

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 March 2022

Public Authority: Brighton and Hove City Council
Address: Bartholomew House
Bartholomew Square
Brighton
BN1 1JE

Decision (including any steps ordered)

1. The complainant has requested information relating to a tenancy at will, issued by Brighton and Hove City Council (the council).
2. Whilst the council provided the complainant with some information, it withheld the name of the individual who was granted the tenancy at will, citing section 40(2) – personal information, of the FOIA.
3. The Commissioner's decision is that the council is entitled to rely on the exemption at section 40(2), when withholding the name of the tenant at will.
4. The Commissioner does not require the council to take any steps as a result of this decision notice.

Request and response

5. On 5 July 2020, the complainant wrote to the council and requested information in the following terms:

'I would like to request the following. Information regarding the council owned land, the former farm buildings entrance is on Vale Rd, that back onto the A23 and are bordering the allotments

<https://www.google.com/maps/@50.8682614-0.1504548,287m/data=!3m1!1e3>

What licenses/leases are in place, to whom, what length are they and the terms and the value of those licenses/leases. What short term/long term plans are in place for this land.'

6. On 4 August 2020, the council provided the complainant with its response. It confirmed that there is a tenancy at will¹ in place with a single occupant for temporary use of the land in question, and that this tenancy is open ended and can be terminated immediately on notice from the council.
7. The council went on to confirm that the occupant is responsible for any rates, utilities, public liability insurance, and any other outgoings arising from the occupation. It said that no other charges exist, and that the occupant has the right to park vehicles and equipment associated with a business at the premises. The council also advised that the land is surplus, and that its intention is to sell a long leasehold interest in the site.
8. The council also confirmed to the complainant that it was to refuse his request for confirmation as 'to whom' held the lease, citing section 40(2) of the FOIA 'by virtue of section 40(3A)(a) of the same Act'.
9. On 10 August 2020, the complainant requested an internal review, and the council provided its response on 3 December 2020, upholding its original decision.

Scope of the case

10. The complainant contacted the Commissioner on 3 December 2020, to complain about the way his request for information had been handled.
11. The Commissioner will decide whether the council is correct to withhold the name of the tenant at will in response to the complainant's request.

¹ a tenancy at will is most often an agreement which allows occupation of a property or land, usually on a short term basis, and without the formal terms that are more commonly set out in a lease.

Reasons for decision

Section 40 – personal information

12. 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.
13. In this case, the relevant condition is contained within section 40(3A)(a)². 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).
14. 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.
15. 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?

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

‘any information relating to an identified or identifiable living individual’.
17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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.
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.

² As amended by Schedule 19 Paragraph 58(3) DPA.

20. The requester has asked for confirmation as 'to whom' holds the license or lease for the relevant site; it is the Commissioner's opinion that it is not unreasonable to assume that he requires the name of that person that has been granted the tenancy at will by the council for the site.
21. The Commissioner understands a tenancy at will is an agreement which is made between parties that does not have a specified end date. Either party is entitled to end the agreement at any time, and it is usually put in place for a short term period only.
22. The council has confirmed that the relevant tenancy at will is recorded in the name of one individual. It has advised that the land covered by the tenancy at will is not being used for commercial or residential use, although it has stated that as part of the agreement to ensure that the site is secured, the tenant is permitted to park vehicles and equipment associated with a business on the site.
23. The council has not provided the Commissioner with any information that would indicate that the agreement was signed in the relevant individual's professional capacity (i.e. on behalf of a business).
24. Based on the information that has been made available, the Commissioner is satisfied that the information relates to, and identifies, the individual who has been granted the tenancy at will for the site and, as such, it 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. It is the Commissioner's opinion that the most relevant DP principle in this instance 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'³.

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.

³ 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'.

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 has advised that the information requested relates to a large piece of commercial land, industrial units and open space. He has advised that it is currently unclear why such valuable land could be given to someone by the council for free.
36. The council states that the land is a development site that was severed from the original farm in the late 1980's in order to accommodate the A27 Brighton relief road. It has confirmed that the site has remained undeveloped since that time and that, as a result, it now consists of a number of derelict and unsafe buildings, and overgrown open space. The council argues that it is not being used for commercial or residential use, and there is no legitimate interest in the release of the withheld information.
37. The council goes on to say that the tenancy at will differs from a leasehold, and it is not registerable with the Land Registry (which would recognise a legal interest in the land). It uses an example of the comparison between a person renting a flat, and a person buying the lease of a flat, to highlight the difference between a tenancy at will and a lease. In addition, the council has said that it does not routinely publish leases, but would, if requested, provide redacted copies as appropriate.
38. The council has also confirmed that the occupant is responsible for any rates, utilities, public liability insurance and any other outgoings arising from the occupation of the site. It states that just by the very nature of occupying the land, it secures the site against any unwanted access; the council has said that it has saved significant funds by not having to directly bear the payment of rates and security costs for securing and patrolling the site.

