

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 December 2021

Public Authority: Fareham Borough Council

Address: Civic Offices
Civic Way
Fareham
PO16 7AZ

Decision (including any steps ordered)

1. The complainant has requested information from Fareham Borough Council ("the council") regarding costs and payments for a property housing council tenants.
2. The council provided some information in scope of the request, but withheld some information on the basis of section 40(2) (personal information) and section 43(2) of the FOIA (commercial interests).
3. The Commissioner's decision is that the council was correct to withhold some information on the basis of section 40(2). However it breached section 10(1) of the FOIA as it provided some information outside of the statutory timeframe of 20 working days.
4. The Commissioner does not require any steps.

Request and response

5. On 22 September 2020 the complainant wrote to the council and requested information in the following terms (numbering added):

"[1] Please inform me of the total payment made by the council to the landlord/owner of 175, Gosport Road, Fareham in (a) 2018, (b) 2019 and (c) 2020 so far.

"[2] Please also inform me of the calculated or actual costs to the council of works to the rear garden of above property during 2019 and so far this year."

6. The council responded on 23 October 2020. It refused to respond to [1] on the basis of section 43(2) and section 40(2). The council provided information in scope of [2], stating: *"The cost to the Council was £400. However, the cost was significantly higher but this was repaid by the occupants and the landlord"*

7. The complainant requested an internal review on 26 October 2020 on the basis that they disputed the application of sections 43(2) and 40(2) to [1] and asked further questions in relation to the council's response for [2] which included a new request:

"[3] Please can you tell me how much of the gross costs was recouped from tenants in 2019 and how much so far this year. Please can you also tell me how much of the gross costs was recouped from the landlord in 2019 and how much this year".

8. The council wrote to the complainant with the outcome of an internal review on 3 December 2020. It upheld the original position in relation to [1]. The council clarified its position for [2], stating: *"We accept that we did not answer the question correctly in that the years were not split and therefore to confirm accurately the answer, in 2019 the cost to Fareham Borough Council was £300 and in 2020, up to the date of your request, the cost to Fareham Borough Council was £100"*

9. The council also provided the complainant with a refusal notice in regard to [3] on the 3 December 2020. The council stated that it was withholding the information on the basis of section 40(2).

10. During the course of the investigation, on 29 November 2021, the council provided the complainant with an updated response in regard to [2] and [3]. Further information was provided including invoiced costs to the council and the amounts that were recharged to the tenant. Four

invoices relating to the works were provided with the bank account information redacted.

Scope of the case

11. The complainant contacted the Commissioner on 18 January 2021 to complain about the way the request for information had been handled. The complainant accepted the council's updated response of 29 November 2021 in regard to [2] and [3]. They remained dissatisfied that information in scope of [1] was withheld.
12. The scope of the case is to determine whether the council is correct to withhold information in scope of [1] on the basis of section 40(2) and 43(2). If section 40(2) is engaged then an analysis of section 43(2) will not be required.

Reasons for decision

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)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 General Data Protection Regulation ('GDPR').
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 the FOIA cannot apply.
16. 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?

17. Section 3(2) of the DPA defines personal data as:

“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. 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.
20. 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.
21. The withheld information in this case is the payments made by the council to the landlord (“the Landlord”) of a property. The council explained that the Landlord rents the property as a business however this is not run as a company, but as an individual. The Commissioner concludes that the Landlord is therefore a sole trader.
22. The Commissioner considers that it is feasible that relatives, or local people will know the identity of the Landlord of the property. As such, the Landlord is identifiable in relation to the property and the withheld information.
23. The Commissioner considers that information relating to sole traders is the personal data of that individual. Information about the business of a sole trader will amount to personal data, as the information about the business will be about the sole trader. In this instance, information about payments made by the council to the Landlord disclose personal information regarding the income of the Landlord. The information therefore relates to them.
24. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information both relates to and identifies the data subject concerned. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
25. 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.

26. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

27. 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".

28. 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.

29. 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

30. 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.

31. 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.

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 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

32. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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.
33. 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

34. 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.
35. The complainant raises a legitimate interest in transparency of the public money being spent on the privately owned property. The complainant raises issues relating to the upkeep of the property, which they state has an overgrown and potentially dangerous garden. The Commissioner therefore assumes that the complainant's reasoning concerns a legitimate interest in transparency relating to the value and quality of the lodgings provided in return for the public monies spent.

(dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

36. The council advises that whilst the Landlord lets the property to the council, it is the council who are responsible for overseeing the maintenance of the property and managing the tenants.
37. The Commissioner considers that as the upkeep of the garden is not directly linked to the responsibilities of the Landlord, this diminishes, somewhat, the legitimate interest. However he agrees that there remains a legitimate interest in transparency of the total payments made by the council, in relation to the property, which would include payments to the Landlord.

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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
39. In response to the request, and during the course of the investigation, the council provided information regarding costs to the council for works in the garden, and costs recharged to the tenants of the house. The Commissioner considers that the disclosures have partly satisfied the legitimate interest in transparency. However, the total spend by the council in relation to the property remains undisclosed.

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

40. 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.
41. 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.

42. 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.
43. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
44. The council advised that they had held a discussion with the Landlord regarding the potential disclosure of the withheld information. The Landlord expressed their strong opinion the information is their personal data, and that they had no expectation that the information could be disclosed to the world at large.
45. The Landlord also advised that the disclosure may harm future negotiations with tenants regarding the amount of rent required, or create discontent with existing tenants of other properties.
46. The Commissioner is satisfied that the Landlord would not expect details of their financial income from the council to be made public. He is also satisfied that this expectation is reasonable.
47. The Commissioner considers that the legitimate interests have been partially addressed by the other disclosures made by the council in response to the request. He has been unable to identify any legitimate interest in disclosure that is more compelling than protecting the sole trader's legitimate interest in keeping his income private.
48. 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.
49. 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 view

50. 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).
51. Since the end of the transition period following the UK's departure from the EU, the GDPR were replaced by the UK GDPR. As this request was

received before the end of that transition period, the application of section 40(2) has been decided by reference to the GDPR. However the Commissioner is also satisfied that the disclosure of the personal data to which that exception was applied would not contravene the UK GDPR for exactly the same reasons.

Procedural Matters

Section 10(1) of the FOIA – Time for compliance with request

52. Section 10(1) of the FOIA states that a public authority must respond to a request promptly and *"no later than the twentieth working day following receipt"*.
53. The complainant made the requests for information on 22 September 2020 and 26 October 2020. The council did not give its final response to questions [1] and [2] until 29 November 2021. This is more than a year after the information requests were made.
54. The Commissioner therefore finds that the council has breached section 10(1) of the FOIA by failing to respond to the request within 20 working days. However, as the response was issued no steps are required.

Right of appeal

55. 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

56. 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.
57. 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

Janet Wyles
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