

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 August 2024

Public Authority: Maidstone Borough Council
Address: Maidstone House
King Street
Maidstone
Kent
ME15 6JQ

Decision (including any steps ordered)

1. The complainant has submitted a number of requests for information held by Maidstone Borough Council (the council) about the way in which it has handled certain planning matters.
2. The complainant has raised concerns with the Commissioner about the council's failure to provide two sets of information in response to their information requests.
3. Whilst the Commissioner considers that the FOIA is the correct information access regime, he has decided that, on the balance of probabilities, the council does not hold one of the sets of information described by the complainant.
4. With regard to the second set of information, the Commissioner is satisfied that the council is entitled to rely on section 40(2) (third party personal information) of FOIA, as its basis for refusing to provide this information.
5. The Commissioner does not require the council to take further steps as a result of this decision notice.

Request and response

6. The complainant has submitted a number of requests to the council for information which relate to specific planning matters, and also how such matters were handled by council officers.
7. The complainant initially raised concerns with the Commissioner about the council's handling of a number of their requests. They subsequently advised that, with the passage of time, they now only required the Commissioner to investigate the council's failure to provide two particular sets of information in response to their requests. These have been described by the complainant (with council officer names redacted) as follows:
 - A letter dated 21 November 2022, from Council Officer A to Council Officer B (Document 1).
 - An email from Council Officer B to Council Officer A where another officer, Council Officer C, was debating whether to stay or leave, and where a specified project would have been listed which Officer C would have been assigned to (Document 2).
8. The Commissioner considers it likely that the information described in the bullet points above will fall within scope of a number of requests submitted by the complainant. However, he has identified the complainant's requests of 9 November 2023 (Request 1), and 9 January 2024 (Request 2), to be the most relevant.

Request 1

9. The Commissioner considers Document 1 to fall within Request 1, which was for the following information:

“[company name redacted] now request an even shorter Re-re-re amended search term period between: 1 July 2022 and 23 October 2023.

Participants; Council Officer A, Council Officer D, Council Officer B

Keyword: [company name redacted]”
10. Whilst the council provided the complainant with copies of information on 7 December 2023, it advised that part of the request was for the complainant's own personal information, and that this would be dealt with separately as a subject access request.

11. The council also advised the complainant that some of the requested information had been withheld under regulations 12(3) and 13 of the Environmental Information Regulations 2004 (the EIR), as it considered such information to be the personal data of third parties.
12. The council also confirmed that it considered the exceptions at regulation 12(4)(d) (material in the course of completion), regulation 12(5)(e) (confidentiality of commercial information), and regulation 12(5)(b) (the course of justice) of the EIR to apply to some of the requested information. The council advised that it had taken into account the public interest test in relation to these three exceptions and had decided that in each case, the public interest favoured maintaining the relevant exception.
13. On 15 February 2024, the council provided its internal review response, upholding its original position.

Request 2

14. The Commissioner considers Document 2 to fall within scope of Request 2, which was for the following information:

“Between; 1 September 2019 and 30 June 2022

Participant: Council Officer A

Keywords: “[company name redacted]”

15. On 6 February 2024, the council provided copies of information to the complainant, stating that some redactions had been made to information that did not fall within scope of the request. In addition, the council confirmed that some third party personal information had been withheld under regulation 12(3) and 13 of the EIR.
16. The council also said that it considered some of the requested information to be the personal data of the complainant, and that this would be considered and responded to separately as a subject access request.
17. On 7 February 2024, the complainant advised that the council’s response to their request was incomplete. In particular, the complainant said that they still required an email that they described as follows:

“Further the email from [Council Officer B] to [Council Officer A] regarding [Council Officer C] debating whether to stay or leave, [company name redacted] project was listed in emails to [Council Officer A] as a project that [Council Officer C] was assigned to.”

18. On 21 February 2024, the council provided its response. It advised that it had provided the information that fell within scope of the request, other than third party personal information. The council said that it did not hold any emails that were relevant to the request.
19. On 21 February 2024, the council provided its internal review response, upholding its original position.

Scope of the case

20. The Commissioner will decide:

- Whether the EIR, or FOIA, is the appropriate information access regime in respect of Document 1, which (if held) the Commissioner considers would fall within scope of Request 1, and Document 2, which (if held) the Commissioner considers would fall within scope of Request 2.
- Whether the council, on the balance of probabilities, holds information that meets the complainant's description of Document 1 and Document 2.
- Where it is determined that the council does hold the information described by the complainant, whether it is entitled to withhold such information under the EIR, or FOIA.

Reasons for decision

Correct access regime

21. There are circumstances where a request for information can contain both environmental and non-environmental information. Where this is the case, a public authority should provide appropriate responses under the EIR and FOIA.
22. The Commissioner acknowledges that the majority of information held by the council that falls within scope of Request 1 and Request 2 will directly concern planning matters. Such information is likely to fall within the definition of environmental information set out within regulation 2(1) of the EIR.
23. However, it is the Commissioner's view that the two sets of information described by the complainant, if held, do not meet the description of environmental information. He therefore considers FOIA to be the appropriate information access regime in the circumstances of this case.

Section 1 of FOIA: Information held, or not held

24. Section 1 of FOIA states that any person making a request for information is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request and, if that is the case, to have that information communicated to them.
25. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner, after considering all of the information available, will make a decision based on the balance of probabilities.

Request 1

26. The council has provided the Commissioner with a copy of an email which meets the complainant's description of Document 1. The Commissioner therefore considers that it is information that is held by the council.
27. The Commissioner's decision as to whether the council is entitled to withhold the information contained within Document 1 is set out within paragraphs 33 to 68 of this decision notice.

Request 2

28. The council has advised the Commissioner that it has been unable to locate any emails that meet the complainant's description of Document 2.
29. The Commissioner has had regard to the content of an email dated 13 April 2023, which has been provided to the complainant in response to one of their requests to the council. This email contained the following information (names of officers redacted).

"In addition, during the period either side of Xmas 21 when [Council Officer C] was debating whether to stay or leave this project was listed in emails to [Council Officer A] as one of those that would have been assigned to [Council Officer C].

30. The Commissioner has had access to a significant amount of information relevant to a number of the requests made by the complainant, and has been unable to identify any information that matches the complainant's description of Document 1, or indicates that it might be held. Furthermore, the Commissioner does not consider that the content of the email of 13 April 2023, suggests that Document 1 does exist.
31. Therefore, without any evidence to the contrary, the Commissioner finds that, based on the information currently available and on the balance of

probabilities, the council does not hold information that meets the complainant's description of Document 2.

32. Given the above, the Commissioner does not require the council to take any steps with regard to its handling of Request 2.

Section 40 of FOIA– third party personal information.

Request 1

33. Section 40 of FOIA is the equivalent of regulation 13 of the EIR. Both allow a public authority to withhold information where disclosure of third party personal information would breach a data protection principle.
34. The Commissioner considers that the council's arguments for its reliance on the exception at regulation 13 of the EIR to be transferable to the exemption at section 40. The Commissioner will therefore consider whether the council is entitled to rely on section 40(2) of FOIA to withhold any of the information contained within Document 1.
35. Section 40(2) of 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.
36. 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 data protection principles relating to the processing of personal data, as set out in Article 5 of the UK General Data Protection Regulation (UK GDPR).
37. 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 FOIA cannot apply.
38. 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 data protection principles.

¹ As amended by Schedule 19 Paragraph 58(3) DPA

Is the information personal data?

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

“any information relating to an identified or identifiable living individual”.

40. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

41. 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.

42. It is important to note that information will only 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. Therefore, a reference to a name within a set of information may not constitute personal data, if the information itself is found not to relate to them.

43. The Commissioner considers that the information contained within Document 1 clearly relates to an individual or individuals, and has them as its focus. The Commissioner is therefore satisfied that the withheld information constitutes personal data falling within the definition in section 3(2) of the DPA.

44. The complainant has indicated that they believe that part of the information contained within Document 1 is their own personal information. However, having considered the full content of Document 1, it is the Commissioner's view that it does not contain information about the complainant that falls within the description of personal information.

45. With regard to the information that has been identified to be the personal information of third parties, such information is not automatically excluded from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

46. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

47. Article 5(1)(a) of the UK GDPR states that:

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

48. 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.

49. 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 UK GDPR

50. Article 6(1) of the UK 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” conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

51. 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”.²

52. The Commissioner considers that the lawful basis most likely to be relevant in relation to a request for information under FOIA is Article 6(1)(f); legitimate interests. In considering the application of this provision in the context of a request for information under FOIA it is

² 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 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”.

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 interests, fundamental rights and freedoms of the data subject.

53. 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

54. In considering any legitimate interests in the disclosure of the requested information under 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.

55. 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.

56. The Commissioner considers that there is a legitimate interest in disclosure of information which promotes transparency and accountability in relation to the council's activities and management of its staff, particularly when those staff have customer facing roles.

Is disclosure necessary?

57. '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.

58. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

59. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For

example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

60. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;
- whether the information is already in the public domain;
- whether the information is already known to some individuals;
- whether the individual expressed concern to the disclosure; and
- the reasonable expectations of the individual.

61. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

62. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

63. Having considered the circumstances relevant to the complainant's information requests, the Commissioner considers the request for Document 1 to largely be an attempt to advance the complainant's personal cause in relation to certain planning matters; the Commissioner finds any broader benefit to the public in the disclosure of the information to be limited.

64. Furthermore, the Commissioner considers that the disclosure of the requested information would not have been within the reasonable expectation of any third party to which the information relates, and such action would cause unwarranted damage and distress.

65. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the fundamental rights and freedoms of the data subject. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

66. 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.
67. The Commissioner therefore considers that disclosing the requested information would be unlawful as it would contravene a data protection principle; that set out under Article 5(1)(a) of the UK GDPR. The Council was therefore correct to apply section 40(2) of FOIA to Document 1.
68. As the Commissioner has concluded that the council is entitled to rely on section 40(2) of FOIA to withhold the information relevant to Request 1, he does not need to consider the councils reliance on any further exceptions it has cited under the EIR.

Right of appeal

69. 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

70. 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.
71. 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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