

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 February 2019

Public Authority: Birmingham City Council
Address: Council House
Victoria Square
Birmingham
B1 1BB

Decision (including any steps ordered)

1. The complainant has requested information about how the Council voted in a Business Improvement District (BID) ballot. The Council refused to provide the information, relying on sections: 44(1)(a) - prohibition on disclosure; 42 - legal professional privilege; and 40(2) - third party personal data, of the FOIA.
2. The Commissioner's decision is that Birmingham City Council has correctly engaged sections 40(2) and 42 of the FOIA and the public interest rests with maintaining the exemption of the latter. She does not find that section 44(1)(a) is engaged. She also finds that the Council has breached section 10 of the FOIA by failing to respond to the request within 20 working days, and sections 1(1)(a) and (b) of the FOIA by failing to disclose information held falling within the scope of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose all information withheld under section 44(1)(a)
 - Issue a fresh response to the information contained within Annex A
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

5. On 23 March 2018 the complainant wrote to Birmingham City Council and requested information in the following terms:

'In the recent renewal ballot for Kings Heath business improvement district, the council abstained in this vote. This was contrary to previous council policy of voting "yes" in business improvement district ballots.

I would like to see all copies of e-mails, memos and cabinet member reports, which show how the council reached its decision to abstain in this vote.

Further, I would like to see what consultation took place with the local Ward Councillors for Moseley and Kings Heath, and Brandwood Wards. I would like to see what their comments were on this ballot.'

6. The Council responded on a number of occasions providing details of where the information could be found. However this was not a full and proper response to the request. Following the involvement of the Commissioner, the Council finally provided a complete and formal response to the request on 15 June 2018. It provided some information falling within the scope of the request but refused confirm or deny that it held any remaining information, citing section 44(1)(a) of the FOIA – prohibition on disclosure under any other enactment and section 44(2) – neither confirming nor denying it held the information as to do so would breach the prohibition on disclosure. It gave the Business Improvements District (England) Regulations 2004 as the relevant piece of legislation covered by the prohibition, and in particular the 'Requirement of secrecy' section therein.
7. On the 2 July 2018 the complainant requested an internal review. The Council sent the outcome of its internal review on 10 July 2018 upholding its original position.

Scope of the case

8. The complainant contacted the Commissioner on 21 May and 13 July 2018 to complain about the way his request for information had been handled. The Council initially failed to provide a formal response to the request, but did so after prompting by the Commissioner, at which point it neither confirmed nor denied it held the information, citing sections 44(1)(a) and 44(2) of the FOIA.

9. Following the Commissioner's investigation, the Council ceased to rely on section 44(2) of the FOIA. Instead it confirmed it held information falling within the scope of the request, but still relied on section 44(1)(a) – that disclosure is prohibited under any other enactment, in this case the 'requirement of secrecy' within the Business Improvements District (England) Regulations 2004. The Council also withheld information under sections 40(2) and 42 of the FOIA. It also released further information to the complainant regarding Councillor comments about the ballot as requested.
10. The Commissioner considers the scope of the case to be whether the Council is entitled to rely on sections 40(2), 42 and 44(1)(a) of the FOIA to withhold information, and whether for section 42, the public interest rests in maintaining the exemption.

Reasons for decision

Section 40(2) – third party personal data

11. As the Council's refusal of the request was after 25 May 2018, the date the new Data Protection Act 2018 ('DPA 2018') and General Data Protection Regulation ('GDPR') legislation came into force, the Commissioner considers that the DPA 2018/GDPR applies.
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(3) or 40(4) is satisfied.
13. In this case the relevant condition is contained in section 40(3A)(a). This applies where disclosure of information to any member of the public would contravene any of the principles relating to the processing of personal data set out in Article 5 of the GDPR ('the DP principles').
14. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA 2018. 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, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA 2018.

Is the information requested personal data?

16. Section 3(2) of the DPA 2018 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.
20. The complainant has requested information about the Council's decision to abstain from the King's Heath Business Improvement District (KHBID) ballot including consultation with and comments from councillors. The personal data that the Council has withheld includes Council staff involved with administration of the BID; staff external to the Council involved with the BID; local residents; and mobile numbers of staff within the Council. The Commissioner is therefore satisfied that this information both relates to and identifies those listed above, and consequently this information falls within the definition of 'personal data' in section 3(2) of the DPA 2018.
21. The Council has not withheld the personal data of more senior staff within the Council or Councillors, save for mobile phone numbers.
22. 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. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

23. 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".

