

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 1 February 2024

**Public Authority:** Westminster City Council  
**Address:** Westminster City Hall  
64 Victoria Street  
London  
SW1E 6QP

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to Westminster City Council's ("the Council") involvement with Princes Square Gardens Limited for a specific period. The Council provided some information but explained it did not hold anything further. Within the information it provided, it redacted some information, citing section 40(2) – personal information and 42 – legal professional privilege.
2. The Commissioner's decision is that the Council is entitled to rely on section 40(1), section 40(2) and section 42 of FOIA to withhold the requested information. He also found that, on the balance of probabilities, no further information is held.
3. The Commissioner does not require further steps as a result of this decision notice.

#### **Request and response**

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4. On 27 February 2023, the complainant wrote to the Council and requested information in the following terms:

"Please supply all information relating to Westminster Council dealings regarding Princes Square Gardens Limited (also know as PSG, PSG Ltd and/or Princes Square Gardens Ltd. ) for the period from May 1, 2021 until the present."

5. The Council responded on 10 March 2023, asking the complainant to clarify their request.

6. On 13 March 2023, the complainant clarified their request as follows:

"To clarify I would need any information related to Council involvement with Princes Square Gardens Limited (also know as PSG, PSG Ltd and/or Princes Square Gardens Ltd. ) for the period from May 1, 2021 until the present.

Specifically related to

1) the potential sale of the privately owned gardens.

2) listing of the gardens as an Asset of Community Value.

Specifically need information related to Councillor [named person] involvement including all correspondence to and from her (as well as any other Councillor) as well as the Planning Department (specifically but not limited to [named person], [named person], [named person]) and Legal (specifically but not limited to [named person]) and the Open Spaces departments."

7. The Council responded on 12 April 2023 and provided some information within the scope of the request, but refused to provide the remainder. It cited the following procedural sections of FOIA as its basis for doing so: section 40(2) – personal information and section 42 – legal professional privilege.

8. Following the complainant sending several chaser emails and communication with the Commissioner, the Council carried out an an internal review on 19 October 2023, in which it provided further information, however it withheld the remainder of the information under section 40(2) and section 42 of FOIA. The Council also explained that insufficient searches had been carried out when it first received the request for information.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 19 September 2023, to complain about the way their request for information had been handled.

10. The Commissioner considers that the scope of his investigation is to determine if the Council has provided all the held information and that it has correctly applied section 40(1), section 40(2) and section 42 of FOIA to the withheld information.
11. The Commissioner asked the Council if they had considered the request under the Environmental Information Regulations (EIR), as he considers that, due to the nature of the request, elements of it would fall potentially under the EIR. However, the Council advised that it did not consider the request falls under the EIR as it was regarding "involvement with" two named parties and the focus of the request was the correspondence, rather than environmental factors.

## **Reasons for decision**

### **Section 40 – personal information**

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#### **Section 40(1)**

12. Section 40(1) of FOIA provides that any information to which a request for information relates is exempt information if it constitutes personal data of which the requester is the data subject
13. Section 3(2) of the DPA defines personal data as:  
"any information relating to an identified or identifiable living individual"
14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. 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.
16. In this case, the complainant has requested correspondence in relation to a garden, which they are a shareholder of. The information withheld under section 40(1) relates to a specific email dated 29 December 2021, on page 12 of the information provided to the complainant on 12 April 2023 and that of page 59, information provided within a form and on page 67, within a document titled "A submission for Listing under the Assets of Community Value Regulations 2012", of the information provided to the complainant on 19 October 2023.
17. The Commissioner has seen the withheld information and considers that it is the personal information of the complainant.

18. As there is no route to a requester's own personal data under FOIA, if the complainant is unhappy with the information received, they should challenge any exemption from disclosure under a Subject Access Request.
19. Section 40(1) is an absolute exemption and there is no requirement for the Commissioner to consider the balance of the public interest. Nor is he required to consider whether or not the complainant would be happy to have their personal data published to the world at large. If the exemption applies, the information is not available via FOIA.
20. The Commissioner is satisfied that the information in these sections is the complainant's own personal data and therefore exempt from disclosure under section 40(1) of FOIA.

### **Section 40(2)**

21. 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.
22. In this case the relevant condition is contained in section 40(3A)(a). 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').
23. 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.
24. 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?**

25. Section 3(2) of the DPA defines personal data as:  
"any information relating to an identified or identifiable living individual".
26. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
27. 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.

28. 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.
29. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information does relate to the data subject(s). This is because it includes their names, email addresses, contact numbers and home addresses. The names and other personal details listed above, of the data subjects quite obviously is information that both relates to and identifies those concerned.
30. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
31. 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.
32. The most relevant DP principle in this case is principle (a).

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

33. 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".

