

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 July 2020

Public Authority: Reigate and Banstead Borough Council
Address: Reigate Town Hall
Castlefield Road
Reigate
Surrey
RH2 0SH

Decision (including any steps ordered)

1. The complainant requested correspondence exchanged with the Chartered Institute of Environmental Health in relation to a property which she owns. Reigate and Banstead Borough Council ("the Council") withheld the information because it considered that the information was the personal data of a third party.
2. The Commissioner's decision is that any information falling within the scope of the request would have been the complainant's own personal data. The Commissioner has therefore taken the decision to apply section 40(1) of the FOIA herself proactively to prevent disclosure. The Council also failed to issue a refusal notice within 20 working days and thus breached section 17 of the FOIA.
3. The Commissioner does not require further steps.

Background

4. The request arose out of two complaints that the complainant made, to the Chartered Institute of Environmental Health (CIEH), about the conduct of a particular Council officer ("the officer") in relation to action the Council had taken against her.
5. On 29 October 2019, the complainant contacted the Council and requested information in the following terms:

"Please provide all recent correspondence/evidence between [the officer] and the Chartered Institute of Environmental Health in relation to the Improvement Notice issued against [address redacted] with particular reference to breach of CIEH guidelines."

6. On 15 November 2019, the Council responded to say that it held no information within the scope of the request.
7. The complainant responded the same day to say that she was dissatisfied with the response because:

"I know from the CIEH that there was correspondence with [the officer] / RBBC in the form of a letter and I have this documented."

"Therefore I re request this correspondence and will do so officially by a further FOI request."

Request and response

8. On 15 November 2019, the complainant wrote to the Council again and requested information in the following terms:

"Please provide Correspondence between RBBC and CIEH in relation to [address redacted]."

"I have documentation that RBBC sent a letter to CIEH regarding this property"

9. The Council responded on 31 December 2019 in a comprehensive response which also addressed some of the underlying matters of contention between itself and the complainant. In respect of the information request, it confirmed that it held information relevant to the request but refused to disclose it. It relied on section 40(2) of the FOIA to withhold the information which it considered was the personal data of the officer. Disclosing such information under the FOIA would, the Council argued, breach the officer's rights under the GDPR.
10. The Council's response did not offer the opportunity to have an internal review of the response and advised the complainant to complain to the Commissioner if she was dissatisfied with the response.

Scope of the case

11. The complainant contacted the Commissioner on 5 January 2020 to complain about the way her request for information had been handled. She was unhappy that the Council had withheld the requested information and queried the extent of the information held.
12. As no internal review had been offered, the Commissioner decided to accept the complaint without requiring the Council to complete one.
13. On commencing her formal investigation on 2 April 2020, the Commissioner wrote to the Council to ask it to provide its justification for the use of the exemption. She also asked the Council to set out why it believed it had identified all the information which would fall within the scope of the request and, given the wording of the request, whether the Council had considered the possibility that information falling within the scope of the request would be the complainant's own personal data. She also asked for a copy of the withheld information.
14. It took until 26 June 2020 and several rounds of chasing before the Council provided a copy of the withheld information – although this delay may have been largely caused by the Covid-19 pandemic.
15. The Council reiterated its position that the withheld information was the personal data of the officer. It rejected the Commissioner's suggestion that the information would be the complainant's personal data because it considered that she was not the primary focus of the email. Finally, the officer drafting the response stated that the Council was satisfied that it had identified all the relevant information it held because:

"By this time, [the complainant] was only able to correspond with the Council through either myself as [job title] or through the CEO and I have reviewed the email correspondence to confirm the extent of the relevant information."

16. On reviewing the withheld information, it was apparent to the Commissioner that this information was the complainant's own personal data. She has therefore taken the decision to apply section 40(1) of the FOIA proactively to prevent the possibility of disclosure. The rationale for this decision is set out below.
17. Section 40(1) of FOIA places an absolute exemption on information which is the personal data of the requestor. If that exemption is (or would be) engaged in relation to the request, the Council would not have been under any obligation to provide information, under the FOIA, in response.