24. 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.
25. 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

26. The Commissioner considers that the lawful basis most applicable is basis (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"¹.

27. 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.

¹ 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 [2018](#)) 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 considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.
29. In considering any legitimate interests in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
30. 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.
31. The complainant has requested information about how the Council reached its decision to abstain in the KHBID ballot including consultation with local Councillors. As the Council reversed its previous policy of voting 'yes' in BID ballots for this specific ballot, the complainant considers there to be a legitimate interest in understanding why this change occurred. The government describes BIDs as

'business led partnerships which are created through a ballot process to deliver additional services to local businesses. They can be a powerful tool for directly involving local businesses in local activities and allow the business community and local authorities to work together to improve the local trading environment.'

32. The Commissioner therefore accepts there are wider transparency issues about why the Council chose to abstain in the BID ballot and that the legitimate interests test is met.

Is disclosure necessary?

33. '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.
34. As the Council is only withholding the names and contact details of certain individuals, rather than the substantive text of communications, the Commissioner is not satisfied that this information is necessary to meet the legitimate interests in disclosure. Senior staff and Councillor names have not been redacted, and therefore the key influences in terms of how the Council decided to vote are not being withheld by the Council.

35. The Commissioner therefore concludes that disclosure of the withheld personal data is not necessary to meet the legitimate interests in question, and so has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a). Given that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
36. The Commissioner has therefore decided that the Council was entitled to withhold the information under section 40(2) of the FOIA, by way of section 40(3A)(a).

Section 42 - legal professional privilege

37. Section 42(1) of the 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.
38. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTA* (EA/2005/0023) (Bellamy)² 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."

39. There are two categories of LPP – litigation privilege and 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. Advice privilege applies when no litigation is in progress or contemplated. 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.

²http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf

40. The Council asserts that the withheld information under section 42 attracts advice privilege because it includes confidential communications between an in-house solicitor and his client (in this case the Council) regarding the KHBID ballot including specific legal advice. Having viewed the withheld information in the context of her guidance³ on LPP, the Commissioner is satisfied that it constitutes communications between a lawyer and their client for the purpose of obtaining legal advice, and as a result section 42 is engaged.

The public interest test

41. Section 42 is a qualified exemption, subject to the public interest test (PIT) as set out in section 2(2)(b) of the FOIA. In accordance with that section the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
42. There is a strong inherent general public interest in maintaining this exemption as the principle behind LPP - safeguarding openness in communications to ensure access to full and frank legal advice as a fundamental aspect in the administration of justice. This approach is endorsed by the Tribunal in the Bellamy case cited above, where it explained the balance of factors to consider when assessing the PIT

'there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest.'

43. The Council recognises that there is a strong public interest in disclosure in terms of transparency and accountability, but considers that the 'fundamental protection afforded' by LPP outweighs this interest.
44. The information withheld under section 42 relates to legal advice obtained by the Council regarding the running and administration of the KHBID renewal ballot. The Commissioner considers that in the circumstances of the case, the ability of the Council to obtain advice about a democratic process in confidence outweighs the public interest in disclosure of the information, and therefore the Council is entitled to rely on section 42.

³ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

Section 44 – prohibitions on disclosure

45. Section 44 of the FOIA states that:

*'(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –
(a) Is prohibited by or under any enactment'*

46. Section 44(1)(a) provides an exemption to disclosure to requests made under the FOIA, where disclosing the information is prohibited by other legislation. In this case the Council has cited the Business Improvements District (England) Regulations 2004 as the relevant piece of legislation, and in particular the 'requirement of secrecy'.

47. Schedule 2 section 6 of the regulations states:

'Requirement of secrecy

6.—(1) Every person attending the proceedings in connection with the issue or the receipt of ballot papers shall maintain and aid in maintaining the secrecy of the voting and shall not attempt to ascertain at the proceedings in connection with the receipt of the ballot papers the way in which any vote is given in any particular ballot paper or communicate any information with respect there to obtained at those proceedings.

(2) Every person attending at the counting of the votes shall maintain and aid in maintaining the secrecy of voting and shall not communicate any information obtained at the counting of the votes as to the way in which any vote is given on any particular ballot paper.

(3) Nothing in this paragraph shall prevent the ballot holder and his clerks ascertaining the address and rateable value of each hereditament in respect of which a vote is cast.

48. The Council maintains that the 'Requirement of secrecy' extends to the withheld information showing how the Council decided to abstain in the ballot.

49. For context, the Council is responsible for holding (i.e. administering) the BID ballot, as well being eligible to vote. However these are two distinct roles; the Council is eligible to vote as it has business premises (referred to as hereditaments) in the BID, and it would be possible for the Council to have no business premises in a BID but still be required to hold the ballot on behalf of the BID.

50. The Commissioner has studied the text closely in Schedule 2 section 6 of the Business Improvements District (England) Regulations 2004 and does not agree with the Council's interpretation of the 'Requirement of secrecy'. The Commissioner understands that the 'Requirement of secrecy' extends only to the process of administering the issuing, receipt and counting of ballot papers, which may or may not include the Council's votes. The requirement of secrecy is to protect those voting in a ballot from pressure, intimidation or vote buying and is a cornerstone of democracy. It does not stop an individual from declaring their intentions to vote, their reasons for doing so, or what they have voted; it only stops those involved with the administration of the ballot (the ballot holder, clerks etc) from making individual votes public.
51. In this case, the Council, as *ballot holder*, has a requirement of secrecy in connection with the ballot's administration. This requirement of secrecy does not extend to the Council's decision-making process as a voter in the ballot. The Council has not acquired knowledge of how it voted in the ballot as the ballot holder, but as a result of its own voting rights. It may or may not chose to make that information public, but it is not, in this case, beholden by statute.
52. The Commissioner does not therefore accept that the 'Requirement of secrecy' within the BID regulations applies to the information withheld under section 44(1)(a) of the FOIA and as such the regulation is not engaged.

Section 10 – time for compliance

53. Section 10 of the FOIA states that responses to requests made under the Act must be provided "*promptly and in any event not later than the twentieth working day following the date of receipt.*"
54. The complainant made his request for information on 23 March 2017. The Council responded on several occasions, signposting the complainant to where information could be found. However this was not an accurate or complete response to the request, and the Council only provided such a response on 15 June 2017, following involvement of the Commissioner. This was 54 days after the request was made and far in excess of the 20 working days required by the act. The Council therefore breached section 10 of the FOIA, and the Commissioner reminds the Council of the need to respond to requests accurately and within 20 working days.

Section 1 – right to information

55. Section 1 of the FOIA states:

'(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him'

56. When the Council provided the withheld information to the Commissioner, it provided some information that it marked as out of scope. On reviewing the information supplied, the Commissioner considered that some information that was marked as out of scope should have been considered in scope. This was further confused by the Council 'double marking' information as out of scope but then applying an exception to the same information.

57. When asked by the Commissioner to explain why it considered the information to be out of scope, the Council said:

'The request is for information "which show how the council reached its decision to abstain in this vote", so we approached this by gathering only that data which directly concerns the decision to abstain and how that decision was reached, by whomsoever made it. If there was any doubt over whether data influenced the decision it was excluded.'

58. The Commissioner disagrees with the Council's marking of some material as out of scope and communicated this accordingly:

'We consider some of this to fall in scope. This is because it includes context and influencing factors regarding the Council's decision as detailed in [redacted] and the Commissioner interprets 'how' to be more than procedural. Additionally...some of the withheld information includes some of this context and influencing factors, and the Commissioner cannot see a clear rationale as to how the Council has distinguished between information in and out of scope.'

59. The Commissioner advised the Council that should it continue to maintain its stance on the out of scope material, which it duly did, she would address this in the decision notice and require the Council to consider some of it held for the purposes of section 1 of the FOIA. The Commissioner therefore finds the Council has breached section 1(1)(a) and 1(1)(b) of the FOIA and directs the Council issue a fresh response to the complainant in relation to the information contained in the confidential Annex A.

Right of appeal

60. 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@hmcts.gsi.gov.uk

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

61. 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.
62. 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

Andrew White
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