

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

### **Decision notice**

**Date:** 7 January 2022

**Public Authority:** Bristol City Council  
**Address:** The Council House  
College Green  
Bristol  
BS1 5TR

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

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1. The complainant requested heating and hot water costs for single bedroom properties within a block of flats. The council disclosed some information however it withheld the details of the annual costs on the basis that section 40(2) of FOIA applies (personal data of third parties).
2. The Commissioner's decision is that the council was correct to apply section 40(2).
3. The Commissioner does not require the council to take any steps.

## Request and response

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4. On 8 February 2021 the complainant wrote to the council and requested information in the following terms:

*"1) The annual cost of heating and hot water for each 1-bedroom flat [address redacted] for the years 2017/18, 2018/19 and 2019/20.*

*2) Details of the 1-bedroom flats which are owned/rented by Bristol City Council or owned by a leaseholder.*

*3) Details of whether leaseholders are charged the same rate as Bristol City Council."*

5. The council responded on 17 March 2021. It withheld the information falling within part 1 of the request on the basis that section 40(2) of FOIA applied.
6. The complainant wrote back to the council on 19 March 2021 stating that it would be possible for the council to anonymise the data by using an anonymised identifier for each flat, so that the flats in question would be unidentifiable. She therefore asked the council to reconsider its response.
7. Following an internal review, the council wrote to the complainant on 22 June 2021. It maintained its position that section 40(2) applied to part 1 of the request.

## Scope of the case

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8. The complainant contacted the Commissioner 8 May 2021 to complain about the way her request for information had been handled.
9. She considers that the withheld information does not relate to third party individuals, but to properties.
10. The following analysis therefore considers whether the council was correct to apply section 40(2) to withhold the information falling within part 1 of the complainant's request.

## Reasons for decision

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### Section 40 personal information

11. 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.
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 the 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".*

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.

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

19. The Commissioner is satisfied that providing the specific property numbers of the properties would allow other residents and friends of the tenants/owners to identify the owner of the property in question and learn how much they paid for their hot water/heating. The withheld information therefore relates to them as individuals; it relates to their heating and water usage. The council was therefore correct to state that this was the case to the complainant in its initial response.
20. The complainant suggested that the council could use anonymised identifiers for each particular property rather than use their actual property number. The council, however, argued that looking at the data over a 3-year period would allow some individuals to be identified using patterns within the information, together with other information in the public domain, such as personal knowledge of some of the residents. Whilst not all individual properties, and therefore individuals might be identified by this method, there is a strong likelihood that some could be, for instance where there was a change in behaviour, or a different tenant(s) moved into a property during the 3-year period.
21. The Commissioner accepts that the identification of a small number of properties might occur in this way, and therefore that there is a possibility that this could occur. He therefore accepts that the information is personal data for the purposes of the DPA 2018.
22. The fact that information constitutes the personal data of an identifiable living individual 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.
23. The most relevant DP principle in this case is principle (a).

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

24. 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".*

25. 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.
26. 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**

27. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.

28. 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>.

29. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

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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 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"*.

30. 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*

31. 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 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.
32. The Commissioner recognises that the complainant has a legitimate interest in the disclosure of the requested information. As an owner of one of the properties, the complainant wishes to know the costs associated with other similar properties in her building to ensure that her own payments are on par with these. This interest is, however, a purely private concern which does not overly concern or affect the wider public.
33. The public does have legitimate interest in understanding how such charges are raised, and the differences that this may result in costs, however a simple disclosure of the requested information would not particularly aid in this.

*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 Commissioner considers that it would be necessary for the council to disclose the information in order to meet the legitimate interests of the complainant.

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

36. 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 the 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.
37. 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.
38. 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.
39. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
40. The requested information is the costs which those individuals paid for water and heating their property.
41. The Commissioner considers that the individuals, as members of the public going about their daily lives, would have no expectations that this information might be disclosed by the council in response to an FOI request. They would not expect that that information about them would be disclosed to the whole world, as is considered to be the case in responses to FOI requests. The information would not otherwise be in the public domain.
42. The individuals are members of the public, not public officials. They have no option but to provide this information to the council in that they have to use the facility to provide heat and hot water in their properties.

43. The Commissioner considers that a disclosure of this information would be intrusive, irritating and potentially stressful to the individuals if this information were to be disclosed to the whole world in response to the request.
44. Balanced against this is the private interest of the complainant, and the minimal wider interests which might be served by the disclosure of the information.
45. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' 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.
46. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

### **The Commissioner's view**

47. 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).

### **Other matters**

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48. Although the Commissioner considers that the council was correct to apply the exemption in this case, he considers that the data could be easily amended to render the information anonymous, and therefore no longer personal data for the purposes of section 40(2) and the DPA 2018. He will write to the council separately regarding this.



## Right of appeal

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

50. 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.

51. 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 .....**

**Ian Walley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**