18. Having considered the Council's response, the wording of the request and the contents of the withheld information, the Commissioner was not satisfied that the Council had identified all the relevant information it held. The Commissioner failed to identify the relevance of the method of correspondence between the complainant and the council to a request seeking correspondence between the Council and the CIEH. However, given the finding she is making in respect of the withheld information, the Commissioner considers that, such is the wording of the request, any further information the Council did hold would also be covered by the same exemption. She has therefore not explored the extent of the relevant information the Council holds – although there are some further comments on this issue in the "Other Matters" section of this notice.
19. The analysis that follows sets out why the Commissioner considers that any information falling within the scope of the request would be the complainant's own personal data.

Reasons for decision

20. Section 40(1) of the FOIA states that:

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

21. Section 2(2) of the Data Protection Act 2018 defines personal data as:-

"any information relating to an identified or identifiable living individual."

22. The withheld information in this case consists of an email that was sent to CIEH. In broad terms, the email discusses the second complaint which the complainant had submitted to the CIEH about the conduct of the officer.
23. In its submission to the Commissioner, the Council argued that the "primary focus" of the email was a complaint submitted about the officer. Therefore, the fact that the complainant may have been mentioned was irrelevant. The email was about a complaint, the complaint was about the officer and therefore the email was the officer's personal data.
24. The Commissioner agrees that, as the email both identifies and relates to the officer, it would be the officer's personal data. However, the fact that information is the personal data of a particular individual does not mean that it cannot *also* be the personal data of another individual.

25. In the Commissioner's view, when considering whose personal data the withheld information is, the Council applied too narrow a test and failed to take account of the broader context of the particular information and of the request.
26. The request did not seek information about a random complaint, nor was the complaint about a random subject. The complaint cited in the request was a complaint submitted by the complainant and it raised matters which related to the complainant's relationship with a particular property.
27. Whether the "primary focus" of the email was the officer or the complainant is irrelevant (although the Commissioner considers that it focuses more or less equally on both parties): the email simply would not have existed if the complainant not made her complaint. The email clearly *relates* to the complainant and the complainant would, in the Commissioner's view, be identifiable from anyone with knowledge about the property in question. The information is therefore the complainant's own personal data.
28. Whilst the Council did not apply the exemption itself, given that the Commissioner is also responsible for overseeing data protection legislation, she is keen to see that personal information is handled appropriately. She is therefore applying section 40(1) on a proactive basis to prevent the possibility of disclosure.
29. Section 40(1) is an absolute exemption and there is no requirement for the Commissioner to consider the balance of public interest. Nor is she required to consider whether or not the complainant would be happy to have her personal data published to the world at large. If the exemption applies, the information cannot be disclosed.
30. As the exemption is engaged in respect of any information which came or would have come within the scope of the request, the Council was not obliged to supply any information in response.

Section 17 – Refusal Notice

31. Section 17(1) of the FOIA states that when a public authority wishes to withhold information or to neither confirm nor deny holding information it 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.

32. In this particular case, the Council did not issue its refusal notice within 20 working days. It therefore breached section 17 of the FOIA.

Other matters

33. Given her finding above, the Commissioner would strongly advise that the Council revisit this request, treat it as a subject access request (SAR) and respond appropriately.
34. Whilst the Commissioner has no power, under the FOIA, to require the Council to issue a SAR response, the complainant is of course entitled to make a SAR request herself. Whilst this may not necessarily result in the disclosure of further information, the complainant will, once she has received her SAR response, have the right to bring a data protection complaint to the Commissioner – who can then determine whether the request has been correctly scoped and whether any exemptions have been appropriately applied.
35. The Commissioner notes that, in its response to the complainant of 31 December 2019, the Council did not offer the complainant the opportunity to have an internal review. She considers this to be poor practice.
36. During the course of making her complaint to the Commissioner, the complainant was frustrated that she had had to make two requests in order to get the Council to admit that it held correspondence sent to the CIEH. Whilst the Commissioner has only considered whether the Council complied with its FOIA obligations in respect of the request made on 15 November 2019, she considers that it is likely to be helpful to note that the withheld information she has considered would not have fallen within the scope of the request of 29 October 2019.

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: 0300 1234504

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

Phillip Angell
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF