

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 September 2019

Public Authority: Brighton and Hove City Council

Address: Kings House
Grand Avenue
Hove
BN3 2LS

Decision (including any steps ordered)

1. The complainant requested information from Brighton and Hove City Council ("the Council") about an access ramp installed at a neighbouring property, including whether any information was held regarding planning procedure allegedly not being followed. The Council provided him with some information but withheld some under the exemption at section 40(2) of the FOIA – third party personal data. It stated that some information was not held.
2. The Commissioner's decision is that the Council does not hold any information relating to procedure not being followed and it correctly withheld some information under section 40(2) of the FOIA. However, some of the information withheld under this exemption can be disclosed in anonymised form, with third party personal data redacted.
3. The Council also breached section 10(1) of the FOIA, since it did not provide a response to the request within the statutory time for compliance.
4. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the email exchange, quotation and form MA1 as described in this notice, redacted for personal information in accordance with paragraph 80 of this notice.

5. The Council authority 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

6. On 18 June 2018, the complainant's solicitors wrote to the Council on his behalf and requested information in the following terms:

"Please provide:

- 1) A copy of the request received by the Council for the provision of the access ramp.*
 - 2) An explanation of the Council's procedures when dealing with requests for disability adaptations to be made to Council owned properties.*
 - 3) A copy of the Occupational Therapist's recommendations in respect of the access ramp (suitably redacted).*
 - 4) A copy of any assessment of need made in respect of the access ramp.*
 - 5) A copy of any assessment of the necessary technical specification for the access ramp.*
 - 6) Copies of the drawings and technical specifications for the access ramp.*
 - 7) Copies of all external and internal correspondence (including e mails, letters, faxes and texts), notes of meetings, notes of telephone conversations, memos etc. relating to the access ramp (to include communications with the Council's Planning and Building Control teams).*
 - 8) An explanation of why it was considered unnecessary to apply for planning permission for the access ramp.*
 - 9) A copy of any Building Control Approval for the access ramp.*
 - 10) Details of the cost of the access ramp."*
7. On 2 August 2018, the Council responded to the solicitors. It explained that it was withholding some information that had been requested under

the exemption at section 40(2) of the FOIA – personal information. It provided some information in respect of point 2. It provided a general explanation in response to point 8. With regard to point 9, it stated that no information was held.

8. The complainant's solicitors requested an internal review on 1 October 2018. They asked whether any of the information withheld under section 40(2) could be redacted, and queried why the Council could not provide the technical information that had been requested at points 5 and 6. Further information was also requested, as follows:

- Further details relating to points 1, 3, 4 and 7 (including the name of who had made the request, and who had carried out the assessment of need);
- Regarding point 2, they asked: *"I note the procedure... states that where adaptations may affect other tenants living in the immediate locality (an example of building a ramp is given) the adaptation is usually put on hold to allow for a 14 day consultation period with neighbouring tenants. Please can you explain why this procedure was not followed in this case?"*;
- A new request was made which related to point 8: *"I understand that the Council's Planning Enforcement team have advised that planning permission is required for the access ramp, but that no application has yet been submitted. Please advise when this application will be submitted"*.

9. The Council sent the solicitors the outcome of its internal review on 8 January 2019. It responded to the new query relating to point 8. However the Council continued to withhold some information under section 40(2), stating that some of the information which had been withheld was comprised of special category personal data. The Council also stated that no recorded information was held regarding the new query which related to point 2.

Scope of the case

10. The complainant contacted the Commissioner on 28 December 2018 to complain about the way his request for information had been handled. At this stage, he had not received a response to his request for an internal review.
11. Following further correspondence and the outcome of the internal review, during the course of the investigation, the Council provided

three drawings to the complainant which had previously been withheld under section 40(2).

12. The complainant remained dissatisfied as to whether any recorded information was held with regard to the query of 1 October 2018 ("*... the adaptation is usually put on hold to allow for a 14 day consultation period with neighbouring tenants. Please can you explain why this procedure was not followed in this case?*") – which related to point 2 of his original request. He was also dissatisfied that the Council was relying on section 40(2) as a basis for refusing to provide the remainder of the information which it held falling within the scope of his request.
13. The following analysis covers these points and also considers the time taken by the Council for compliance with the request.

