

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 September 2023

Public Authority: Colchester Borough Homes
Address: 1st Floor Rowan House
33 Sheepen Road
Colchester
Essex
CO3 3WG

Decision (including any steps ordered)

1. The complainant requested various information in respect of their application for housing. Colchester Borough Homes (CBH) provided some information, but refused the remainder citing section 40(2) (third party personal information) FOIA. The Commissioner's decision is that CBH was entitled to withhold the remaining information in reliance on section 40(2) FOIA. The Commissioner does not require any steps

Request and response

2. On 14 March 2023, the complainant wrote to CBH and requested the following information:

"The **full name** of every individual whom has communicated with me as part of my application for housing under reference [redacted] on the following dates:

10/01/2023

30/01/2023

03/02/2023

24/02/2023".

3. CBH initially responded on 11 April 2023. It refused to provide the requested information citing section 40(2) FOIA. The complainant was also informed of their Subject Access Rights (SAR) for their own personal data in respect of the application.
4. The complainant was not satisfied with this response and also submitted the following additional related request for information on 18 April 2023:

"...the seniority and role of those employees with whom I have had contact with."
5. CBH provided its internal review of the first request on 20 April 2023 and upheld its decision to rely on section 40(2) FOIA to withhold the information. It also confirmed the role of the members of staff who have communicated with the complainant in relation to their housing application. Finally, it reiterated its comments in respect of the complainant's SAR rights in respect of their housing application.
6. There followed various communications between both parties which led to CBH confirming the seniority of the role of those employees who had communicated with the complainant in respect of their housing application on 7 June 2023.

Scope of the case

7. The complainant contacted the Commissioner on 10 July 2023 to complain about the way their request for information had been handled. The complainant was not satisfied with the application of section 40(2) FOIA in respect of their request, particularly as they felt there had been no consideration of their legitimate interests.
8. The scope of the Commissioner's investigation is to consider whether CBH was entitled to rely on section 40(2) to refuse the requested information.

Reasons for decision

Section 40 – personal data

9. 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.

10. 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 General Data Protection Regulation ('GDPR').
11. 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.
12. 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.
13. **Is the information personal data?**
14. Section 3(2) of the Data Protection Act 2018 defines personal data as:
"any information relating to an identified or identifiable living individual."
15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.
17. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
18. The withheld information in this case is the names of all employees of CBH who have communicated with the complainant in respect of their housing application on specified dates in January and February 2023.
19. The Commissioner is satisfied that this information both relates to and identifies the individuals in question. It therefore falls within the definition of "personal data" in section 3(2) of the DPA. None of the individuals are the complainant, so it is third party personal data.
20. The fact that information constitutes third party personal data does not automatically exclude it from disclosure under FOIA. The next step is to consider whether disclosure of this personal data would be in breach of

21. any of the data protection principles. The Commissioner has focussed here on principle (a), which states:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”

22. 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.

23. 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

24. 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”.¹

25. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under 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;

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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) 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”.

iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

26. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interest

27. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

28. CBH has not commented in its correspondence to the complainant on whether it accepts that they have a legitimate interest in disclosure of the withheld information, and the Commissioner has made his decision without requesting further submissions from CBH.

29. The complainant has stated that their legitimate interest is to obtain data which revolves around CBH's insistence on access to their sensitive medical information, whilst also claiming not to have a medical officer solely responsible for viewing this data. The complainant further considers that the medical qualifications of the housing officers concerned are of significant importance in determining whether they are qualified to access such data, of which, the first requirement is their name. The complainant has further stated that the officers in question are in a position of seniority where they are making life impacting decisions for members of the public. On this basis the complainant considers that it is in the public interest at the very least that their names are available for transparency in relation to any such breaches of the Housing Act 1996.

30. The Commissioner accepts that the complainant has a legitimate interest in disclosure of this information.

Is disclosure necessary?

31. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

32. The Commissioner notes that the complainant has stated that their legitimate interest ultimately hinges on ascertaining the qualifications of each individual they have communicated with in the course of their housing application. The Commissioner does not consider that disclosure is necessary to meet that interest. CBH has provided the complainant with the role of all relevant individuals. It has also confirmed that each of its five Homechoice Officers reports to the Homechoice Manager, who in turn reports to the Head of Housing Options. It has further confirmed that its Head of Housing Options is a member of its Corporate Management Team.
33. It is common practice for a public authority to argue that the names of junior officials are exempt from disclosure under FOIA on the basis of section 40(2) as disclosure would contravene the principles set out in Article 5 of the GDPR. Furthermore, unless there are very case specific circumstances, the Commissioner accepts that the names of the junior officials are exempt from disclosure on the basis of section 40(2) of FOIA. This is in line with the approach taken in the Commissioner's section 40 guidance² and previous decision notices.³
34. The Commissioner does not consider that knowing the names of the relevant individuals would assist the complainant in ascertaining their qualifications. The Commissioner also considers that disclosing the job roles of the individuals and how they fit into CBH's organisational structure satisfies any legitimate interest in understanding the seniority of the individuals concerned. He has therefore determined that disclosure of the names of the officers in question, to the world at large, is not necessary.

² https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

³ <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022310/ic-114449-b7p7.pdf>

35. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he has not gone on to consider the balance between those interests and the rights and freedoms of the individuals concerned. 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).
36. The Commissioner has therefore decided that CBH was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: 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

Catherine Dickenson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF