

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

### **Decision notice**

**Date:** 10 February 2015

**Public Authority:** Torbay Council

**Address:** Town Hall  
Castle Circus  
Torquay  
TQ1 3DR

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

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1. The complainant requested the names of the 20 landlords (excluding housing associations) whose tenants collectively received the largest amounts of housing benefit from Torbay Council (the Council) in the last financial year 2012/13. The Council provided the complainant with a list of the 20 landlords but redacted the names of individual landlords and sole traders on the basis of section 40(2) of FOIA. The Commissioner has concluded that the Council was not entitled to rely on this exemption.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld names of the landlords.
3. 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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4. The complainant submitted the following request to the Council on 3 June 2014:

*'I am emailing to make a request under the Freedom of Information Act. I would like to know further details of the 20 landlords (excluding housing associations) who have directly received the largest amounts of housing benefit from Torbay council in the last financial year 2012/13.'*<sup>1</sup>

5. The Council responded on 27 June 2014 and provided him with a revised list of the amounts paid to landlords in question. However, it explained that the names of individual private landlords (16 in total) had been redacted on the basis of sections 40(2) and 41(1) of FOIA. The names provided were those at positions 3, 11, 13 and 15 of the 'top 20'.
6. The complainant contacted the Council on 13 August 2014 in order to ask for an internal review of this decision.
7. The Council informed him of the outcome of the review on 28 August 2014. The review upheld the application of section 40(2) and in light of this finding did not consider the application section 41(1).
8. During the course of the Commissioner's investigation the Council established that the names of two of the 16 landlords which had been withheld were in fact not private landlords but were corporate landlords. These appeared at positions 4 and 7 on the 'top 20' list. The Council provided the complainant with the names of these two landlords on 14 October 2014.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 2 September 2014 to complain about the Council's decision to withhold the names of the remaining landlords. In light of the Council's disclosure of 14 October 2014 there are 14 such landlords. At the point this decision notice is being issued the Council is only seeking to withhold this information on the basis of section 40(2) of FOIA.
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<sup>1</sup> This request related to a previous request that the complainant had submitted to the Council (request ref: 1314754 and Internal Review request Ref: 255302).

## Reasons for decision

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### Section 40(2) – personal data

10. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA).

#### Is the withheld information personal data?

11. Clearly then for section 40(2) to be engaged the information being withheld has to constitute 'personal data' which is defined by the DPA as:

*'...data which relate to a living individual who can be identified*

*a) from those data, or*

*b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'*

12. The Council argued that the names of the individual landlords clearly related to identifiable living individuals and thus it constituted their personal data. In the Commissioner's opinion information about sole traders will comprise their personal data and therefore he agrees with the Council's analysis and accepts that the information constitutes the landlords personal data.
13. The Council argued that disclosure of the personal data would be unfair and thus breach the first data protection principle of the DPA which states that:

*'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*

*(a) at least one of the conditions in Schedule 2 is met, and*

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'*

14. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
    - what the public authority may have told them about what would happen to their personal data;
    - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
    - the nature or content of the information itself;
    - the circumstances in which the personal data was obtained;
    - particular circumstances of the case, e.g. established custom or practice within the public authority; and
    - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
  - The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
    - whether information of the nature requested is already in the public domain;
    - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
15. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure.
16. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, ie it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.

### The Council's position

17. The Council argued that the individual landlords had a reasonable expectation that this information would not be placed into the public domain. It explained that, having received this request, it contacted the 14 landlords in question and asked them to consent to the disclosure of their information. The Council received 11 responses; all those who responded refused to give their consent.
18. Taking into account the nature of these responses, in the Council's opinion disclosure of withheld information would invade the privacy of the individual landlords. It noted that disclosure of their names could lead to a motivated individual acquiring their home address. More specifically, the Council explained that the following concerns had been raised by the landlords:
  - That disclosure of their names may have a detrimental effect on their relationship with their tenants.
  - Infringement of the landlords' privacy would cause both them and their families distress. It would also cause them untold problems with their business.
  - Disclosure would cause resentment from their tenants and would be misleading/misunderstood.
  - Concerns that the information would be used for improper reasons, for example leaving them exposed to fraudsters.
19. The Council also explained that it did not believe that there was a legitimate interest in disclosure of this information. It argued that these individual landlords carry out an important social service to tenants who can only pay their rent via housing benefit. It noted that a lot of landlords do not take on tenants who can only pay their rent this way. With the shortage of housing, the Council relies upon these landlords to house tenants who could otherwise potentially end up being homeless. It argued that it made no difference whether the housing benefit was paid direct to the tenant or to the direct to the landlord in terms of the Council's accounting purposes as long as the payment was made lawfully and accounted for in public accounts. Indeed it was argued that payment of housing benefit direct to a tenant was a positive arrangement because it meant that the tenant was likely to stay housed longer. If the landlord received the housing benefit directly this avoids the situation where some tenants do not pay their rent from the housing benefit they receive and run the risk of being made homeless.

### The complainant's position

20. Based upon the information initially disclosed by the Council (ie before the additional disclosure of two further landlords names in October 2014) the complainant noted that over £3.3m of housing benefit had been paid by the Council directly to the top 20 landlords in the financial year 2012-13 but of this 85.4% of it (£2.86m) had gone to the sole traders and individual buy-to-let landlords, the identities of whom had been redacted on the basis of section 40(2). In particular, the complainant noted that the first and second landlords, whose identities had been withheld, received significant amounts, £1,050,803 and £293,411 respectively. He argued that it was in the public interest that the names of the sole traders and buy-to-let landlords, operating in a business capacity who were in receipt of such amounts was disclosed.

21. The complainant referred to piece of guidance issued by the Commissioner which stated that:

*'Information about people acting only in a business capacity should be treated differently to information about their private lives. This is because running a business is, in the main, a public activity and business people cannot expect the same degree of privacy in relation to their business activities as they can in their private lives.'*<sup>2</sup>

22. The complainant emphasised that the information he was seeking about these individuals concerned their activities in a business capacity and not information related to activities carried out in a personal or private capacity. The complainant also noted that the guidance suggested that:

*'The Act [the DPA] should not be applied in an unnecessarily restrictive way...Transparency is a key requirement of the Act. Local Authorities should make business people aware of how information about them will be used or shared. Sharing of this information should not cause, nor is likely to cause, 'substantial, unwarranted damage or distress, then the processing may go ahead despite an individual's objection to it'.*

23. The complainant explained that he had received similar data from other local authorities and noted that one in particular had stated that they had *'provided names and addresses even where the landlord is not a*

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<sup>2</sup> The guidance in question, 'The use and disclosure of information about business people' has been withdrawn.

*limited company. [They] have taken advice and take the view this is in the public interest.'*

24. The complainant also referred to a previous decision the Commissioner had issued regarding a request to High Peak Borough Council for a breakdown of fees paid to consultants between 1998 and 2011 in connection with a development project was partially refused. In that case information relating to limited companies was provided but further information relating to sole traders was exempt under section 40(2). The Commissioner concluded that the withheld information was not exempt from disclosure on the basis of section 40(2) because the information related to an individual in their professional capacity will be subject to a significantly lower expectation of privacy than information concerning their private life.<sup>3</sup> The complainant argued that this decision supported his view that the withheld information should be disclosed.

#### The Commissioner's position

25. Based upon the Council's submissions, not least the refusal of the majority to consent to disclosure, the Commissioner accepts that the landlords would not expect the withheld information to be disclosed. However, it is important to consider whether this is in fact a *reasonable* expectation. Central to determining this is whether the information actually relates to the individuals private or public lives. Moreover, it is important to remember that the expression of a data subject's refusal to consent to disclosure is not absolutely determinative in deciding whether their personal data would be unfair.
26. In the circumstances of this case, as the individuals are private landlords or sole traders, the Commissioner believes that it is difficult to draw a clear distinction as to whether the information relates to their public or private lives. Disclosure of the information would some reveal biographical details about aspects of the individuals' private lives: it would reveal that they are landlords and it would provide an indication of the amount of revenue they received in one financial year through renting their properties and thus inferences could be drawn about their financial circumstances. The Commissioner also accepts that it may be possible to link the withheld information with other personal information in the public domain about the landlords.
27. However, as the complainant has highlighted the information clearly relates to the business activities of the individuals in question, rather

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<sup>3</sup> [http://ico.org.uk/~media/documents/decisionnotices/2013/fs\\_50450700.ashx](http://ico.org.uk/~media/documents/decisionnotices/2013/fs_50450700.ashx)

than an activity they undertake simply or solely in their private lives. The Commissioner would therefore concur with the view that the 14 landlords should not, and cannot, reasonably expect the same degree of privacy in relation to the withheld information as they would about information that relates solely to their private lives.

28. The Commissioner acknowledges the established practice of not disclosing such information, and that its disclosure would reveal some biographical information about these individuals, therefore the Commissioner is persuaded that the landlords' expectation is a reasonable one. However, the issue is finely balanced.
29. The Commissioner also believes that the degree to which disclosure of the withheld information would infringe the privacy of the individuals is relatively limited. Disclosure would, as is acknowledged above, provide the public with an indication of the revenue which each landlord receives for their rental portfolio. To some extent an assessment could therefore be made in relation to an individual's financial circumstances. However, the individuals may receive rental income from other sources (eg housing benefit paid directly from other local authorities or rent from private tenants who pay their rent from their own funds) and moreover may have other sources of income. Any insight into the financial position of each landlord following disclosure of the withheld information is therefore likely to be quite limited.
30. The Commissioner notes that the Council has argued that disclosure could cause distress to the landlords and their families but it has not sought to clearly explain exactly why this would be the case. The statements provided by the Council are merely assertions with no reasoning or explanation provided. The Commissioner does not accept the assertion that disclosure would have a detrimental effect on the landlords' relationship with their tenants nor the suggestion that it would cause them problems with their business. Again, these are not clearly explained or set out enough detail to be given significant weight in the fairness analysis. The disclosure would clearly have an impact on the individuals – they could receive more questions and scrutiny about their housing provision, but scrutiny may not be unreasonable or unfair.
31. Furthermore, the Commissioner does not accept that simply because the information may be misunderstood or misinterpreted this is a reason to withhold it. In his view, when a public authority discloses information under FOIA it has the opportunity to explain the relevance of that information and set it into context in order to counteract any potential misunderstanding.
32. Disclosure would contribute to the Council's general openness and transparency. There is a significant public interest in understanding how

the housing benefit system works, on a national and local scale. DWP statistics reveal that 4.9 million people claim housing benefit<sup>4</sup>. There is considerable public debate about the subsidy that housing benefit provides to private landlords and whether the subsidy should be invested in public housing stock. Furthermore, it should not be forgotten that the landlords in question clearly received, on behalf of their tenants, a significant amount of housing benefit. This is particularly true in relation to the relation to the top two landlords on the list. Disclosure would also allow the public to compare this information to similar possible disclosures by other local authorities in order to establish how much a particular landlord had received from all local authorities. Disclosure of the names of the landlords can promote greater accountability for the quality of the housing stock provided in relation to the amount of housing benefit received by the private landlord. The disclosure of the information could provide a source of information for analysis and accountability at both national and local level.

33. In conclusion, any invasion of the landlords' privacy following disclosure is likely to be a relatively marginal one, in the light of the compelling case for disclosing this information, the Commissioner is of the view that disclosure would not be unfair.
34. As well as considering the fairness of disclosure the Commissioner has also considered whether schedule 2 condition 6 of the DPA is met. It states that:

*'The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'*

35. The Commissioner has found that there is a strong compelling legitimate interest in disclosure of the names and that this can be regarded as necessary. Limited prejudice has been identified but the Commissioner finds that this is not unwarranted. Condition 6 is met.
36. In conclusion, the Commissioner has found that disclosure would not breach the first data protection principle – disclosure would be fair and

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meet schedule 2 condition 6 of the DPA. The withheld information is therefore not exempt from disclosure on the basis of section 40(2) of FOIA.

## Right of appeal

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37. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

38. 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.
39. 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** .....

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
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