

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 April 2024

Public Authority: South Tyneside Council
Address: Town Hall and Civic Offices
Westoe Road
South Shields
NE33 2RL

Decision (including any steps ordered)

1. The complainant has requested information regarding the allocation of properties and information surrounding the tenancies. South Tyneside Council ('the Council') relied on section 40(2) of FOIA (third party personal information) to withhold some of the information and section 36(3) to neither confirm or deny holding the remaining information.
2. The Commissioner's decision is that:
 - The Council has correctly relied on section 40(2) of FOIA to withhold some of the information.
 - The Council was entitled to rely on section 36(3) when refusing to confirm or deny holding the remaining information.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 6 September 2023, the complainant wrote to the public authority and requested information in the following terms:

"Would you please advise me if the council currently own the following properties –

[address redacted] South Shields.

If either of these properties have been sold, please provide me with the date of sale, method of marketing, (copy of marketing material) sale price, and date, name of purchaser, and was it sold under RTB, and if so what discount was given, percentage and figure.

If the Council is still the owner, please advise me –

When the current tenants were allocated to the property and which Officers signed off this allocation.

Please provide a copy of the documents which the officers would have signed, to allocate this property to a council employee who was at the time in an intimate relationship with the then Leader of the Council.

What the weekly rent figure is.

Who the landlord is.

Would the current tenants be able to exercise the RTB with the property.”

5. The Council responded on 4 October 2023. It advised that it did own both addresses, but advised it could neither confirm or deny holding the remaining information. It cited section 40(5) of FOIA when refusing this request, which concerns personal data.
6. Following an internal review the Council wrote to the complainant on 24 October 2023. It stated that it was maintaining its application of section 40(5).

Scope of the case

7. The complainant contacted the Commissioner on 24 October 2023 to complain about the way their request for information had been handled.
8. After the investigation began, the Council informed the complainant that it was the landlord of the properties. It also confirmed holding information regarding when the tenants were allocated the properties, the weekly rent figure and whether the current tenants could exercise the Right to Buy (RTB) with the properties. But the Council explained that the information was being withheld under section 40(2).
9. The Council also advised that it could neither confirm nor deny holding information regarding which officers signed off the allocation of the properties and the documents relating to these property allocations. It cited section 36(3) as its basis for doing this.

10. The Commissioner considers that the scope of his investigation is to establish whether the Council is entitled to withhold some of the requested information under section 40(2) and whether the Council is entitled to neither confirm nor deny holding the remaining information under section 36(3) of FOIA.

Reasons for decision

Section 40 - personal information

11. 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.
12. 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').
13. 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.
14. 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?

15. Section 3(2) of the DPA defines personal data as:
"any information relating to an identified or identifiable living individual".
16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.

18. 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.
19. The Council explained to the Commissioner that the requested information would consist of the tenants' information, dates of property allocations, whether the data subjects – ie the tenants - have the Right to Buy and the weekly rent paid by the tenants.
20. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information does relate to the data subjects. The Commissioner notes that the original request included the address of both properties. Therefore, any information that the Council holds within the scope of the request, would have to be information about those properties and, by extension, the tenants living within them. The tenants would be identifiable from publicly available sources such as the electoral register.
21. Some of the withheld information would reveal details about the domestic arrangements of the tenants and about the conditions under which the properties are occupied. This is clearly biographical information about the tenants and has them as its main focus.
22. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
23. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

24. 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”.

25. 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.
26. 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

27. 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.

28. 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.
29. 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

30. 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.
31. 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

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) 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".

compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

32. The complainant has explained that they are an elected Councillor and one of the duties required of Councillors is to scrutinise the Council's financial activities.
33. The complainant stated that the properties in question are "luxury residential properties", which have "never been advertised for rent to the general public". The complainant further advised that they believed that the current tenants of the houses did not have a housing need and this has led to the request for information.
34. The Commissioner is satisfied that the complainant does have a legitimate interest in the requested information and will now go on to consider whether disclosure is necessary.

