

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

### **Decision notice**

**Date:** 20 March 2024

**Public Authority:** Warrington Borough Council  
**Address:** Town Hall  
Sankey Street  
Warrington  
WA1 1UH

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

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1. The complainant requested information about dog breeding and pet selling licences issued to a specific breeder. Warrington Borough Council (the "council") refused the request under the exemptions for personal information (section 40(2)) and commercial interests (section 43(2)).
2. The Commissioner's decision is that the council wrongly applied section 40(2) to the information and that, whilst the exemption in section 43(2) is engaged, the public interest favours disclosing the information.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
  - Disclose the licences specified in part 1 of the request.
4. The public authority 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

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5. On 7 June 2023, the complainant wrote to the council and requested the following information:
  - “1. A copy of the dog breeding and pet selling licences in place immediately before the issuing of the dog breeding and pet selling licence issued on 5 July 2022 under reference BRO1PS32. In response to a previous request you have claimed that as the licence is no longer valid it is not relevant and refused to disclose it. Should you continue to maintain this position please explain exactly which parts of the FOIA you are relying on as grounds to withhold the previous licence.
  2. All correspondence in relation to the dog breeding licence issued by Fermanagh & Omagh District Council in the names of [redacted]. Please note all correspondence includes correspondence with [redacted] (the existence of the licence is a matter of public record so I do not believe S40 will apply), Fermanagh & Omagh District Council and any other party.”
6. The council responded on 3 July 2023 and confirmed that it was refusing to comply with the request because it considered the cost of compliance would exceed the appropriate limit provided by section 12.
7. On 3 July 2023 the complainant wrote to the council confirmed that they were limiting the scope of their request to the information specified in part 1. Effectively, this was a request for the council to carry out an internal review.
8. The council responded on 21 November 2023. It confirmed that it was refusing the request under the exemptions for personal information (section 40) and prejudice to commercial interests (section 43(2)).

## Scope of the case

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9. On 11 November 2023 the complainant contacted the Commissioner 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 whether the council correctly withheld the requested information.

## Reasons for decision

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### Background

11. The Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018 (the "regulations")<sup>1</sup> set out the duties of local authorities in England to license activities involving animals and the relevant establishments relating to this. The licensable activities include the selling of animals as pets and dog breeding.
12. Upon application for a licence, the business will be inspected. Following the inspection, a licence will be issued or denied based upon an assessment as to whether the business is likely to meet the general and specific licence conditions for the licensable activity applied for. The inspection will also inform a risk scoring matrix that will determine the licence length for a business. A licence, if issued, will last for one, two or three years based on a risk assessment system. The length of the licence will depend on an assessed star rating.<sup>2</sup>
13. The local authority will determine whether a business activity is low or high risk based on elements such as past compliance, complaint history, appreciation of animal welfare standards, appreciation of hazards / risks, and welfare management procedures. A star rating will then be determined, ranging from one to five stars. The issued licence will indicate the star rating awarded as well as stating the length of the licence. This information will be publicly available, either being published on the local authority website or through a direct enquiry to the local authority. In addition, the licensee must clearly display the licence on their premises<sup>3</sup>.
14. In this case the council is the relevant licensing authority and the complainant has asked for a copy of the licences issued to the named dog breeder prior to the current licences.

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<sup>1</sup> <https://www.legislation.gov.uk/ukxi/2018/486/contents/made>

<sup>2</sup> <https://www.gov.uk/government/publications/animal-activities-licensing-guidance-for-local-authorities/dog-breeding-licensing-statutory-guidance-for-local-authorities>

<sup>3</sup> Ibid.

## **Section 40 – personal information**

15. In this case the withheld information consists of dog breeding and pet selling licences issued to a named breeder. The licences in question have been superseded by current, publicly available licences.
16. 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.
17. 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').
18. 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.
19. 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?**

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

"any information relating to an identified or identifiable living individual".
21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. 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.
23. 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.
24. The requested information identifies specific individuals who own and operate a dog breeding premises. The information relates to decisions taken in respect of those individuals in respect of their roles as business owners.

25. The Commissioner therefore finds that the withheld information is the personal data of the business owners and falls within the definition of 'personal data' in section 3(2) of the DPA.
26. 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.
27. The most relevant DP principle in this case is principle (a).

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

28. 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".

29. 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.
30. 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**

31. 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.
32. 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>4</sup>

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<sup>4</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

33. The council has accepted that there is a legitimate interest in disclosure, specifically, in the importance of the public having confidence that public authorities tasked with the issuing of licenses for dog breeders are following the required regulations so that only dog breeding establishments which comply with the required welfare standards are granted licenses.
34. The Commissioner understands that there is a legitimate interest in disclosure, namely that it would add to the accountability and transparency of the council in relation to its role as licence issuer. The Commissioner is also mindful that the information relates to the individuals in their business role and their responsibilities in respect of animal welfare.