34. 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.
35. 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**

36. 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"<sup>1</sup>.

37. In considering the application of Article 6(1)(f) of the UK 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.
38. 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**

39. 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.
40. 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.

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<sup>1</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 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".

41. In its submissions to the Commissioner the Council explained that it had left as much information unredacted as possible, in order to meet the legitimate interests around transparency and accountability of actions.
42. Based on the information provided to him by the complainant, the Commissioner understands that the complainant is requesting disclosure of the information, as they are a shareholder of the area in question.
43. The Commissioner is also aware that other individuals will be involved, who live in the surrounding area and also use the facility. The Commissioner considers that this demonstrates that there is a legitimate interest in the disclosure of the requested information.

### **Is disclosure necessary?**

44. '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.
45. The Commissioner has seen the withheld information and he is satisfied that it is the personal data of several individuals. In light of the information disclosed already, he is satisfied that it is not necessary to meet the legitimate interest by disclosing this personal data. He has therefore not gone onto consider the balancing test.
46. The Commissioner finds that the Council was correct to withhold the requested information under section 40(2) of FOIA.

### **Section 42 - Legal professional privilege**

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47. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings. LPP protects the confidentiality of communications between a lawyer and client.
48. Section 42 is a class based exemption, that is, the requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting LPP for it to be exempt. There is no need to consider the harm that would arise by disclosing the information.

49. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Tribunal in the case of 'Bellamy v The Information Commissioner and the DTI' (EA/2005/0023) (Bellamy) as:

" ... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation."

50. There are two categories of LPP – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
51. The requested information in this case relates to legal advice relating to several matters referring to the specific area in question. This covers only the redactions on pages 68-70 of the information provided to the complainant on 12 April 2023.
52. The Council has advised the Commissioner that the content that has been redacted, constitutes advice provided by one of its solicitors, with regards to the legal options that could be pursued with regards to obtaining the gardens.
53. The Council added that the emails were only sent to relevant parties within the Council for consideration of their legal options. It added that it is therefore considered that the exemption at section 42 is engaged in response of this information as legal advice privilege.
54. From the evidence he has seen, the Commissioner is satisfied that the withheld information falls within the definition of LPP.

### **Public interest test**

55. Section 42 is a qualified exemption and the Commissioner has therefore considered the balance of the public interest to determine whether it favours the disclosure of the information, or favours the exemption being maintained.



### **Public interest arguments in favour of disclosure**

56. The Council has explained that, by way of disclosure of resulting emails, it has shown transparency around legal advice being sought and discussed.

### **Public interest arguments in favour of maintaining the exemption**

57. The Council has explained that the public interest favours maintaining the exemption in this case, as the advice is only a year old and remains relevant to similar scenarios.

58. The Commissioner acknowledges the complainant's position that they consider that there has been a lack of transparency and that they consider that they have the rights to the information as they are a shareholder of the entity in question.

59. However, he must also take into account that there is a public interest in the maintenance of a system of law which includes legal professional privilege as one of its tenets.

60. In reaching his decision in this case, the Commissioner has considered the prior findings of the Commissioner and the Information Tribunal in relation to legal professional privilege. He has also had regard to the content of the withheld information, and balanced this against information which has already been disclosed in order to keep the public informed, without the need to disclose the advice itself.

61. The Commissioner is mindful that, while the inbuilt weight in favour of the maintenance of legal professional privilege is a significant factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is equalled or outweighed by the factors favouring disclosure.

62. However, in all the circumstances of this case, the Commissioner is not satisfied, from the evidence he has seen, that there are factors present that would equal or outweigh the strong public interest inherent in this exemption.

63. The Commissioner has therefore concluded that the public interest in maintaining the exemption at 42(1) outweighs the public interest in disclosure. It follows that the Council applied section 42(1) correctly in this case.

### **Section 1 – information held**

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64. Under section 1(1) of FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the

authority holds the information and, under subsection (b), to have the information communicated to them if it is held and is not exempt information.

65. The Commissioner has sought to determine whether, on the balance of probabilities, the Council holds the requested information.
66. The Council explained to the Commissioner that it had undertaken searches in areas that were considered most likely to hold the requested information, along with asking the named Councillor to also carry out searches.
67. The Council explained that the named Councillor had not been asked to carry out searches until they did the internal review, however, any information that was located, was provided in the internal review response.
68. The Commissioner is satisfied that adequate searches were carried out to locate the information and, therefore, on the balance of probabilities, he is satisfied that the Council does not hold any further information in relation to the request.
69. The Council has therefore complied with its obligations under section 1(1) of FOIA.

## Right of appeal

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70. 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](mailto:grc@justice.gov.uk)

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

71. 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.

72. 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 .....**

**Michael Lea**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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**SK9 5AF**