

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 July 2020

Public Authority: London Borough of Hounslow
Address: Hounslow House
7 Bath Road
Hounslow
Middlesex
TW3 3EB

Decision (including any steps ordered)

1. The complainant has requested information about rent and repairs at a particular council-owned property ("the Property"). The London Borough of Hounslow ("the London Borough") relied on section 40(2) of the FOIA to withhold the requested information which, it stated, was the personal data of a third party.
2. The Commissioner's decision is that the London Borough has correctly relied upon section 40(2) of the FOIA to withhold the requested information.
3. The Commissioner does not require further steps.

Request and response

4. On 3 January 2020 the complainant requested information of the following description:

"Please provide me with the following information:-

"(1) Confirmation that [the Property] is owned by LBH (Hounslow Homes.

"(2) How much is the current weekly rent for [the Property]?"

"(3) How much rent has LBH (Hounslow Homes) received in the last 10 years?"

"(4) How much has LBH (Hounslow Homes) spent on repairs/maintenance and improvements at [the Property]?"

"(5) What are the terms of the tenancy for [the Property]"

5. On 6 January 2020, the London Borough responded. It refused to provide the requested information. It argued that the requested information would be the personal data of the tenant of the Property and that disclosing it would be contrary to data protection legislation.
6. The complainant complained about this response on the same day. The London Borough then provided him with the information he had requested in respect of element (1) but maintained its position in respect of the remaining elements.
7. The complainant requested a formal internal review on 22 January 2020. The London Borough sent the outcome of its internal review on 19 February 2020. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 7 January 2020 to complain about the way his request for information had been handled.
9. The Commissioner considers that the scope of her investigation is to determine whether the London Borough is entitled to rely on section 40(2) of the FOIA to withhold the information.

Reasons for decision

Section 40 personal information

10. 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.
11. 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 principles relating to the

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

processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').

12. 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.
13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. 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.
18. The Commissioner notes that the original request included the address of the Property. Therefore any information that the London Borough held, that fell within the scope of the request, would have to be information about the Property and, by extension, the tenant(s) living within it.
19. The withheld information would reveal details about the domestic arrangements of the tenant(s) and about the conditions under which the Property is occupied. This is clearly biographical information about the tenant(s) and has them as its main focus.
20. It is immediately obvious that elements [2] and [5] must relate to the current tenant(s) of the Property and, because the full postal address was quoted in the request, the Commissioner considers that the tenant(s) would be identifiable.

21. In relation to elements [3] and [4], the London Borough informed the Commissioner that any information falling within the scope of these elements could only relate to the current tenant(s).
22. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that all of the information relates to the Property and its tenant(s). She is satisfied that this information both relates to and identifies the tenant(s) concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
23. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
24. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

25. 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".

26. 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.
27. 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

28. Article 6(1) of the 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.
29. 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.

30. 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.
31. 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

32. 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, the narrower and more trivial the interest, the less likely it is that the interest in disclosure to the world at large will outweigh the rights of the data subject(s).

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 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”.

33. In this particular case, the Commissioner recognises that there is a broad interest in public authorities being transparent and accountable for the money they spend. There is also an interest in ensuring that tenants are being fairly treated.

Is disclosure necessary?

34. '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.
35. As disclosure under the FOIA is disclosure to the world at large it is rare that such processing will be necessary to achieve a legitimate interest.
36. In this particular case, the Commissioner considers that the broader interests in transparency are already met by the London Borough publishing its spending data on line. Disclosure is therefore not necessary to achieve the interest.
37. Similarly, there are many mechanisms, available to social housing tenants, to challenge their landlords if they believe they are being treated unfairly. All of these mechanisms would require less intrusion into the privacy of the tenants themselves. Disclosing information, such as that anticipated by the request, to the wider world – especially without the consent of the data subjects involved – would not be necessary to achieve the legitimate interest.
38. The complainant did not identify, to the Commissioner, any personal interest he might have in the information. However, the Commissioner would struggle to identify any legitimate interest he might have which would necessitate publication of such information.
39. The complainant did however draw attention to the publication of the cost of renovations at Frogmore Cottage. The Commissioner considers that the distinction between the two is obvious. Frogmore Cottage was originally intended to be the permanent UK base for the Duke and Duchess of Sussex. These are two very high profile individuals who have a reasonable expectation of a lower level of privacy than the population at large. The complainant has not suggested that those who live at the Property are persons of similar stature and the London Borough confirmed to the Commissioner that the repair bill was a small fraction of that attributed to Frogmore Cottage. The Commissioner does not therefore consider that the tenant(s) of the Property would have a reasonable expectation that such information would be disclosed.

40. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
41. The Commissioner is therefore satisfied that the London Borough is entitled to rely on section 40(2) of the FOIA to withhold the requested information.

Right of appeal

42. 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

43. 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.
44. 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
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SK9 5AF**