Reasons for decision

Section 1 – general right of access to information

14. Section 1(1) of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information within the scope of the request, and if so, to have that information communicated to him.
15. In scenarios where there is some dispute between the public authority and the complainant about the amount of information that may be held, following the lead of a number of Information Tribunal decisions, the Commissioner applies the civil standard of the balance of probabilities.
16. In this case, the complainant considers that the Council would hold information about why planning procedure had apparently not been followed with regard to a 14-day consultation period with neighbouring council tenants.
17. For clarity, the Commissioner is not expected to prove categorically whether the information is held; she is only required to make a judgement whether, on the balance of probabilities, a public authority holds any information within the scope of the request.
18. The Council explained that it had referred the complainant's full request both to the Planning Department and to Housing Adaptations. The information which had been located falling within the scope of the request had been found to reside in the Housing System and IDOX document management system in the form of electronic data.

19. The Council explained that searches were made against property addresses and client names, and that it had identified information relevant to the scope of the request, which had either been provided to the complainant, or withheld under section 40(2). It had not identified anything relating to why procedure may not have been followed in this case.
20. The Commissioner is satisfied that the Council carried out adequate and appropriately-targeted searches and that it would have been likely to locate this information, had it been held.
21. The Commissioner is satisfied on the balance of probabilities that no information falling within the scope of the request submitted on 10 October 2018, relating to the 14-day consultation period, ("*... Please can you explain why this procedure was not followed in this case*") is held by the Council.

Section 40 - personal information

22. The Council has withheld the following documents under this exemption:
 - a "referral summary" dated 25/4/17;
 - a "functional assessment" dated June – July 2017;
 - Email exchange (three emails) between an officer on the Health and Adult Social Care Team and an officer on the Housing Adaptations Team, including a forwarded email between a contractor and a provider of healthcare equipment;
 - Two email attachments: a quotation from a contractor, and a Minor Adaptations form ("MA1").
23. 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.
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").

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

25. 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.
26. 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?

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

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

28. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
29. 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.
30. 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.
31. In this case, the Council argued that all of the withheld information is the personal data of the occupant of the property at which the ramp was built. The Commissioner also notes that two Council officers are named in the information, and that the information includes the details of an employee of a contractor and an employee of a provider of healthcare equipment. All of these individuals are living. The Commissioner has therefore considered whether the withheld information is the personal data of any or all of these individuals.
32. With regard to the referral summary and functional assessment, the Commissioner notes that the occupant of the property is named and described throughout these documents. The Commissioner is satisfied that these two documents wholly comprise information which relates to the occupant. She is satisfied that they both relate to and identify her. This information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
33. With regard to the email exchange, quotation and MA1, the Commissioner notes that these documents include identifying details;

specifically, the name of the occupant of the property, the address of the property in question, the name and contact details of a family member of the occupant, the name and contact details of Council officers, the name and contact details of an employee of the contractor, and the name and contact details of an employee of a provider of healthcare equipment. Since these details relate to and identify individuals, the documents can be said to comprise personal data.

34. 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. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

35. 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".

36. 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.
37. 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.
38. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.
39. The Commissioner has considered the referral summary and functional assessment separately from the remainder of the withheld information.

The referral summary and functional assessment

Is the information special category data?

40. Information relating to special category data is given special status in the GDPR.
41. Article 9 of the GDPR defines "special category" as being personal data which reveals racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health, or data concerning a natural person's sex life or sexual orientation.

42. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that these documents include special category data since they relate to the health of the occupant of the property. Indeed, the two documents provide comprehensive detail of that individual's state of health.
43. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
44. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
45. The Commissioner has seen no evidence or indication that the individual concerned has specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
46. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so the whole of the referral summary and functional assessment are exempt under section 40(2) of the FOIA.

Anonymisation

47. The Commissioner notes that the complainant asked whether this information could be anonymised; that is, redacted so that it does not comprise third party personal data. However, in the case of the referral summary and functional assessment, their purpose is to describe the individual's state of health and healthcare needs, and therefore, they consist almost entirely of her personal data. The Commissioner considers that nothing meaningful would remain once the personal data was redacted, and therefore she does not consider that the documents can be anonymised to enable disclosure under the FOIA.

Email exchange, contractor's email and quotation, and MA1 form

48. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that these documents do not comprise special category data.
49. The Commissioner has therefore considered whether there is a lawful basis for processing the information (that is, disclosing it in response to the request) under Article 6(1) of the GDPR.

50. She has also considered whether these documents could be anonymised, further on in this notice.

Lawful processing: Article 6(1)(f) of the GDPR

51. 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.

52. 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.

53. 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:-

- **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

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".