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 Commissioner is not satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified. If the complainant is concerned that impropriety has taken place then the matter could be raised internally or with the Local Government and Social Care Ombudsman.
37. As the Commissioner is satisfied that in this case it is not necessary to disclose the requested information, he is satisfied that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
38. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
39. The Commissioner will now go on to consider whether the Council was entitled to rely on section 36 when refusing to provide the remaining information.

Section 36 - prejudice to the effective conduct of public affairs

40. The Commissioner will now consider whether the Council was entitled to rely on section 36(3) when it advised it could neither confirm nor deny holding the information regarding which officers signed off the allocations of the properties and a copy of the documents which the officers would have signed to allocate this properties.
41. Section 1(1) of FOIA places a duty on a public authority to confirm whether it holds information an applicant has requested; this is known as 'the duty to confirm or deny'.
42. Section 36(3) of FOIA removes the duty to confirm or deny information is held if, in the reasonable opinion of a qualified person, to do so would or would be likely to have any of the effects under section 36(2).
43. Section 36(2)(b)(ii) says that information is exempt information if, in the reasonable opinion of a Qualified Person (QP), disclosure would inhibit, or would be likely to inhibit, the free and frank exchange of views.
44. Section 36(2)(c) says that information is exempt information if, in the reasonable opinion of a QP, disclosure would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.
45. The Council stated that confirming or denying whether it holds the requested information would inhibit, or would be likely to inhibit, the free and frank exchange of views and disclosure would otherwise prejudice under section 36(2)(b)(ii) and would be likely to otherwise prejudice, the effective conduct of public affairs under section 36(2)(c).
46. To determine, first, whether the Council correctly applied section 36(3) to the remaining parts of the request, the Commissioner must consider the QP's opinion as well as the reasoning that informed the opinion.
47. The Council advised that its QP is Nicola Robason the Council's Monitoring Officer and the Director of Governance and Corporate Affairs.
48. In determining whether the exemption is correctly engaged, the Commissioner must determine whether the QP's opinion was a reasonable one. In determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. The QP's opinion does not have to be the most or only reasonable opinion that could be held: it only has to be a reasonable opinion

49. The QP's opinion in this case – given in the QP submission - is that the prejudice envisioned under section 36(2)(b)(ii) and section 36(2)(c) would be likely to occur if the Council confirmed or denied holding the remaining information. 'Would be likely' imposes a less strong evidential burden than the higher threshold of 'would occur'.
50. Having seen the explanation of the QP's opinion and considered the circumstances, the Commissioner is satisfied that the QP's opinion that section 36(2)(c) was engaged was reasonable. However, he Commissioner is not persuaded that the QP has identified a process of deliberation that would be prejudiced by confirming or denying that the information was held. As such considers that the QP's opinion about section 36(2)(b)(ii) wasn't reasonable.
51. The Commissioner will not be repeating the QP's opinion about 36(2)(c) in his decision. The Commissioner is satisfied that the QP has identified a form of prejudice which is not covered by any other exemption and detailing the opinion here would be likely to cause the prejudice the Council is seeking to avoid.

Public interest test

52. The Council acknowledges that if it were to confirm or deny whether the requested information was held, any information would relate to a Council owned property. As with any Council owned property, the public will have an interest in whether the Council's processes and procedures had been carried out in a consistent and fair manner.
53. The Commissioner also notes that confirming or denying whether the requested information is held would demonstrate that the Council is operating in a transparent manner.
54. The Council argued that confirming or denying whether the requested information was held would likely "otherwise" prejudice the effective conduct of public affairs.
55. The Council explained to the Commissioner that when the risk of prejudice is gone or significantly less, it will confirm or deny whether it holds the requested information. But it is unable to do so at this point as the risk of prejudice is too significant.

The Commissioner's conclusion

56. Although the Commissioner acknowledges that there is a clear public interest in knowing whether the requested information is held, he is satisfied that there was, at the time the request was responded to, a stronger public interest in preventing the prejudice that the qualified person believes would be likely to occur.

57. The Commissioner has decided that the Council is entitled to rely on section 36(3) of FOIA to neither confirm nor deny holding the requested information and that the public interest favours maintaining this exemption.

Right of appeal

58. 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

59. 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.
60. 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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