

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 September 2023

Public Authority: London Borough of Lambeth
Address: Lambeth Town Hall
Brixton London
SW21 RW10

Decision (including any steps ordered)

1. The complainant has requested information from the London Borough of Lambeth ('the Council') regarding which Councillors have arrears on their Council Tax.
2. The Commissioner's decision is that the Council was not entitled to rely on section 40(2) to withhold the requested information.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information.
4. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 25 April 2023, the complainant wrote to the Council and requested information in the following terms:

"Please could you tell me which (if any) Lambeth Councillors are in arrears for their council tax."
6. The Council responded on 7 June 2023. It stated that it was withholding the requested information under section 40(2).

7. Following an internal review the Council wrote to the complainant on 29 June 2023. It stated that it was upholding its original position.

Scope of the case

8. The complainant contacted the Commissioner 9 June 2023 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of his investigation to be to establish whether the Council is entitled to withhold the requested information under section 40(2) of the FOIA.

Reasons for decision

Section 40 personal information

10. 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.
11. 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').
12. 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.
13. 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?

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

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

“any information relating to an identified or identifiable living individual”.

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

16. 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.

17. 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.

18. The complainant requires the name of any Councillor who, at the time of the request, was in arrears with council tax. It is clear to the Commissioner that disclosure of this information would reveal the identity of any Councillor who was in arrears. Therefore, the Commissioner is satisfied that the requested information is personal data.

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

Would disclosure contravene principle (a)?

20. 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”.

21. 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.

22. 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

23. 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.

24. 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 subjects ie the Councillor(s) in this case.
25. 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

26. 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.
27. 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.

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

28. The Commissioner appreciates that there is a legitimate interest in the public knowing when Councillors are in council tax arrears and who those Councillors are. This was considered in the Upper Tribunal (UT) decision *DH v Information Commissioner and Bolton Council*³, which found that the names of Councillors who were in council tax arrears should be disclosed. The view of the UT was that there is a legitimate interest in the public being aware of this information as Councillors are responsible for the expenditure of public money and the administration of council tax; if a Councillor is in arrears of more than two months, they cannot vote on matters that concern council tax.
29. The Commissioner therefore considers that the complainant is pursuing a legitimate interest and that disclosure of the requested information is necessary to meet that interest.
30. The Council has explained to the Commissioner why it believes that the information should not be disclosed in this instance.
31. The UT decision referred to above stated that:

"There may be exceptional cases in which the personal circumstances of a councillor are so compelling that a councillor should be protected from such exposure."
32. Given the comments set out in the Tribunal decision, the Commissioner accepts that there will be circumstances where a public authority will be entitled to withhold the information described by the complainant's request; however, he is not persuaded that the circumstances described by the Council in this case meet the threshold of 'exceptional'.
33. In regard to the rights and freedoms of the individual, the UT case cited above determined that Councillors should expect to be scrutinised and be accountable for their actions in so far as they are relevant to their public office.
34. Having considered the UT's comments, and the circumstances that are relevant to this case, it is the Commissioner's opinion that the legitimate interest of the complainant outweighs the rights and freedoms of the individual(s) in this instance.

³ [DH v Information Commissioner and Bolton Council: \[2016\] UKUT 139 \(AAC\) - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

35. Therefore, it is the Commissioner's decision that the processing of personal data inherent in the disclosure of the information requested by the complainant would be compliant with principle (a) and hence that the exemption at section 40(2) of FOIA is not engaged. At paragraph 3 above the Council is now required to disclose the withheld information.

Right of appeal

36. 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

37. 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.
38. 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

Cressida Woodall
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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