- **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

54. 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

55. In considering any legitimate interest(s) in the disclosure of the requested 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. 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.

56. In this case, the Commissioner considers that there is a legitimate interest in the Council being transparent about its decision that a ramp needed to be built, including, as the Council has acknowledged, the legitimate interest in finding out whether the ramp was recommended by an appropriately-qualified medical practitioner.

57. She has therefore considered whether disclosure is necessary in order to meet this legitimate aim.

Is disclosure necessary?

58. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves the 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.

59. The Commissioner notes that the complainant has requested the names of individuals involved in the decision-making process, as well as seeking generally to gain a better understanding of the procedure followed in this case.

60. To some extent, she considers that the legitimate interest in transparency has already been met, since the complainant has been informed of the relevant departments within the Council that were involved in the process.

61. However, in view of the wording of his request, she considers that the complainant would be unable to gain full understanding regarding the building of the ramp, and the individuals involved, without requesting disclosure under the FOIA.
62. Since disclosure would be necessary to meet the legitimate interest, the Commissioner has considered the balancing test.

Balance between legitimate interests and the data subjects' interests or fundamental rights and freedoms

63. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
64. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
65. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
66. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
67. In this case, part of the withheld information comprises the name and contact details of an employee at the contractor which provided the quotation, and the name and contact details of an employee at a company which provides healthcare equipment.
68. The Commissioner does not consider that these individuals would have any expectation that their personal information would be disclosed in

response to an information request regarding Council procedures. The Commissioner has no evidence that the two employees are in senior roles at their respective companies; while they were involved in providing a quotation for the Council, this falls outside the legitimate interest described above. The Commissioner therefore does not consider that there is a lawful basis for processing the names and contact details of the two employees in response to this request, and she finds that they have been correctly withheld under section 40(2).

69. With regard to the personal data of the occupant of the property and of a family member, which feature on the MA1, in the quotation and in the subject line of the emails, these are the personal data of the occupant and of the family member for the reasons already explained in this notice. The Commissioner does not consider that the individuals would expect to have their personal information disclosed publicly. She does not consider that the legitimate interest in the disclosure of the information outweighs the data subjects' interests or fundamental rights and freedoms, and therefore considers that there is no lawful basis for processing the information. She finds that these details have been correctly withheld under section 40(2) of the FOIA.
70. With regard to the two Council officers, whose names and contact details appear on the emails, it is evident that both were involved in the process of the ramp being built. They are, respectively, an officer in the Health and Adult Social Care team and an officer in the Housing Adaptations team.
71. The Commissioner considers that they would both have some expectation that their names and contact details may be disclosed in response to an FOIA request. Both are employees of a public authority and have a role to play in decision-making.
72. One employee is evidently not in a senior role and the other is described as a senior post-holder.
73. The Commissioner has already found that there is some legitimate interest in the names of the Council officers being disclosed. In the case of the senior post-holder, this may be said to be a greater legitimate interest due to their higher level of accountability.
74. However, the Commissioner considers that the individuals' interests, rights and freedoms outweigh this legitimate interest.
75. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore

considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

76. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on separately to consider whether disclosure would be fair or transparent.

The Commissioner's view

77. 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).

Anonymisation

78. The Commissioner's arguments above have focused on third party personal data in relation to the three emails, the quotation and the MA1 form.
79. With regard to these documents, she considers that the third party personal data can be redacted, leaving some meaningful information falling within the scope of the complainant's request which does not comprise personal data, and which should, therefore, be disclosed.

The Commissioner's decision

80. She therefore orders that the Council should disclose the three emails, the quotation and form MA1, but should redact the following identifying information (which has been correctly withheld under section 40(2) for the reasons explained above):
- All names and contact details on the three emails;
 - The subject line of the three emails;
 - All names and contact details on the quotation;
 - The title line of the quotation;
 - Page 1 of the MA1 should be redacted in its entirety;
 - Page 2 of the MA1: the name and contact details of the Council officer.

Time for compliance

81. Section 10(1) of the FOIA states that a public authority shall comply with the requirements of section 1(1), set out previously in this notice,

"promptly and in any event not later than the twentieth working day following the date of receipt".

82. From the evidence presented to the Commissioner in this case, it is clear that, in failing to issue a response to the request of 18 June 2018 within 20 working days, the Council breached section 10(1) of the FOIA. The Commissioner does not require the Council to take any remedial steps in respect of this.

Right of appeal

83. 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

84. 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.
85. 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

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