicit consent of the suppliers to publish their personal information. They also say that it is not reasonable that they should have their personal information published for the world at large to see, and the Council would be disclosing details of their income that would not occur in the private sector. The Commissioner says in the response to the appeal that she agrees it is reasonable for the data subjects to expect that their names alongside information already published regarding their private income would not be disclosed in the public domain.

32. We do not have any other evidence about the individuals’ expectations. It is not necessary for the Council to have explicit consent to publish the information – an expectation that information may be published may arise without express consent. The Council did not provide any examples of contractual terms with suppliers that might be relevant, e.g. a commitment not to publish individual names. These are individual suppliers who are fully aware that they are contracting with a public authority, which is subject to rules designed to ensure transparency. The Code makes it clear that the names of individual suppliers may need to be disclosed, and this is not automatically prohibited by the DPA. The appellant makes the following point in his comments on the Council’s internal review outcome (page C52 in the open bundle) – *“There is a case that people who choose to contract with public authorities should not expect the same degree of privacy as business conducted wholly within the private sector. Government policy on transparency, by its very existence, makes it clear that there is not a level playing field between the two sectors.”* In the absence of any specific evidence to the contrary, we agree

that individuals who choose to contract with a public authority would not necessarily expect that their identity and amount of payments made to them would remain private.

33. In relation to the adverse effects of disclosure on the individuals, we have considered the arguments put forward by the Council and relied on by the Commissioner. The Council said that the information relates to the individual's income, and publication may cause unjustified distress as their income could then be identified. The Commissioner also refers to unwarranted intrusion into the privacy of the named individuals by disclosing information relating to their income. It is correct that publication of names would reveal how much those individuals were paid for items of work for the Council. However, this is not publication of an individual's full private income, but simply what they charged for particular services provided to this Council. The information would not reveal total earnings, or profit and loss. We have no evidence as to why disclosure of this limited information would cause "distress" to individual suppliers. They are providing a professional, commercial service to the Council, and being paid for that service from public funds. We do not find that this would be an unjustified effect that would make publication unfair.

34. The Council also said that publication of suppliers' names may put them at risk. Suppliers with unique names would be easily identified, and they may not want information about their personal information made public, or they may not want anyone to know they are working in and around Exeter. The Council said they were not prepared to publish the personal information for security reasons. We do not understand this point (and note it is not addressed by the Commissioner). We have no evidence as to how or why this would create a security risk for suppliers, and in particular do not see how knowledge that a particular individual does work in and around Exeter would create a security risk.

35. Having considered the above, we find that publication of the data would be fair and so comply with that aspect of the first data protection principle.

36. We have also considered whether publication of the data would be transparent. As explained in the Commissioner's guidance, "*Transparency is fundamentally linked to fairness. Transparent processing is about being clear, open and honest with people from the start about who you are, and how and why you use their personal data.*" From the information we have, it does not appear that the Council expressly tells individual suppliers that their names may be published alongside details of payments for their services. However, as noted above, these are individual suppliers who are fully aware that they are contracting with a public authority, which is subject to rules designed to ensure transparency. The publication would take place in accordance with a clear published Code which has legal force. We therefore find that publication of the data would not breach the transparency aspect of the first data protection principle

37. The Council's response to the Commissioner addresses some other data protection principles that they say would be breached by disclosure of the information. We have considered these as follows:

- a. Purpose limitation (principle (b)). The Council says the data is collected to maintain a relationship with the suppliers and process their payment, not for the purpose of publishing their details on the Council's website. We do not agree – part 2 of the Code legally requires publication of supplier details, so this must be one of the purposes for collecting information on their identity.



- b. Data minimisation (principle (c)). The Council says the other information it publishes is sufficient for the public to hold them to account for payments made. We do not agree. The appellant submits that the names are required to show whether particular suppliers are being favoured, and to enable questions to be asked about competence and suitability. The other information published by the Council does not address these issues. We accept that these issues are relevant to transparency of supplier payments, and note that publication of supplier identity is specifically required by the Code.
- c. Integrity and confidentiality (principle (f)). The Council refers here to the concerns about security risks, which we have addressed and rejected above.

38. We therefore find that general publication of individual supplier names would not breach any of the data protection principles, in relation to payments in excess of £500. Publication is lawful as it is required by a legal obligation, is fair and transparent, and would not breach any of the other principles. The Council was not entitled to rely on the exemption in section 40(2) FOIA in relation to individual supplier names for payments in excess of £500.

39. We note that this finding relates to using section 40(2) FOIA as a blanket exemption from disclosure, as was done in this case. There may be individual cases where it is not lawful, fair and transparent to publish the name of a particular supplier, depending on their individual circumstances and the application of the tests under the DPA and GDPR.

40. This finding means it is not necessary for us to address lawfulness under Article 6(f) in any detail. In brief, we would have found that this applied in the alternative. We disagree with the Commissioner's finding that disclosure would not be necessary for the purpose of the specific legitimate interests in transparency put forward by the appellant. As explained above, he submits that the names are required to show whether particular suppliers are being favoured, and to enable questions to be asked about competence and suitability, and the other information already published by the Council does not address these issues. We would also take a different view on the balancing test, taking into account the importance of transparency in light of the Code, and the limited impact on individual privacy as discussed above. However, this would be limited to payments in excess of £500, as lower payments are not covered by the Code and would also involve a lower public interest in transparency as they would be payments of small amounts.

41. We uphold the appeal in part and issue the substitute decision notice set out at the start of this decision.

Signed: Hazel Oliver  
Judge of the First-tier Tribunal

Date: 11 December 2020

Date promulgated: 14 December 2020