

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 December 2021

Public Authority: Pendle Borough Council
Address: Market Square
Nelson
BB9 7LG

Decision (including any steps ordered)

1. The complainant has requested information in relation to dog breeding licences from Pendle Borough Council ("the council").
2. The council withheld some information on the basis of section 40(2) (personal information), and denied holding some information. During the course of the investigation the council agreed to release some of the redacted information to the complainant.
3. The council also stated that some information, in relation to the number of dogs, was not held.
4. The Commissioner's decision is that Pendle Borough Council was correct to withhold some information on the basis of section 40(2). She also finds, on the balance of probabilities, that information regarding the number of dogs is not held.
5. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - Disclose the redactions within paragraphs 1.4, 5.1, 11.4 of the Review Report.
6. 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.

Request and response

7. On 2 December 2020 the complainant requested information from Pendle Borough Council in the following terms. It is regarding an independent review into the handling of the licensing application submitted by Douglas Hall Kennels:

Request A:

1. *"The name(s) of the person(s) who conducted the review*
 2. *Confirmation of how the person(s) was appointed. From an existing panel? Via tender?*
 3. *A copy of the letter of instruction or other document(s) setting out the terms of reference /remit of the review*
 4. *A copy of the review report"*
8. The council responded on 9 December 2020 and provided some information within the scope of the request. The council redacted information from the letter of instruction (3) and the review report (4), but did not cite an exemption as the basis for the redactions.
9. The complainant wrote the council on 10 December 2020. They accepted the redaction made to the letter of instruction, but requested an internal review of the redactions made to the review report ("The Review Report").

Request B

10. On the 7 December 2020 the complainant requested information in the following terms:

"Please provide copies of the following documents and related information

1. *A copy of dog breeding licence MAW/20/1401 and confirmation of the number and type of dogs kept by the licence holder for the purpose of breeding and selling dogs.*
 2. *A copy of dog breeding licence MAW/20/0420 and confirmation of the number and type of dogs kept by the licence holder for the purpose of breeding and selling dogs*
 3. *A copy of dog breeding licence MAW/19/0306 and confirmation of the number and type of dogs kept by the licence holder for the purpose of breeding and selling dogs."*
11. The council responded on 11 December 2020 and provided copies of the licence documents and stated: *"The information about the breeding dogs*

is on the license. The number of dogs kept is not recorded as it alters on a regular basis."

12. The complainant requested an internal review on the basis that the council hadn't provided all the information requested. Clarifying that the request was for the details of the actual number and type of dogs kept, not the information on the licence.
13. The council wrote to the complainant with the outcome of an internal review covering both Request A and Request B on 25 February 2021. In regard to request A, the council upheld its position to withhold the redacted information on the basis of section 40(2). Regarding request B, the council advised that the information is not held, explaining: "*The Council does not record the number of dogs as there is no requirement under the licensing legislation for it to do so. The Council does not hold the information you request.*"

Scope of the case

14. The complainant contacted the Commissioner on 18 January 2021 to complain about the way the request for information had been handled. Specifically the application of section 40(2) to redact information from the Review Report. Furthermore, in respect of request B, whether the council holds information regarding the number of dogs kept for the purpose of breeding.
15. The scope of this case is to decide whether the council was correct to withhold information from the Review Report on the basis of section 40(2). Furthermore, whether the council is likely, on the balance of probabilities, to hold further information in scope of request B for the purposes of section 1.

Reasons for decision

Section 40 personal information

16. 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.

17. 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 processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
18. 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.
19. 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?

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

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

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. 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.
23. 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.
24. The Review Report is a peer review of an animal licence application made to the council in relation to a specified kennels. The scope of the review was an assessment of how the council administered and regulated the new licence application and of the renewal in relation to the kennel's activities.
25. The Review Report states that its purpose is to highlight whether the owner(s) of the kennels met the legal requirements and conditions under the Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018 and whether the council have ensured that

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

the operator has a licence for activities that were being undertaken at the time of the inspection.