39. The council has argued that the disclosure of the name of the relevant individual is not necessary for the purposes of the request. There is not a pressing social need to disclose this information, and disclosure would not give any additional information in relation to the other points raised in the request.
40. Whilst there have been no background details provided by either party in this case, the Commissioner has become aware of a number of past (and current) proposals relating to the development and, or disposal, of this site by the council; it is also clear that such discussions about the site have been ongoing for a number of years. Furthermore, the Commissioner notes that certain proposals have met with considerable resistance from local residents⁴. This is in relation to both past and current plans.
41. The council has granted permission for the tenant to keep vehicles and equipment relating to a business on the site. Whilst the Commissioner appreciates that the individual is not entitled to carry out any development of the site, it is his opinion that the approved use of the site does have some affect on the local community; at the very least, it is likely that regular access to the site and movement of the vehicles and equipment would be required, and this would have an impact on a number of factors such as traffic congestion, noise, and pollution. Furthermore, whilst the arrangement is somewhat informal, and there is no fee, it could be argued that there are some commercial activities linked to it.
42. It is the Commissioner's opinion that releasing details of who has been granted the tenancy at will would provide the public with a greater understanding of how the site is being used, and also the impact that such use is likely to have during the term of the tenancy.
43. The Commissioner has also taken account of the wider legitimate interest in the disclosure of information about the council's licensing, leasing and tenancy processes, whether they be temporary or permanent arrangements. The disclosure of details about the tenant at will would, in the Commissioner's view, provide for further transparency

⁴ http://news.bbc.co.uk/1/hi/england/southern_counties/4338908.stm

<https://democracy.brighton-hove.gov.uk/documents/s3175/Item%2094%20Patcham%20Court%20Farm%20-%20Update%20on%20disposal.pdf>

and accountability with regard to the decisions that are made by the council.

44. Furthermore, it is the Commissioner's view the identification of the tenant at will is likely to reassure the public that proper processes have been followed, and that the council was both protecting the public purse, and acting in the best interests of all parties when making the decision not to charge any rental (or other) fee for the site.
45. Given the above, the Commissioner accepts that there is a legitimate interest in disclosure of the requested information.

Is disclosure necessary?

46. '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.
47. The council has confirmed that details of the tenancy at will are not in the public domain, and that it does not have a statutory obligation to publish such information. As far as the Commissioner is aware, there is no alternative way of establishing who has been granted the tenancy at will.
48. The Commissioner is therefore satisfied there are no less intrusive means of achieving the legitimate aims identified than to disclose the information requested.

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

49. 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.
50. 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.
51. In the Commissioner's view, a key issue is whether the individual concerned has 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.
 52. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
 53. The council has advised that the relevant individual has explicitly stated that they do not wish for their identity to be disclosed to the public.
 54. The Commissioner regards it to be of some relevance that the withheld information provided for his consideration by the council consists only of the name of an individual. Had it been the case that the details of any commercial business were also held by the council which could be linked to the tenancy, then this may have affected the strength of any arguments supporting the data subject's interests or fundamental rights and freedoms.
 55. The Commissioner has also considered that information which has already been released about the tenancy at will; in the Commissioner's opinion, these details go some way in informing the public about why the tenancy at will was granted without a fee/rental charge, and also the terms and restrictions. Furthermore, if the use of the site causes any concern to the local community, a formal complaint can still be made without being aware of the identity of the tenant.
 56. Without any evidence to the contrary, the Commissioner accepts the council's claim that its agreement is solely with a private individual, and that it has a duty of confidentiality to that person to respect their request that their identity remain confidential.
 57. 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.
 58. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
 59. 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.

60. 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

61. The Commissioner faced significant difficulty in investigating this matter due to unacceptable delays from the council.
62. The Commissioner originally asked the council several questions relating to its application of section 40, and for a copy of the withheld information. The council's subsequent failure to respond or engage with the Commissioner led to an information notice being served. Whilst the council has now provided sufficient information for the Commissioner to make a decision, it failed to do so within the time frame specified by the information notice.
63. A record has been made of the poor engagement that the Commissioner received from the council during this investigation. This matter may be revisited should similar poor engagement be experienced by the Commissioner in any future cases relating to this council.

Right of appeal

64. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

65. 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.
66. 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

Suzanne McKay
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF