

Freedom of Information Act 2000 ('FOIA')
Environmental Information Regulations 2004 ('EIR')
Decision notice

Date: 27 July 2017

Public Authority: Hertsmere Borough Council
Address: Civic Offices
Elstree Way
Borehamwood
Hertfordshire
WD6 1WA

Decision (including any steps ordered)

1. The complainant has requested information regarding a complaint made against him. The Commissioner's decision is that Hertsmere Borough Council has correctly applied the exemption for third party personal data at section 40(2) of the FOIA and, insofar as the information is environmental, regulation 13(1) of the EIR. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

2. On 3 November 2016 the complainant wrote to Hertsmere Borough Council ('the council') and requested information in the following terms:

"I have recently been contacted by [name redacted] (Senior Scientific Officer @ Hertsmere) about an alleged incident regarding a pesticide spray. (Environmental Health Ref: AH/68524 – letter dated 24th Oct 2016.)

I have spoken to [name redacted] and given her the information she requested, and later the same day she phoned me back to confirm that I was not guilty of any wrong doing.

A written confirmation of this was requested by myself and also a copy of the original complaint (Detailing the names of the person/s making

the complaint / the date the complaint was made and FULL details of the complaint. [Name redacted] said that she could not do this but that I could get all this information by contacting your department – hence this letter.

I would be very grateful if you could please send me this information."

3. The council responded on 9 November 2016 and provided some redacted case notes, redacted emails and a redacted letter.
4. On 15 November 2016, the complainant wrote to the council expressing his dissatisfaction with the response. He asked for the full details of the complaint made against him (i.e. notes on 13th Oct and 19th Oct') excluding any names or personal details.
5. The council responded on 22 November 2016 as follows:

"Complainant reported that a bamboo plant in their garden had been sprayed and that the spray had killed some grass."
6. The Commissioner wrote to the council on 21 December 2016 requesting that it conduct an internal review of the initial response. She specifically requested that the council inform the applicant whether it held the requested information and, if it is held, provide the applicant with a copy of it, or, if the information is held but not being provided, state which exemptions in Part II of FOIA, or other exclusions, are being applied and explain why.
7. No internal review was provided to the complainant.

Scope of the case

8. The complainant initially wrote to the Commissioner on 30 November 2016 to complain about the way his request for information had been handled.
9. As part of her enquiries on this case, the Commissioner informed the council of the following:

"Having considered the correspondence provided by the complainant in this matter, it appears that, apart from the name and contact details of the person submitting the allegation, it constitutes the complainant's personal data and is therefore exempt from disclosure under section 40(1) of the FOI/regulation 5(3) of the EIR. This is because it appears that the information relates to the complainant because it was used by

the council in deliberations and decisions relating to him, that being to determine whether to take action against him. Therefore please reconsider the request as a subject access request under the Data Protection Act 1998 ('DPA') and provide the information to the complainant unless an exemption under the DPA applies. Please note that the complainant has stated that he appreciates that he cannot have the name and personal details of the person who made the complaint against him."

10. In its response to the Commissioner's enquiries, the council agreed that the request should have been treated, at least in part, as a subject access request pursuant to section 7(1) of the DPA. However, it explained that having examined the un-redacted file copies of the redacted information supplied to the complainant, it is of the view that all of the redactions made were necessary to prevent the disclosure of third party personal information and protect the identity of the person who made the complaint to the council and that such redactions were justified by the exemption at section 7(4) of the DPA. It also said that to the extent that the complainant's request constitutes a request for information in respect of which he was the data subject, the council would have been able to rely on the absolute exemption at section 40(1) of the FOIA and/or regulation 5(3) of the EIR to decline to supply that data to him - but subject nevertheless to his subject access rights pursuant to section 7(1) of the DPA.
11. Therefore, because the council has considered release of the complainant's personal data under the subject access provisions of the DPA, none of the complainant's personal data has been considered in this decision notice.
12. The council also said that, insofar as any of the redacted information did not constitute the complainant's personal information but did constitute the personal information of a third party, it considers that it is entitled to withhold this information pursuant to section 40(2) of the FOIA or regulation 13(1) of the EIR as disclosure of such information would contravene the first data protection principle. In addition, it said that it received the name and address of the complainant in confidence and therefore the council was entitled to withhold such information pursuant to the absolute exemption at section 41(1) of the FOIA or the qualified exception at regulation 12(5)(f) of the EIR.
13. The Commissioner notes that the complainant specifically stated that he did not want names or personal details (which the Commissioner understands to mean the address or other contact details of the person who made the complaint) to be provided. However, having examined the redacted information, the Commissioner considers that some of it constitutes the personal data of the third party other than name and

contact details. Therefore, it is this specific information that is being considered in this decision notice.

