

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 5 March 2020

**Public Authority:** Solihull Metropolitan Borough Council  
**Address:** Council House  
Manor Square  
Solihull  
West Midlands  
B91 3QB

### Decision (including any steps ordered)

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1. The complainant has requested information about a hackney cab driver against whom he intended to pursue legal action. Solihull Metropolitan Borough Council ('SMBC') refused to disclose the requested information on the grounds that it was exempt under section 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that SMBC was entitled to cite section 40(2) to refuse the request. However, by failing to respond to the request within the statutory time for compliance, she found breaches of section 1 and section 10 of the FOIA.
3. The Commissioner requires no steps as a result of this decision.

### Background

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4. The complainant, who uses a wheelchair, explained that on a recent visit to the National Exhibition Centre he was refused service by a hackney cab driver, who said that his taxi could not accommodate the wheelchair. The complainant believed this to be unlawful discrimination on the grounds of disability and a breach of the Equality Act 2010. He pursued his concerns with SMBC's Licensing Officer, as SMBC is

responsible for issuing a license to operate to the hackney cab driver in question. There was an exchange of correspondence about the matter, particularly as to whether SMBC should take any action over the incident.

5. The complainant was not satisfied with SMBC's response and wanted to pursue a civil claim against the hackney cab driver. To do so, he said he required the driver's name and address, in order to serve the appropriate papers.

## **Request and response**

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6. On 9 July 2019, the complainant wrote to SMBC and requested information in the following terms:

*"Please supply me with the name of the taxi business, the name of its proprietor and their address. I believe that I have the right to ask the licensing authority for this information. I intend making a claim of disability discrimination against them, unless you sanction them in a way which makes the taxi firm understand its duty under the Equality Act."*

7. Outside the FOIA, the complainant also continued to correspond with SMBC's Licensing Officer about the matter and, on 16 October 2019, in the course of that correspondence, SMBC confirmed the hackney cab driver's name to the complainant and that he was self employed.
8. SMBC formally responded to the FOIA request on 30 October 2019. It refused to disclose the address of the driver on the grounds that it was exempt information under section 40(2) of the FOIA.
9. A representative acting for the complainant requested that SMBC review its decision on 30 October 2019. He believed that the information he was asking for was accessible to the public under sections 41 and 42 of the *Town Police Clauses Act 1847* and that this therefore meant the information could be disclosed without breaching data protection legislation (with which section 40(2) of the FOIA intersects).
10. SMBC responded on 4 December 2019, maintaining its decision to apply section 40(2) to withhold the information.

## Scope of the case

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11. The complainant contacted the Commissioner on 11 December 2019 to complain about the way his request for information had been handled. He explained that he wished to challenge the application of section 40(2) to refuse the request for the driver's address.
12. The analysis below considers SMBC's application of section 40(2) of the FOIA to refuse the request for the driver's address. The Commissioner also considered the timeliness of its response.

## Reasons for decision

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### Section 40 personal information

13. 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.
14. 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 set out in Article 5 of the General Data Protection Regulation (GDPR) ('the DP principles').
15. 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.
16. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

### ***Is the information personal data?***

17. Section 3(2) of the DPA defines personal data as:-
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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) of the Data Protection Act 2018

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

18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. 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.
20. 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.
21. The request asks to know the address of the hackney cab driver. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the driver (his address clearly has biographical significance for him) and that the driver is identifiable (the complainant knows his name). This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
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 data protection principles.
23. The most relevant data protection principle in this case is principle (a).

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

24. Article 5(1)(a) of the 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 FOI 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 GDPR must apply to the processing. It must also be generally lawful.

***Lawful processing: Article 6(1)(f) of the GDPR***

27. Article 6(1) of the 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 (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 GDPR in the context of a request for information under FOIA, it is 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.
30. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

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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) 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".*

*Legitimate interests*

31. 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.
32. 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.
33. In this case, the complainant has explained that he requires the driver's address so that he may serve papers in connection with a disability discrimination claim under the Equality Act 2010. The Commissioner is satisfied that a legitimate interest is therefore being pursued by the request.
34. She has therefore gone on to consider whether disclosure is necessary in order to meet that legitimate interest.

