

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 28 October 2019

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

#### Decision (including any steps ordered)

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1. The complainant has requested a copy of an inspection report for a named kennels. Pendle Borough Council (the council) refused the information under section 40(2) of the FOIA as it considered it to be third party personal data.
2. The Commissioner's decision is that section 40(2) of the FOIA is engaged to the requested information.
3. The Commissioner does not require the council to take any steps.

#### Request and response

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4. On 14 January 2019 the complainant made the following request to the council:

*"Please could you email me a copy of the last inspection report for [Kennels name redacted]. The one done for the renewal license (2019)"*

5. The council responded on the 5 February 2019 refusing the request under section 40(2) of the FOIA as it determined the information was third party personal data.

6. The complainant requested an internal review on the 1 March 2019 which the council carried out on the 22 March 2019 upholding its initial response.

### **Scope of the case**

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7. The complainant contacted the Commissioner as she is not satisfied with the council refusing her request.
8. The Commissioner considers the scope of the case is to determine whether or not the council can rely on section 40(2) of the FOIA to refuse the request.

### **Reasons for decision**

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#### **Section 40(2) of the FOIA**

9. 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.
10. In this case, the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public (if it is personal data) 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').
11. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (the DPA). If it is not personal data then section 40 of the FOIA cannot apply.
12. Secondly and only if the Commissioner is satisfied that the requested information is personal data, she would establish whether disclosure of that data would breach any of the DP principles.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

***Is the information personal data?***

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

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

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. 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.
16. 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.
17. The council has told the Commissioner that it considers the requested report constitutes personal data of the director and site manager of the kennels.
18. The council argues that although this is a limited company, the director is the sole director and shareholder of the company and he is identifiable via Companies House. He is also the owner of the site.
19. The council has further explained that the site manager is identified on the kennel licence and he is associated publicly with the premises through planning applications made by him in relation to the premises and he also lives there.
20. The Commissioner accepts that the requested report relates to both individuals and the report contains information about the structure of the premises and the practices on the premises in relation to its suitability or otherwise for kennels. The information relates to them as the owner and manager of the kennels. The Commissioner therefore finds that the withheld information is the personal data of the director and manager and falls within the definition of 'personal data' in section 3(2) of the DPA.
21. 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.
22. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

23. 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"*.

24. 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.

25. In order to be lawful, one of the lawful basis 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**

26. 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.

27. 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 interest 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"<sup>2</sup>.*

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<sup>2</sup> <sup>2</sup> 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"*.

28. 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.
29. 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*

30. 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.
31. 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 a wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
32. The council has identified that there is a legitimate interest in disclosure as it would add to the accountability and transparency and any concerns about animal welfare.
33. The complainant has told the Commissioner that she does not consider there to be any legitimate reasons for refusing to provide the inspection report. She states she is already aware of the personal data in the inspection report and has previously been given copies of all the inspection reports to these kennels as far back as 2014.
34. The complainant has stated to the Commissioner that the reason that the council has chosen to refuse this request is because of a complaint she raised regarding the licence being issued.

35. The council has advised that it was not previously aware of a Decision Notice<sup>3</sup> issued by the Commissioner in relation to a very similar request concerning dog kennels. But now being aware of it and after reviewing it, the council considered the report should be exempt from disclosure.
36. The Commissioner concludes that the legitimate interest is concerns for animal welfare, which relates to how the two individuals operating the kennels are conducting the business.

*Is disclosure necessary?*

37. '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 be the least intrusive means of achieving the legitimate aim in question.
38. The complainant has told the Commissioner that the council conducted a peer review into the handling of the licence renewal for the kennels and it provided her with a copy of this review on request.
39. The complainant states that this peer review contains far more information than the actual licence inspection with a few minor redactions to protect sensitive or personal information. She questions why the council are willing to provide a copy of this peer review but have refused the inspection report.
40. The council has advised the Commissioner that it provided the complainant with a copy of the peer review because it is a procedural review, which makes clear at paragraph 2.5 that it does not contain 'personal professional opinion rather factual interpretation on the procedure that has been followed.'
41. The council explains that essentially, it is a review of the appropriateness of the way that the inspections were carried out and not a second opinion on whether a licence or licences ought to have been granted. It is a commentary on the council's competence and a reflection on its own policies and procedures not, the kennels.

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<sup>3</sup> [ico.org.uk/media/ac\\_on-weve-taken/decision-no\\_ces/2013/904496/fs\\_50501130.pdf](https://ico.org.uk/media/ac_on-weve-taken/decision-no_ces/2013/904496/fs_50501130.pdf)

42. The council accepts that paragraphs 10.5 to 10.7 of the peer review do refer to the inspector's notes about the kennels, but states that these are limited to three examples to illustrate where notes might have been augmented or improved. But this is against the fact that there are many more inspector observations throughout the withheld inspection report, not mentioned at all in the peer review, which could potentially be perceived as contentious.
43. The council has also advised the Commissioner that the law requires any licence is displayed. The licence itself contains the star rating given and as such, the law would seem to deem this sufficient information for consumers to form their own judgement on the applicant licenced, without further detail.
44. The council therefore feels that it is justified in considering that it is unfair to reveal what the law does not otherwise require in terms of the inspectors many observations and suggestions noted in the inspection report, which include, for example, risk scoring tables which informs the star rating.
45. The council has concluded by stating that it has been strongly influenced by paragraph 33 of the Commissioner's previous decision notice, mentioned above, where it states: *"Any perceived negative comments/ findings could be constructed in a manner not intended by the licencing authorities who ultimately have the expertise to decide whether or not a licence should be issued or renewed. It would be detrimental to the data subjects' business for that to happen."*

#### *Commissioner's conclusion*

46. The Commissioner has considered the above. She notes that the inspection report determines the star rating, and it is this star rating – which is requirement by law to be displayed by the business – that allows the public to make an informed decision on the kennels suitability.
47. There is also a peer review that can be carried out, such as happened in this case and was provided to the complainant. This peer review considers whether reports are being correctly carried out.
48. The Commissioner agrees with the council's view about her comments from her previous Decision Notice, mentioned above at paragraph 45, being relevant to this case.
49. With regards to the complaint's suspicion that had she not raised a complaint about a renewal licence being issued then her request would not have been refused by the council. The Commissioner can see why

she may have reached this conclusion if previous reports had been provided to her and now this one is not being.

50. However, it must be remembered that the consideration has to be about the personal data of the individuals who operate the kennels. That the council provided previous reports does not override the third party's rights to privacy and now that the council has become aware of this report falling under section 40(2) of the FOIA, it is correct to consider the release or refusal under such exemption.
51. Based on the above, the Commissioner concludes it is not necessary to disclose the inspection report for the purposes of transparency and therefore has decided the council was entitled to withhold the information under section 40(2) of the FOIA by way of section 40(3A)(a).



## Right of appeal

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52. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

53. 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.
54. 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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**