26. During the course of the investigation, the council advised the Commissioner that it had reconsidered the Review Report and found that three words should not have been redacted. The three words are contained within paragraphs 1.4, 5.1, 11.4. The Commissioner requires the council to disclose this information to the complainant.
27. The remaining redactions are addressed in this analysis, and relate to paragraph 11.9. They consist of the name(s) of the business owner(s).
28. The Commissioner accepts that the withheld information identifies the business owner(s). The information contained in the Review Report relates to them as the business owner(s) of the kennels. The Commissioner therefore finds that the withheld information is the personal data of the business owners and falls within the definition of 'personal data' in section 3(2) of the DPA.
29. 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.
30. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

31. 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".

32. 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.
33. 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

34. 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.
35. 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.

36. 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.
37. 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

38. 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

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".

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

39. The complainant expresses a legitimate interest in disclosure, being that it would add to the accountability and transparency of the council in relation to the licence and help to address any concerns about animal welfare.
40. The complainant also states that there is information available in the public domain that identifies the business owner.

Is disclosure necessary?

41. '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.
42. The Commissioner considers that the report sufficiently meets the identified legitimate interests, without a need to disclose the name(s) of the business owner(s). The report identifies the kennels, gives details of the review of the regulatory procedures followed by the council in administering the licence, it details changes required to the licence, and provides recommendations for further regulatory actions.
43. The Commissioner considers this is sufficient to address the legitimate interests in accountability and transparency and animal welfare.
44. As the Commissioner has decided in this case that further 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).

The Commissioner's view

45. The Commissioner requires the council to disclose the information contained within paragraphs 1.4, 5.1, 11.4 of the Review Report to the complainant.
46. The Commissioner has decided that the council was entitled to withhold the information, in paragraph 11.9 of the Review Report, under section 40(2), by way of section 40(3A)(a).
47. Since the end of the transition period following the UK's departure from the EU, the GDPR were replaced by the UK GDPR. As this request was received before the end of that transition period, the application of

section 40(2) has been decided by reference to the GDPR. However the Commissioner is also satisfied that the disclosure of the personal data to which that exception was applied would not contravene the UK GDPR for exactly the same reasons.

Section 1 – General right of access to information

48. 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.*

49. Section 1(1) requires that any person making a request for information to a public authority must be informed in writing by the public authority whether it holds information relevant to the request, and if so, to have that information communicated to them. This is subject to any exclusions or exemptions that may apply.

50. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.

51. In other words, in order to determine such complaints, the ICO must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).

The complainant's position

52. The complainant believes that the council holds information regarding the number of dogs kept for the purpose of breeding, albeit that they may not record the information on the dog breeding licence.

53. The complainant gave an example of a previous request where the council had confirmed there was one dog kept for breeding and gave the type of the dog.

54. The complainant stated that when renewing the current licence for a particular breeder, the council had upgraded the breeder's star rating. They contend that the council will have to obtain information about the number of dogs kept for the purpose of breeding in order to process and upgrade the renewal.

The council's position

55. The council considers that the Animal Welfare Regulations have no requirement for it, as a licensing authority, to record the number of animals.
56. The council advises that the Animal Welfare Regulations set out the conditions which are to apply to licences. As these are prescribed by law, it is not for the council to add to or change them.
57. The council explained that the process of inspection is to assess the competency of the organisation and its effectiveness in looking after the animals and their welfare. The inspectors, in this case, will have looked at how the animals were kennelled, including whether the size of kennels was adequate for those animals in them.
58. The council stated that the inspectors do not need to count the number of animals specifically but assess the facility based on the overall criteria.
59. The council states that in light of the complaint, it had looked again at the Animal Welfare Regulations and remained of the view that there is no requirement to record the number of breeding animals. However, even if it were wrong in this interpretation, the fact is that the council has not recorded the requested information.
60. It is therefore the council's position that it does not hold the requested information, and it has no purpose for recording the information.

The Commissioner's conclusion

61. The Commissioner has considered the council's position, in conjunction with the request.
62. The Commissioner understands that the complainant considers that the council should hold the requested information in order to fulfil its duties in regard to licencing. However the council has explained the process of inspection which does not involve counting and recording dog numbers. It has also advised that it considers there to be no statutory requirement to record the number of dogs in relation to its responsibilities as a licensing authority.
63. There is no contradictory evidence available to the Commissioner that indicates the council's position is wrong. Therefore the Commissioner has concluded that, on the balance of probabilities, the requested information is not held.

Right of appeal

64. 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

65. 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.
66. 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

Janet Wyles
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