*Is disclosure necessary?*

35. '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.
36. Disclosure under the FOIA is a disclosure to the world at large<sup>3</sup>. Therefore, the effect of complying with this request would be that the driver's home address was effectively being publicly disclosed, and would be accessible to anyone, for any purpose.
37. SMBC said that the driver (the data subject) had been asked to give consent to the disclosure of his home address in respect to the request and he had refused, expressing some concern about the prospect.

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<sup>3</sup> This principle was endorsed by the Information Tribunal in *S v Information Commissioner and the General Register Office* (EA2006/0030, 9 May 2007)

38. The Commissioner has considered whether the legitimate interests set out in paragraph 33 could be pursued otherwise than by the information being disclosed under the FOIA.

39. On the question of whether the *Town Police Clauses Act 1847* requires SMBC to publish the information, it said:

*"...The Council does not agree that the Town & Police Clauses Act 1947 [sic] requires the Council to disclose addresses of licence holders. Whilst s.41 of the T&PCA 1947 [sic] requires home address to be specified on the Licence, S.42 only requires the Council to have a register of the Licences issued. The legislation does not go so far as to require this register to contain home addresses."*

40. The Commissioner has viewed the *Town Police Clauses Act 1847*<sup>4</sup> and agrees with SMBC's interpretation that the sections cited do not appear to require that home addresses be published in the publicly available register of licenses.

41. With regard to the purpose for which the complainant requires the information, SMBC advised the Commissioner as follows:

*"...for legal action to be taken [the complainant] did not need to know the taxi drivers home address. This appears to have born true as since sending the below response to you I have learnt that [the complainant] has now started legal action and his Solicitors have been talking with the Council's Solicitors. Between them they have agreed to apply for an "Order for Alternative Service" which means that upon receipt of the order, the council can serve legal papers on behalf of [the complainant] / Solicitors. [The complainant] will then be able to pursue the legal action he seeks."*

42. The Commissioner has consulted the procedure rules for the service of documents for civil claims<sup>5</sup>. Rule 6.15 states:

*"Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place."*

43. By applying for an "Order for Alternative Service", the complainant has a clear, alternative route to achieving the legitimate end which disclosure was intended to meet (ie initiating legal proceedings), one which is

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<sup>4</sup> <http://www.legislation.gov.uk/ukpga/Vict/10-11/89>

<sup>5</sup> <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part06>

significantly less intrusive to the data subject than the disclosure of his home address to the world at large would be.

44. The Commissioner is therefore satisfied that, in this case, disclosure is not necessary to achieve the legitimate interest described at paragraph 33.
45. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it would therefore be unlawful. It therefore does not meet the requirements of principle (a).
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.

### ***Conclusion***

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

### **Section 1 – general right of access** **Section 10 - time for compliance**

48. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
49. Section 10(1) of the FOIA states that on receipt of a request for information a public authority should respond to the applicant within 20 working days.
50. The complainant submitted his request to SMBC on 9 July 2019 and while it corresponded with him about the matters that it pertained to, SMBC did not formally respond to the request until 30 October 2019, 80 working days later.
51. Therefore, by failing to respond to the request within 20 working days, SMBC breached sections 1(1) and 10(1) of the FOIA.
52. SMBC said that the delay in formally responding to the request was largely due to its significance as an FOIA request being overlooked. Rather, the wider concerns expressed by the complainant were instead taken forward in line with 'normal course of business' procedures.



53. On that point, the Commissioner's published guidance<sup>6</sup> makes it clear that any letter or email to a public authority asking for recorded information is a request for information under the FOIA and it should be treated in accordance with the FOIA's provisions if, for any reason, the information being requested cannot be provided straight away, or if the requester mentions the Act.

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<sup>6</sup> <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/receiving-a-request/>

## Right of appeal

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54. 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)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

55. 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.
56. 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 .....**

**Samantha Bracegirdle**  
**Senior Case Officer**  
**Information Commissioner's Office**  
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**Wilmslow**  
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