

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 May 2022

Public Authority: Wealden District Council
Address: Council Offices
Vicarage Lane
Hailsham
BN27 2AX

Decision (including any steps ordered)

1. The complainant requested information from Wealden District Council ("the Council") regarding the average value of properties for each postcode of its retirement court properties.
2. The Council provided the postal sectors for relevant retirement living courts but refused the wider request on the basis that the information was accessible on its website providing a link and citing section 21 (accessible by other means) of FOIA, and at internal review also sought to rely on the exemption at section 40(2) (personal information) of FOIA.
3. The Commissioner's decision is that the Council was entitled to rely on section 21(1) and section 40(2) of FOIA for the withheld information.
4. The Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

5. On 4 June 2021, the complainant wrote to the Council and requested information in the following terms:

"Please now provide the data for retirement court properties to show EUV-SH Values Average ("average value of properties") for each separate post code for the location of its retirement court properties."
6. On 14 June 2021, the Council responded refusing the requested information citing section 21 of FOIA to do so. The Council provided a link to information on its website and relevant postal sectors for the retirement living courts noted within the request.
7. On 10 September 2021, the Council cited section 40(2) of FOIA at internal review to refuse to provide the specific requested information, as it argued this would identify individual properties and individuals living in those properties.

Scope of the case

8. The complainant contacted the Commissioner on 11 October 2021 to complain about the way their request for information had been handled.
9. The Commissioner considers the scope of this case to be to determine if the Council has correctly applied section 21 and section 40(2) of FOIA to the withheld information.

Reasons for decision

Section 1 – general right of access

10. Section 1(1) of FOIA states any person making a request is entitled to be told whether the information they have asked for is held and, if so, to have that information communicated to them, subject to the application of any exemptions that are appropriate.

Section 21 – information accessible to the applicant by other means

11. Section 21(1) of FOIA provides that a public authority is not obliged to provide information under section 1 of the FOIA if that information is reasonably accessible to the complainant by other means.
12. Section 21 provides an absolute exemption. This means that if the requested information is held by the public authority, and it is reasonably accessible to the applicant by other means, it is not subject to the public interest test.
13. In order for section 21 to apply there should be another existing, clear mechanism by which the applicant can reasonably access the requested information outside of the FOIA. Furthermore, for section 21 to apply, it is necessary to consider whether the entirety of the requested information is reasonably accessible to the applicant.
14. Information is only reasonably accessible to the applicant if the public authority:
 - knows that the applicant has already found the information; or
 - is able to provide the applicant with precise directions to the information so that it can be found without difficulty.
15. The Council provided the complainant with a link to their website and details of how they could access information from the spreadsheet along with postal sector information.
16. The Council confirmed that the information not publicly available was that relating to individual addresses rather than that of the postal sector information which are published in accordance with the Governments Transparency Code 2015. The code stipulates that the information must be published in a Data Protection Act compliant manner.
17. And that, the complainant has previously collected information from the Council regarding the retirement/sheltered housing accommodation they live in. It is considered that to provide further information above and beyond that prescribed within the Transparency Code would allow the complainant to aggregate all the information they have obtained and reveal insight into other tenants' financial data.

The Commissioner's conclusion

18. The Commissioner has considered the arguments put forward by both parties in support of their positions.

19. The Commissioner is sympathetic to the complainant's argument "that it is impossible to cross reference the Postal Sector data with the Social Housing Value File on the website."
20. However, in this respect the Commissioner wishes to refer to the case of [The London Borough of Bexley and Colin P England v Information Commissioner \(EA/2006/0060 & 0066, 10 May 2007\)](#) the Information Tribunal considered whether the fact that 70% of the requested information was available to the applicant meant that it was reasonably accessible or whether all the information had to be reasonably accessible.
21. The word "reasonably" does qualify the word "accessible," but it does so in the sense that the mechanism available to the particular applicant for accessing the information must be reasonable, rather than whether a reasonable amount of the information is available elsewhere. Therefore, for section 21 to apply, it is necessary to consider whether the entirety of the information is reasonably accessible to the applicant. Section 21 will only apply to the extent that any of the requested information is in fact reasonably accessible to the applicant.
22. Having considered the above, and in the absence of any conflicting evidence, the Commissioner has concluded that the requested information is reasonably accessible to the complainant by other means, and that the Council was entitled to rely on section 21 of FOIA.

Section 40(2) – personal information

23. Section 40(2) 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.
24. 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').
25. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection

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

Act 2018 ('DPA'). If it is not personal data, then section 40 of FOIA cannot apply.

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

Is the withheld information personal data?

27. Section 3(2) of the DPA defines personal data as: 'any information relating to an identified or identifiable living individual'.
28. 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.
29. 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.
30. A combination of the name of the street on which a property is located, the postcode of the property and an individual property constitutes a property address. The Commissioner considers property addresses personal data within the meaning of section 3(2) of the DPA because they relate to an identifiable individual. The complainant has already been provided with the postcode of properties. Combining that information with information already provided and within the public domain would reveal property addresses.
31. The Commissioner considers that an individual can be indirectly identifiable when information held by a public authority can be combined with other information in the public domain to identify the individual. Individual property postcodes could be combined with the information already disclosed to reveal a property address which could be combined with other publicly available information such as the electoral register and Land Registry records to reveal the identity of an occupier and their ownership status, whether they are a tenant or leaseholder.
32. According to the public authority, these properties can contain a single dwelling. The Commissioner shares the view that the property type increases the chance of identifying occupiers and also obtaining ownership related information about individual properties.
33. A motivated person who is already in possession of the postcode of properties could clearly obtain the individual property door numbers by

using an online mapping tool or physically visiting the street. This demonstrates that the withheld information constitutes personal data within the meaning of the DPA and is therefore caught by the exemption in section 40(2).

34. It is inevitable that by virtue of the properties within the scope of the request can be fully identified, complying with the request in full would necessitate the disclosure of property addresses.
35. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

36. 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'.
37. 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.
38. 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

39. 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 child².'

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

40. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under 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.
41. 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

42. In considering any legitimate interest(s) in disclosing the withheld information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
43. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
44. The Commissioner considers that there is a legitimate interest in knowing what the Councils Social Housing Assets are. The public authority has disclosed this information. There is also a legitimate interest in knowing the general postal area of each property under the public authority's ownership. However, the Commissioner does not consider that there is a pressing social need to interfere with the privacy rights of individuals in order to disclose the withheld information.

Is disclosure necessary?

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"

45. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least restrictive means of achieving the legitimate aim in question.
46. The Commissioner does not consider that there is pressing social need to interfere with the privacy rights of residents in order to satisfy the legitimate interest in obtaining the specific postal address of each property under the public authority's ownership. Disclosing the withheld information is not the least restrictive means of satisfying this legitimate interest. The public authority has struck the right balance in the circumstances of this case by revealing the number of properties in a given location and average ranges per postal sector.
47. In addition, through the location data provided, the complainant could also identify the properties under the public authority's ownership. It would be unnecessarily intrusive however to also publish the specific home addresses of individuals in response to the complainant's request.
48. The Commissioner has therefore concluded that disclosing the individual postcodes to each property would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure of the withheld information would therefore breach the first data protection principle and thus is exempt from disclosure on the basis of section 40(2) of FOIA.
49. As the Commissioner has concluded that the necessity test has not been met, he has not gone on to consider the balancing test in this case.
50. The Commissioner has therefore decided that the council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

51. 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

52. 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.
53. 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
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