

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 November 2018

Public Authority: Halton Borough Council
Address: Municipal Building
Kingsway
Widnes
WA8 7QF

Decision (including any steps ordered)

1. The complainant requested information about the number of individuals resettled within a particular geographical area of Halton under the Syrian Vulnerable Person's Refugee Resettlement Scheme and about the decision to participate in that scheme.
2. The Commissioner's decision is that Halton Borough Council ("the Council") has provided the information within the scope of one part of the request. In respect of the other part of the request, she finds that neither Section 40(2) (Third Party Personal Data) nor Section 38 of the FOIA (Health and Safety) is engaged and therefore the Council is not entitled to rely on either exemption. In addition, she also finds that the Council issued a refusal notice which was both inadequate and provided outside the statutory time period for responding. It thus breached Sections 17 and 10 of the FOIA respectively.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose, to the complainant, the information it has withheld within the scope of part [2] of the request.
4. The Council 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.

Background

5. The Borough of Halton is comprised of the towns of Runcorn and Widnes which lie either side of the River Mersey. In 1964, Runcorn was designated as a "New Town" under the New Towns Act. This led to a rapid expansion of the town with considerable amounts of new housing being built – largely to the east of the existing town.
6. On 2 November 2017, the complainant contacted the Council via whatdotheyknow.com and requested information in the following terms:

*"Can you tell me if there is a change to the figures and housing status

1 How many migrants/asylum seekers is HBC now responsible for
2 Are any in, or have any been, offered social housing."*
7. The Council responded on 16 November 2017 and confirmed that it had resettled 15 refugee families (71 individuals) since 2017.
8. The complainant then enquired about the costs of the resettlements and the Council provided this information. The Council also pointed out that the resettlements had come about because of its participation in the Vulnerable Person's Resettlement Scheme ("SVPRS").

Request and response

9. On 21 January 2018, the complainant wrote to the Council and requested information in the following terms:

*"14 to one is predominantly social housing. I fully remember Mr Cameron launching this dispersal scheme [SVPRS]. He called for councils that had spare housing to apply. HBC doesn't have any houses so should not have joined the scheme. So tell me. Was it an elected representative or a council employee who changed the criteria?

Both the last PM and Mr Pickles stated that local needs must be met first.

[1] So tell me who elevated foreign people above UK citizens. Was it an elected representative or a council employee?"*

"There were only 922 social houses built in the whole of 2016. HBC refused to have anything to do with the "New Town" when the Devco¹ closed.

[2] So tell me how many of the 14, social houses now taken away from "vulnerable" British people are not in the New Town?"

10. The Council responded on 7 March 2018. In relation to element [1] of the request, it stated that the Council's Executive Board had approved the decision to participate in SVPRS, provided the date of the meeting where approval had been granted and provided a link to the report that was put before the Executive Board.
11. In relation to element [2] of the request, the Council refused to either confirm or deny holding information within the scope of the request. It relied on Section 40(5) to do so, as the information, if it existed, would be the personal data of a third party.
12. Following an internal review the Council wrote to the complainant on 20 April 2018. It upheld its original position.

Scope of the case

13. The complainant contacted the Commissioner on 23 May 2018 to complain about the way his request for information had been handled.
14. The complainant's concerns are twofold:
 - a. That the information provided in respect of element [1] does not satisfy the request
 - b. That there is a public interest in disclosure of the information in respect of element [2] of the request.
15. During the course of her investigation, the Council withdrew its reliance on Section 40(5) and confirmed that it held information within the scope of element [2] of the request. However, it continued to withhold the information itself – relying on Section 40(2) instead. Later in the investigation, the Council claimed that Section 38 was also engaged and that the public interest favoured maintaining the exemption.

¹ The Commissioner understands this to refer to the Development Corporation which was set up as part of the New Town project to help the Borough expand.

16. The Commissioner considers that the scope of her investigation is to:
- a. Determine whether further information is held within the scope of element [1] of the request
 - b. Determine whether the Council is entitled to rely on either Section 40(2) or Section 38 to withhold the information within the scope of element [2]
 - c. Determine whether the Council has complied with the other procedural requirements of the FOIA.

Reasons for decision

Element [1] – information that is held

17. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

18. In respect of element [1] of the request, the Commissioner's view is that the Council does not on the balance of probabilities hold further information within the scope of the request.
19. The context in which the request was made is significant here. The request above came about during a chain of requests about refugee families in social housing and because of a response the Council had provided to a previous request where it noted that the additional refugee families had been accommodated as part of the SVPRS.
20. It seems to the Commissioner that such a decision, regardless of its merits, would have had the effect of increasing the numbers waiting to be allocated social housing. Given this context, it was entirely reasonable for the Council to conclude that "*So tell me who elevated foreign people above UK citizens*" referred to the Council's decision to participate in SVPRS.
21. The Council confirmed that a decision was taken, by its Executive Board, to participate in SVPRS. It provided the complainant with the date of

that meeting and the report that was considered by the Board before reaching its decision.

22. As the Council has supplied the complainant with details of how it took the decision to participate in SVPRS, the Commissioner considers that it has met its obligations under Section 1(1) of FOIA in respect of this element of the request.

Section 40(2) – Third Party Personal Data

23. Section 40 of the FOIA² states that information which is the personal data of any individual other than the requestor is exempt if one of two conditions is satisfied:

"(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)."

24. The first step for the Commissioner in determining whether the exemption is engaged is therefore to determine whether the information in question is personal data.

² The Commissioner has assessed this complaint in relation to the 1998 Data Protection Act – which was the law in force at the time the request was responded to.

25. The definition of personal data is set out in section 1 of the Data Protection Act 1998:

"...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."

26. The key starting point for the Council is therefore to demonstrate that an individual can be *identified* from the withheld information.
27. The Council in this case has already confirmed the total number of refugee families in social housing within the Borough as a whole (14). It argues that to break this figure down further by geography would heighten the risk of an individual being identified.
28. The Council has further pointed to the very low percentage of ethnic minority residents living within the New Town area. According to the 2011 Census, out of a total of 34,333 residents in this area 33,496 were White (97.6%).
29. The Council has suggested that the withheld information could be combined with "*casual observation within that specific area*" or "*the use of social media websites and other associated platforms to illicit information from others concerning any known or suspected non UK nationals living within their area.*"
30. The Commissioner is always mindful that information which, by itself, may not identify a living individual, may do so when combined with other information within the public domain.
31. However, in this case, she cannot see the link between the information that has been withheld and the possibility of identification. Casual observation could take place anyway without knowing the number of refugees living in a particular area. The withheld information would not, in the Commissioner's view, make identification via casual observation

any more or less likely – even in the hypothetical scenario that the number of families living in a particular area was one.³

32. The Council did not elaborate on its argument about the use of social media, however the Commissioner again takes the view that the withheld information would not affect the possibility of an individual being identified via this method.
33. The fact that the Council has, in its submissions as to why Section 38 is engaged, argued that there is a danger of *mis*-identification of an individual would appear to undermine its own argument in relation to Section 40(2) – that an individual *could* be identified.
34. Because the Council has confirmed the total number of refugees resettled in the Borough as a whole, the Commissioner is conscious that confirming the number living in one area will necessarily confirm the number living in the other area. Whilst the request asked for the number *not* living in the New Town area, the Council is required to consider whether disclosing one number would disclose other personal data by proxy.
35. However the Commissioner's view is that the Council has still failed to establish a link between disclosure of the withheld information and any individual(s). Nor has it been able to demonstrate how the withheld information might be combined with other information already in the public domain to allow a "motivated intruder" to identify an individual.
36. Whilst the Commissioner accepts the Council's argument that each additional subdivision of a relatively small number increases the chances of an individual being identified (and it may well be that further subdividing the subdivisions would lead to an individual being identified), she does not accept that the Council has demonstrated that identification would result from disclosure of the withheld information. Even in the hypothetical scenario that one or other of the areas had just one refugee family living in it, she is not convinced that they would be identifiable from that information alone.
37. The Commissioner does not therefore accept that the information is the personal data of any living individual and consequently Section 40(2) is not engaged.

³ This is a hypothetical scenario for the purposes of developing the argument. The Commissioner is not disclosing the actual figure itself.

Section 38 – Health & Safety

38. Section 38(1) of the FOIA states that:

"Information is exempt information if its disclosure under this Act would, or would be likely to—

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual."

39. The Council introduced its reliance on this exemption at a late stage in proceedings. However, the Commissioner can and does allow public authorities to both introduce and withdraw reliance on exemptions during the course of her investigations and this approach has been endorsed by the Upper Tribunal (see for example *McInerney v IC and Department for Education* [2015] UKUT 0047 (AAC)).

40. The First Tier Tribunal in *Lownie v Information Commissioner* EA/2017/0087 recently took issue with the Commissioner's published guidance in relation to the application of Section 38, arguing that Parliament had deliberately set the test as the "endangerment" of individuals and that this was not equivalent to the causing of prejudice.

"We note that the assimilation of 'endanger' to 'prejudice' in PETA was not a reasoned conclusion but was based on agreement between the three parties involved in that case. The 'prejudice' test is expressly included in a number of FOIA exemptions. In our view, if Parliament had intended s38 to depend upon the same test as those other exemptions, it would have used the same language. It did not, but instead chose to use different language in s38. We should follow the Parliamentary intention. In our view, attempting to assimilate the two tests merely muddies the waters. For the purposes of s38 we must apply the words of s38, not the words of different exemptions."

41. It was not explicit, from the submissions provided to the Commissioner, whether the Council was relying on Section 38(1)(a) or (b). Nor was it explicit whether the Council was claiming that disclosure "would" endanger or "would be likely to" endanger the individuals.

42. The Council's submissions highlighted that *"given the current political and social climate, both domestic and international, there has been a focus upon immigration and in some instances the emergence of right wing and populist politics."*

43. The basis for the Council's case that Section 38 would apply was that:

"The Council considers it reasonable to conclude that to release information which may lead to individuals being identified who are, or are presumed to be, asylum seekers could result in them becoming the subject of unwarranted attention from certain individuals or sections of the community, including those opposed to the Syrian Refugee Resettlement Programme in particular, or wider immigration into the UK in general.

"Such attention could result in alarm or distress to the individuals / families concerned and or impact upon their emotional and physical health and wellbeing. Furthermore such attention may extend to families / individuals who have no connection to the Syrian Refugee Programme being mistakenly identified upon the basis of their ethnicity and regardless of their actual immigration status."

44. The Commissioner accepts that there is a possibility that families could be mis-identified as refugees, however she fails to see how releasing the withheld information would make such mis-identification significantly more likely. Confirming the number of refugee families resettled in the Borough as a whole would increase slightly the possibility of mis-identification, yet the Council felt this could be done safely.

45. Furthermore, the Tribunal in *Lownie*, commenting on the Commissioner's position in that appeal, found that:

The Information Commissioner's position appeared to be, at least at times, that the requisite probability of 'distress' to living relatives would be sufficient to meet the requirements of s38. If that was what was meant, we do not agree. While distress can be a trigger leading to mental ill-health, we do not consider that distress in itself should be equated with mental ill health for the purposes of s38. A healthy or unhealthy person may experience distress without suffering any, or any additional, mental ill-health.

46. It is therefore not sufficient for the Council to make unsupported assertions about a possible "impact" on emotional well-being. It must demonstrate that an individual would suffer an adverse effect to their mental or physical health.
47. The Commissioner has considered whether releasing the information would be likely to endanger the physical and/or mental health or the safety of an individual. Whilst the phrase "would be likely to" implies a lower than 50% chance, her guidance states that the likelihood of endangerment occurring must still be "real and significant".
48. In this case, the Council has failed to demonstrate that there is a real and significant chance of endangerment occurring. It has failed to

demonstrate that the mental or physical health of an individual would be endangered and has also failed to show a line of causality between the information it has withheld and any endangerment occurring.

49. The Commissioner therefore concludes that Section 38 is not engaged and thus there is no need for her to consider the balance of public interest in relation to this request.

Procedural Matters

Section 17 – Refusal Notice

50. Section 17(1) of the FOIA states that:

A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies.*

51. In this case, the Council's refusal notice of 7 March 2018 failed to confirm that information was held and failed to cite an exemption on which it later chose to rely. The Commissioner therefore considers it to be inadequate and thus the Council has breached 17 of the FOIA.

Section 10 – Timeliness

52. Section 10 of the FOIA states that responses to requests made under the Act must be provided "*promptly and in any event not later than the twentieth working day following the date of receipt.*"
53. From the evidence presented to the Commissioner in this case, it is clear that, in failing to issue a response to the request within 20 working days, the Council has breached Section 10 of the FOIA.

Right of appeal

54. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

55. 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.
56. 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

Ben Tomes
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