

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 May 2022

Public Authority: Portsmouth City Council
Address: Civic Offices
Guildhall Square
Portsmouth
Hampshire
PO1 2AL

Decision (including any steps ordered)

1. The complainant requested information from Portsmouth Council ("the Council") about the number of people living at a household address in Southsea.
2. The Council confirmed they held the information but would not disclose the number as it was exempt under section 40(2)(third party personal data) of FOIA.
3. The Commissioner's decision is that the Council was entitled to rely on section 40(2) to withhold the requested information.
4. The Commissioner does not require the Council to take any steps in relation to this decision notice.

Request and response

5. On 20 January 2022, the complainant wrote to the Commissioner in relation to the outcome of a Stage 3 complaint with the Council of 4 May 2021. The Commissioner requested that the Council consider the final response from the complainant as a request for information under FOIA as below:

“In relation to [address redacted]: Confirmation of how many people live in this property or an explanation as to why PCC are unable to provide this information.”

6. The Council responded on 20 January 2022 to confirm they held the information requested. However, they declined to provide the information stating that it was personal data and exempt under section 40(2) (third party personal data) of FOIA. They advised the exemption was absolute.
7. On 21 January 2022, the complainant asked the Council to complete an internal review and confirmed they wished to know the total number of people residing in the house and no other details.
8. The Council responded on 24 February 2022. They revised their view to confirm they believed they only held some of the information requested. They explained they could not be certain information they held was accurate. The Council stated they would not necessarily hold information about the following:

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- All people who were registered to pay council tax as not all who are liable for council tax provide their details, only the bill payer
- They may not know about children enrolled at independent schools
- They may not know about children attending schools outside the city
- They may not know about children elected as home schooled.”

The Council confirmed in their internal review they considered section 40(2) of FOIA to be engaged.

Scope of the case

9. The complainant contacted the Commissioner on 25 February 2022, following the outcome of the internal review to complain about the way his request for information had been handled.
10. The Commissioner considers that the scope of the case is to determine if the Council is correct to withhold the information on the basis of section 40(2) of FOIA.

Reasons for decision

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)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.

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

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.

19. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the individuals who live at the specific address stated by the complainant in their request.

20. The Commissioner considers that those individuals may be identifiable from the address when combined with other information. It is possible if the number of occupiers were provided that the complainant would be able to consider this alongside electoral roll data to 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 UK 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"².

27. 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 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.

² 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 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".

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 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 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. The complainant has outlined that they have a personal interest in the information being disclosed. They have indicated in their complaint to the Commissioner that the request is linked to their concern about the address being used as a house of multiple occupation ("HMO"). The complainant alleges that their family have suffered anti social behaviour connected to the address.
32. The complainant has previously made enquiries about the status of the address to the Council. The Council advised them the address is not a registered HMO. The Council provided the complainant with a definition of an HMO as a house where more than five or more adults who are not related share facilities. This would require registration with the Council as an HMO.
33. The complainant therefore has a legitimate interest in discovering how many adults are living in the property if they wish to challenge the status of the address with the Council.
34. The Council state they cannot identify a legitimate interest in relation to the requested information. They indicate if the address is overcrowded, or anti-social behaviour is a concern then there are processes and procedures available to the complainant to pursue these matters.
35. The Commissioner identified that the complainant does hold a legitimate interest in obtaining the information. If the house were an unregistered HMO the information may confirm the number of adult occupants and assist the complainant to pursue this matter.
36. However, the Council have clearly indicated in their response they have no accurate way of knowing how many adult occupants live in a property. Their information is limited due to the factors stated in their

internal review. The Council's records would only be definitive about those adults registered to vote, adults in receipt of certain benefits or payment of taxes or children attending mainstream schools and academies within the authority.

37. Furthermore, the Council believe when considered alongside information that may be freely available on the electoral roll, some adults could be made identifiable if they confirmed the numbers they hold.

Is disclosure necessary?

38. '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.
39. The Council informed the Commissioner that the complainant is able to access the electoral roll via the library. This will provide them with information about adults registered to vote at the address and provide some information.
40. The complainant requested the information to establish if the house is an HMO. The Council have confirmed they have visited the property and it is not an HMO.
41. The Commissioner accepts, that in addition to other information available to the complainant, disclosure of the number held by the Council may be necessary in order to pursue a complaint under other procedures. However, this must be considered carefully alongside the occupiers right to have their information and identity protected. It is appropriate to consider the balancing test in this case.

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

42. 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.
43. 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.
44. In the Commissioner's view, a key issue is whether the individual(s) concerned have a reasonable expectation 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.
45. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
46. The Council have confirmed that the information they hold is numerical but could lead to other information in the public domain being used to actually identify individuals in the address by name. Based upon the information available the Commissioner is in agreement with this view.
47. The Commissioner has also noted there are other processes available to the complainant if overcrowding or anti-social behaviour is a concern. These processes do not require the information to be shared in order to be pursued, whilst ensuring the privacy of occupants is protected.
48. As the requested information could potentially lead to identification of specific individuals the Commissioner agrees with the Council in its application of the exemption under section 40(2) of FOIA. It is unlikely the occupants of the address would expect the information to be made public.
49. The Commissioner considers that disclosure of this information would be disproportionately intrusive to the data subjects in this situation and interference with their rights to privacy must be proportionate.

Commissioner's conclusion

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 in this case. 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 it is not necessary to go on to separately consider whether disclosure would be fair or transparent.

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

Right of appeal

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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: 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

Phillip Angell
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