

# Freedom of Information Act 2000 (FOIA)

## Decision notice

**Date:** 16 October 2024

**Public Authority:** Redcar & Cleveland Borough Council  
**Address:** Redcar & Cleveland House  
Kirkleatham Street  
Redcar  
Yorkshire  
TS10 1RT

### Decision (including any steps ordered)

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1. The complainant requested information relating to councillors who were in council tax arrears. Redcar & Cleveland Borough Council (the Council) provided details of the number of councillors in arrears but withheld the remaining information under section 40(2) (personal data) of the FOIA. During its internal review the Council stated that it also considered that section 38(1) (health and safety) applied to the withheld information. During the course of the Commissioner's investigation, the Council disclosed further information, but continued to withhold the names of the councillors concerned.
2. The Commissioner's decision is that the Council correctly applied section 40(2) of the FOIA to the names of the councillors concerned. However, the Commissioner finds that the Council breached section 10 (time for compliance) of the FOIA in failing to disclose some information within the statutory timescale. The Commissioner does not require any steps to be taken.

### Request and response

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3. On 26 February 2024, the complainant wrote to the Council and requested information in the following terms:

"I'm writing to request the following information:

- The number of elected council members who have unpaid council tax arrears.

And, for each elected council member who may have unpaid council tax arrears:

- Their names
  - The amounts owed by each
  - The dates when any outstanding amount of unpaid council tax was initially due”.
4. The Council responded on 25 March 2024, and provided the number of councillors in council tax arrears. It also stated that the other information requested was exempt under section 40(2) of the FOIA.
  5. On 3 April 2024, the complainant requested an internal review of the Council’s decision to withhold information in response to their request.
  6. The Council provided the outcome of its internal review on 16 April 2024. It upheld its decision that section 40(2) applied to the remaining information held relevant to the request, and stated that it also considered that section 38(1) applied to the information.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 1 May 2024, to complain about the way their request for information had been handled.
8. During the course of the Commissioner’s investigation, the Council disclosed the amounts of council tax arrears owed by councillors, and the dates but continued to withhold the names of the councillors concerned under sections 40(2) and 38(1) of the FOIA.
9. In light of the above, the scope of the Commissioner’s investigation is to determine whether the Council correctly withheld the names of councillors in council tax arrears.

## **Reasons for decision**

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### **Section 40(2) – third party personal data**

10. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.

11. Section 3(2) of the Data Protection Act 2018 defines personal data as:  
“any information relating to an identified or identifiable living individual.”
12. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
13. In this case, the Council has continued to withhold the names of councillors who were in council tax arrears. It is clear to the Commissioner that disclosing this information would reveal the personal data of the councillors concerned, namely their identity and how much they owe. The Commissioner is therefore satisfied that the information both relates to, and identifies, the individuals concerned.
14. The next step is to consider whether disclosure of the names of the councillors concerned would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a).

### **Would disclosure contravene principle (a)?**

15. 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”.
16. 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.
17. 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**

18. 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” lawful bases for processing listed in the Article applies.
19. 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”<sup>1</sup>.

20. In considering the application of Article 6(1)(f) of the UK 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.
21. 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**

22. 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

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<sup>1</sup> 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”.*

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

23. The Commissioner accepts that there is a legitimate interest in knowing when elected officials are in council tax arrears. This was considered in the Upper Tribunal (UT) decision *DH v Information Commissioner and Bolton Council*<sup>2</sup>, which found that the name of a councillor who had failed to pay council tax should be disclosed. The view of the UT was that there is a legitimate interest in the public being aware of this information as councillors are responsible for the expenditure of public money and the administration of council tax.
24. The Commissioner therefore considers that the complainant is pursuing a legitimate interest.

### **Is disclosure necessary?**

25. '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.
26. The Commissioner is not aware of any other means by which the complainant could reasonably obtain the requested information, nor is he aware of any other circumstances where the Council would make it available.
27. The Commissioner is therefore satisfied that disclosure is necessary to meet the legitimate interests identified.

### **Balance between legitimate interests and the data subject's interests**

28. 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 the 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.

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<sup>2</sup> <https://www.gov.uk/administrative-appeals-tribunal-decisions/dh-v-1-information-commissioner-2-bolton-council-2016-ukut-139-aac>

29. 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.
30. 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. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
31. The UT decision referred to in paragraph 23 above stated that:
- "There may be exceptional cases in which the personal circumstances of a councillor are so compelling that a councillor should be protected from such exposure."
32. Given the comments set out in the UT decision, the Commissioner accepts that there will be circumstances where a public authority will be entitled to withhold the name of an elected official who has failed to pay council tax.
33. The Council acknowledges that, ordinarily, there is a legitimate interest in disclosure of information relating to councillors who are in council tax arrears, given the high level of accountability and transparency expected of those in elected public office. However, in this case, the Council considers that this legitimate interest is "overridden by the fundamental rights and freedom of the data subjects concerned given the exceptional personal circumstances which apply and which warrant protection".
34. The Council provided the Commissioner with detailed representations to support its view that the personal circumstances of the councillors concerned in this particular case are exceptional. This includes representations from the councillors concerned about their position and the impact that disclosure of their identity would have on them. The Commissioner has not included these explanations within this notice as to do so would, in itself, reveal personal data about the councillors concerned.
35. The Commissioner accepts that, generally, there is a significant legitimate interest in disclosure of the information relating to councillors who are in council tax arrears. As such, he considers that the councillors

in this case would have had an expectation that such information about council tax arrears might be made public. However, having considered the Council's representations in respect of the exceptional personal circumstances involved in this case, he has determined that there is insufficient legitimate interest to outweigh the harm and distress that disclosure would cause to the individuals.

36. The Commissioner therefore considers that disclosing the names of the councillors would be unlawful as it would contravene a data protection principle; that set out under Article 5(1)(a) of the UK General Data Protection Regulation. The Council was therefore correct to apply section 40(2) of the FOIA to this information.
37. 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.

## **Procedural matters**

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### **Section 10 – time for compliance**

38. Section 10 of the FOIA requires a public authority to confirm whether it holds any information within the scope of a request, and to provide any information not otherwise exempt within 20 working days.
39. In this case, the complainant submitted their request for information on 26 February 2024. During the Commissioner's investigation, the Council disclosed some of the information it originally withheld, namely the amount of council tax arrears and the dates.
40. In failing to provide part of the disclosable information within the statutory time for compliance, the Commissioner finds that the Council breached section 10(1) of the FOIA.

## Right of appeal

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41. 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](mailto:grc@justice.gov.uk)

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

42. 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.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Joanne Edwards**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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