### **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. The council considers that the disclosure of the licences would assist with accountability in respect of the historic period but it considers that the information is limited, it is historic and the current licences are publicly available.
37. The Commissioner considers that disclosure of the information is reasonably necessary for the purposes of the legitimate interests. The legitimate interest relates to transparency around the council's licencing function.
38. The Commissioner does not accept that the public interest in accountability and transparency regarding the council's role under the regulations is confined to current licences. That a licence has been superseded does not negate the public interest in being able to assess and understand the council's practice and effectiveness in respect of animal welfare matters over time.

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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"

39. Similarly, those undertaking dog breeding/selling as a business activity will be aware of the licencing process and the public scrutiny this brings. Historic licences such as those identified in the request will also have been subject to the same publication and display conditions as the current license.

**Balancing test: do the legitimate interests outweigh the interests and rights of the individual?**

40. The balancing test involves considering whether the legitimate interests served by the disclosure outweigh “the interests or fundamental rights and freedoms of the data subject which require the protection of personal data”.

41. The Commissioner considers that, when conducting the balancing test, authorities should consider:

- the potential harm or distress that disclosure would cause;
- the extent to which the information is already in the public domain;
- the extent to which the information is already known to some people;
- whether the individual has expressed concern or objected to the disclosure; and
- the data subject’s reasonable expectations of privacy.

42. The Commissioner considers that these factors are often interlinked. For example, what other information is available in the public domain may have a bearing on the consequences of disclosure or on the person’s reasonable expectations.

**The council’s position**

43. The council has argued that, given that the current licences are available, the fact that the licences are historic and provide limited benefits to accountability, it is not considered that the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subjects. The council considers that releasing this information to the world at large is likely to lead to the data subjects suffering unwanted contact with members of the public about the (defunct) licences. The council has stated that dog breeding and selling is an area of business where emotions are liable to be raised and such contact can be distressing. The council confirmed that the data subjects have not provided their consent for the information to be disclosed.

## **The Commissioner's conclusions**

44. In reaching his conclusions in this matter the Commissioner has referred to a decision issued by the First-tier Tribunal (Information Rights) (the "tribunal") in a case which shares some common features<sup>5</sup>.
45. The request under consideration by the tribunal related to the review into the handling of a specific breeder's dog licensing application. The tribunal concluded that, whilst it acknowledged the potential effects of disclosure on the data subjects, these were counterbalanced by the legitimate interests in accountability and transparency which disclosure would serve. It also found that it would have been within the data subjects' reasonable expectations for the information to be in the public domain.
46. In relation to the request under consideration in this notice, the Commissioner considers that the data subjects would have had a reasonable expectation that the requested licences would, at the time it was in force, have been publicly accessible. This is a provision of the regulations<sup>6</sup> which the data subjects would be required to follow in operating their business.
47. That the requested licences have been superseded does not change their status as a factual record of the business' compliance with the regulations and of the council's actions as the responsible licensing authority. The Commissioner considers that the information should form part of the public record of a business' compliance with legislation and facilitate scrutiny of practice in respect of animal welfare. The Commissioner appreciates that the scrutiny this brings might be unwanted but, providing it is lawful, it is not something that he considers someone entering into such a business would reasonably expect to avoid.
48. Taking all the above into account, the Commissioner has concluded that although there is only a moderate interest in disclosure of this small amount of information, it is not outweighed by the legitimate interests of the individuals involved. In those circumstances the Commissioner finds

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<sup>5</sup> Tribunal reference: : EA/2021/0380; issued 7 July 2022:  
<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i3081/015%20%20060722%20Judge%20Buckley%20Open%20decision.pdf>

<sup>6</sup> See paragraph 12 above.



that the council was not entitled to withhold the requested licences under section 40(2) of the FOIA.

### **Section 43 – commercial interests**

49. Section 43(2) of the FOIA provide that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
50. Where a public authority considers that the information it holds comprises commercial information, the Commissioner's longstanding view is that, in order to engage section 43, the public authority must be able to show how, and why, its disclosure has the potential to prejudice someone's commercial interests.
51. The council has argued that disclosing the requested licences would be likely to prejudice the commercial interests of the current holders of the licences as it would make available to the public details of the historic premises, the details of the activities that were licensed, the dates it was in place, the rating, and the conditions, information which is out of date.
52. The council has argued that the information contained on the licences is not reflective of the current state of the commercial undertaking. It has argued that the current business is likely to be approached and considered on the basis of this historic information rather than on the basis of the more up to date information which is required by the regulations to be in the public domain.
53. The Commissioner notes that the council has not provided any evidence that it consulted with or otherwise sought the views of the licence holders about the application of this exemption. He, therefore, considers that the arguments provided are speculative and general in nature and he has accorded them due weighting.
54. However, the Commissioner accepts that there is potential for disclosure of the information to have an impact on the public perception of the licence holder and that this is a legitimate argument for concluding that disclosure would be likely to result in damage to its commercial interests. He has gone on to consider the public interest.

### **Public interest in disclosure**

55. The council has acknowledged that there is a public interest in knowing that dog breeding is properly regulated and that animals are treated and cared for properly and in the transparency and accountability of the council in exercising public functions, even where that was some time ago.

56. The Commissioner notes that the information is of value to the public because it would facilitate its understanding of how the council carries out its regulatory duties in respect of animal welfare. Specifically, he considers that disclosure would show how, over time, the council regulates specific dog breeders.

### **Public interest in maintaining the exemption**

57. The Commissioner acknowledges that there is obviously a public interest in ensuring that a business does not suffer commercial harm as a result of the disclosure of particular information. In this case it has been argued that this could arise as a result of the misrepresentation or misunderstanding of the information.
58. The Commissioner recognises that the publication of the current licences goes some way to serving the public interest in this matter.

### **Balance of the public interest**

59. The Commissioner has published guidance on the application of exemptions and he has set out his views on the status of certain types of arguments authorities sometimes adopt.
60. One such argument takes the following form: The harm the exemption is designed to protect against either exists or is increased because the requested information is misleading or could be misunderstood.
61. The Commissioner is generally reluctant to accept arguments for withholding information based on the contention that disclosure might result in the information being misunderstood or misapplied. His view is that it is always possible to offset the potential for this to happen by issuing an accompanying statement placing the information in context. So, whilst he has accepted the council's grounds for engaging the exemption he does not consider that they carry considerable weight.
62. The Commissioner notes that information which might be deemed commercial that is contained in dog breeding/pet selling licenses is very limited, being largely confined to the confirmation of the star rating awarded to a breeder and the length of the licence. For current, published licences this information will be readily available to both potential customers and competitors.
63. The Commissioner considers, therefore, that anyone applying for a dog breeding/pet selling licence would be aware of the potential for information about their performance and practices to be placed in the public domain.

64. Where a poor star rating has been awarded, the Commissioner accepts that this will have a relationship with the reputation and commercial standing of a breeder; however, he considers that the public would expect the council to allow scrutiny of its decisions around animal welfare and, in a commercial market, those businesses who fall short of regulatory standards should legitimately expect the consequences of this. The Commissioner considers that, for logical consistency, this principle should equally apply to previously issued licences as well as those that are current since it would assist the public in understanding how regulatory practice works and in assessing its effectiveness.
65. In relation to the council's substantive argument that disclosure could result in the business being approached/appraised on the basis of the previous licences, as noted above, the Commissioner considers that this concern could be addressed by an accompanying statement and/or by providing a copy of the current licences.
66. The Commissioner acknowledges that there is a link between the information and the commercial standing of the business, however, he considers that this is offset by the attendant public expectations around the regulatory environment within which the business operates. Understanding how the council carries out its duties under the regulations via the narrative of its engagement over time with a specific licence holder would appear to the Commissioner to be strong public interest grounds for disclosure.
67. For these reasons he considers that any prejudice which disclosure of the information might cause to the licence holder is outweighed by the public interest in accountability and transparency regarding the effectiveness of the council's licensing decisions over a period of time.
68. He has, therefore, concluded that the public interest in this case favours disclosing the information.

## Other matters

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69. Although they do not form part of this decision notice the Commissioner would like to note the following matters of concern.

### **Section 45 code of practice – internal review**

70. The code of practice issued under section 45 of the FOIA (the “code”) sets out the recommended practice that authorities are expected to follow when handling requests for information<sup>7</sup>.

71. The code recommends that authorities should normally send the outcome of an internal review 20 working days after it has been received.

72. In this case the complainant sent their request for review on 3 July 2023 and the council sent its response on 21 November 2023.

73. The Commissioner expects that, in future, the council will ensure that its practice conforms to the recommendations of the code.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/744071/CoP\\_FOI\\_Code\\_of\\_Practice\\_-\\_Minor\\_Amendments\\_20180926\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf)

## **Right of appeal**

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74. 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)

75. 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.

76. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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