14. For the avoidance of doubt, the Commissioner has considered whether the council was correct to apply the exemption for personal data at section 40(2) of the FOIA, and, insofar as the information constitutes environmental information, the exception at regulation 13(1), to the third party personal data other than name and contact details that does not also constitute the complainant's personal data.
15. Given that the council applied the exemption at section 41(1) of the FOIA, or the exception at regulation 12(5)(f) of the EIR, to the name and address of the person who made the complaint, and the complainant does not want such details, the Commissioner has not considered these provisions.

Reasons for decision

Section 40(2) and regulation 13(1)

16. Section 40(2) of the FOIA and regulation 13(1) of the EIR state that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the legislation would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA'). In this case, the council has relied on section 40(2)
17. In order to rely on the exemption provided by section 40(2) or the exception at regulation 13(1), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

““personal data” means 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 intentions of the data controller or any other person in respect of the individual.”
18. 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 data protection principles under the DPA.

Is the withheld information personal data?

19. As explained above, the first consideration is whether the withheld information is personal data.
20. The withheld information under consideration in this case is details of the notes of a telephone call in which a complaint was made regarding the alleged use of a pesticide spray.
21. The Commissioner's guidance on what is personal data¹ states that if information 'relates to' an 'identifiable individual' it is 'personal data' regulated by the DPA.
22. The information being considered in this case doesn't directly identify an individual. However, because the name of an individual is not known, it does not mean that an individual cannot be identified. The aforementioned guidance states the following:

"A question faced by many organisations, particularly those responding to Freedom of Information requests, is whether, in disclosing information that does not directly identify individuals, they are nevertheless disclosing personal data if there is a reasonable chance that those who may receive the data will be able to identify particular individuals."
23. The complainant has informed the Commissioner that he knows who the third party is in this case. As the withheld information details the concerns of the person who made the complaint, and that person could be identified by the complainant in this case, the Commissioner is satisfied that such information constitutes personal data.

Does the disclosure of the information contravene any of the data protection principles?

24. The council considers that the disclosure of the information would contravene the first data protection principle.
25. The first data protection principle states that:

¹<https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf> & https://ico.org.uk/media/for-organisations/documents/1549/determining_what_is_personal_data_quick_reference_guide.pdf

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

26. In deciding whether disclosure of this information would be unfair, the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subjects, the consequences of disclosure on those data subjects and balanced the rights and freedoms of the data subjects with the legitimate interests in disclosure.

Nature of the information and reasonable expectations

- 27. The council said that the person who made the complaint would have a legitimate expectation that their identity would not be disclosed to the person complained of and that the information was received in confidence.
- 28. The Commissioner is satisfied that the individual making the complaint would have a reasonable expectation of confidentiality and privacy in relation to the notes of a telephone call in which a complaint was made. Such notes refer to her personal circumstances and precise details about the nature of her contact with the council.

Consequences of disclosure

- 29. In order to assess the impact of the consequence of disclosure on whether disclosure would be fair, it is necessary to consider whether disclosure of the withheld information would cause unwarranted damage or distress to the data subject.
- 30. The Commissioner considers that disclosure would amount to an infringement into the privacy of the person who made the complaint, particularly as she has found that disclosure of the information requested would not have been within that person's reasonable expectations.

Balancing the rights and freedoms of the data subjects with the legitimate interests in disclosure

- 31. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for its own sake along with specific interests.

32. The complainant has said that the third party is making false allegations against him.
33. Although the Commissioner can appreciate why the information is of particular interest to the complainant, she is mindful of the fact that the FOIA is request and motive blind and has not seen any evidence to indicate that there is sufficient wider legitimate public interest which would outweigh the rights and freedoms of the person who made the complaint against the complainant in this case. The complainant's wish to access this information is a matter that the Commissioner can appreciate but it is nonetheless a personal need.

Conclusion on the analysis of fairness

34. Taking all of the above into account, the Commissioner concludes that it would be unfair to the person who made the complaint to the council to release the requested information. Disclosure would not have been within their reasonable expectations and the loss of privacy could cause unwarranted distress. She acknowledges that there is a legitimate interest in transparency but considers that this has been met to some degree by the provision of a summary of the complaint. She does not consider that the interest in transparency outweighs the individual's expectations of, and rights to, privacy. The Commissioner has therefore decided that the council was entitled to withhold the information under section 40(2), by way of section 40(3)(a)(i), and regulation 13(1).
35. As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, she has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

Right of appeal

36. 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

37. 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.
38. 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

Deborah Clark
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Wycliffe House
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