

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 November 2020

Public Authority: Stockton-on-Tees Borough Council
Address: PO Box 11
Municipal Buildings
Church Road
Stockton-on-Tees
Cleveland
TS18 1LD

Decision (including any steps ordered)

1. The complainant has requested information about a traffic calming consultation from Stockton-on-Tees Borough Council (the Council). The Council provided some information but refused to provide actual addresses of those consulted, citing section 40(2) (Personal information) of the FOIA.
2. The Commissioner's decision is that section 40(2) is properly engaged. No steps are required.

Request and response

3. On 10 February 2020 the complainant wrote to the Council and requested information in the following terms:

"Subject: Traffic 'Calming' Measures on The Wynd, Wynyard

... I refer to the consultation process conducted in connection with the implementation of the above scheme.

Your letter to residents dated 12th December 2017 states that 45 responses were received during the consultation process, 4 of which were from the wider Wynyard community. Please disclose:-

** With whom the Council consulted in regard to the scheme (apart from residents).*

** The 4 responders from the wider Wynyard community".*

4. On the same day the Council responded. It provided some information within the scope of the request but refused to provide the remainder citing section 40(2) (Personal information) of the FOIA.
5. The complainant requested an internal review on 21 February 2020, adding to the information request as follows:

"I do not seek the disclosure of personal information. That being said I make application in respect of the following points relating to the consultation process adopted by the Council: -

1. *There are 13 houses (No's 1 x 15) fronting The Wynd in the section containing the pinch point and the chicane adjacent to no 10. Please disclose how many of these households responded to your consultation. How many agreed to the installations and how many did not?*
2. *The remainder of The Wynd, east beyond Swainston Hall comprises 35 properties. How many favoured the installation and how many were against?"*

6. On 3 March 2020, the complainant added the following to his request:

"I refer to appendix 3 – consultation as part of the delegated decision document dated 6th December 2017. That document records the number of properties directly consulted as 113. Please disclose the locations of these properties to include the names of the streets targeted and the number of properties in each of those streets. The document records receipt of 41 responses in the direct consultation with 26 supporting the scheme and 15 objecting/not in support. Please identify the number of supporters of the scheme in each of the streets targeted and the numbers of dissenters from each of the streets targeted. The document records 4 wider responses received. Please disclose the streets from which these responses emanated; the street in which the one supporter of the scheme resided and the streets in which the 3 dissenters resided".

7. Following an internal review, the Council maintained its position regarding the citing section 40(2) of the FOIA.
8. During the Commissioner's investigation, the complainant advised:

"I hope this matter can be resolved informally. To assist this aim I am prepared to modify my request to disclosure of the following information: -

- 1. The 113 households that were directly consulted by letter drop.*
 - 2. The streets in which the 4 respondents resided from the wider area".*
9. During the Commissioner's investigation, the Council disclosed some further information, correcting some figures which had previously been disclosed which were found to be inaccurate. It maintained its position regarding disclosure of the actual house numbers of the properties, advising that it considered these to be personal data and therefore exempt from disclosure under section 40(2) of the FOIA.

Scope of the case

10. The complainant wrote to the Commissioner on 17 March 2020 to complain about the way his request for information had been handled. His grounds were as follows:

"The information sought relates to the processes taken by SBC [the Council] which led to their decision to install traffic calming measures along a stretch of approximately 3/4 mile of The Wynd, in Wynyard during 2019 incorporating an elongated pinch point and two chicanes.

We and many other like minded residents of Wynyard are seeking the removal of these installations for reasons predominantly relating to safety. As part of that process we are seeking to challenge the validity and fairness of the consultation processes undertaken by SBC with residents.

In particular we have requested information relating to a directed consultation survey conducted by SBC in October 2017 in which they sought the views of selected residents with regard to their proposals.

SBC wrote to 113 properties. These included, we believe, all 49 properties in The Wynd, including a property known as Swainston Hall and certain other properties located beyond The Wynd.

We first requested information relating to the consultation process from SBC on 10th February 2020 by email and within 10 minutes of that email received a response advising that they refuse to communicate with us any further on this matter.

We repeated our request to SBC citing it as a request under FOI. SBC refused, stating that to do so could breach the Data Protection Act (DPA).

On 21st February 2020 we submitted an amended request in our desire to allay concerns over DPA.

We were advised by SBC on 13th March 2020 that in revealing such information there was a strong likelihood that third parties i.e. other local residents could be identified from the details that would be provided. Our request was therefore considered exempt under section 40 (personal information) of FOI Act 2000 ...

Section 40 of FOI Provides an exemption from the right to information if it is personal data as defined in the DPA. We therefore, in an attempt to avoid involving the ICO and to ensure no personal information could be discerned, submitted an amended request on 16th March 2020, in the following terms: -

- 1. The provision of the names of the streets, other than The Wynd, included in the consultation process.*
- 2. How many of the 49 properties on The Wynd (including Swainston Hall) were in favour of the proposed measure?*

SBC responded on 17th March 202 stating that their response was final.

The provision of the data requested at 2 above would, by deduction, inform the number of properties outside of The Wynd that were in favour of the proposal. This is an important aspect to us as we believe that properties forming cul-de-sacs adjacent to The Wynd and within the boundaries in which the features were to be installed were excluded from the consultation process.

We know from documents disclosed previously by SBC in connection with our objections to the scheme that the total number of properties from inside and outside of The Wynd that were in favour of the proposals was 26 out of the total of 113 properties consulted.

In relation to our request at 2 above we fail to see how, as SBC seem to argue, given the total number of responses in favour of the proposal was 26, that any personal information could be discerned or third parties identified from the provision of this information.

We feel aggrieved by the actions of SBC and that they are in breach of FOI. We have sought to accommodate their concerns by amending our requests in a way to ensure there could be no identification of third parties or breach of the DPA".

11. During the Commissioner's investigation, the Council disclosed a table with corrected figures (following consultation with the Commissioner about their accuracy), that provided postcodes, street names, numbers of households consulted on each street, numbers of responses from householders on each street, and an overall figure of those responses showing how many were in favour of / against the traffic calming measures.
12. Following this disclosure, the Commissioner invited further comments from the complainant. He responded saying:

"Point 1.

I don't profess to understand the answer given as to how 11 postcodes became 15 in their first response back in March. How do you duplicate addresses and postcodes?

Point 2.

The Council now say they wrote to 47 households on The Wynd (not including the property known as Swainston Hall).

Which household on The Wynd did the Council choose to omit from their process and why?

It is apparent from the numbers that some unspecified properties in Woodend Court, Salter House and Brierley Drive were not consulted. I ask on what basis?

Point 3.

*The Council's explanation for withholding the addresses of those households chosen for consultation (Data Protection) is simply not credible. How does disclosing that they wrote to, for example, no 2 The Wynd in the consultation process breach the Data Protection Act? We are **NOT** asking for disclosure of occupants names and whether they responded to the letter; let alone how they voted.*

Confidence in the council is not helped when learning that previous information supplied under FOI with regard to the numbers of households consulted has been admitted as also being incorrect. The total shown in the table is now disclosed as 115 whereas in the previous version and all earlier documents obtained under FOI including the Council Cabinet decision document of 6th December 2017 refer to 117 consultations (113 direct + 4 from wider community).

Point 4.

The Council should disclose the two households from the wider community that were seemingly added to their postal consultation along with the addresses of all other households that participated through social media.

We have previously been informed that households were selected for consultation on the basis that they represented 'frontage' properties of The Wynd. Can the council disclose the basis of their decision to consult 9 properties in Wellington Drive? There are only two properties on this road (no's 98 and 99) that can be said to form frontages with The Wynd. Only by disclosure of these 9 households can a view be formed as to the rationale adopted by the Council to justify their inclusion in the consultation process.

Generally

My confidence in the Council has degenerated further by the admission that many unexplained errors have been made in the information so far supplied by them. It is only by disclosure of all addresses subject to consultation by letter drop that we can deduce those households excluded from the process. In this way a considered view can be taken of the appropriateness and fairness of the process adopted by the Council".

13. The Commissioner will comment on each of these concerns in turn.
14. Point 1 is considered to be a new request for information, so it falls outside the scope of this investigation. Furthermore, it is noted that the FOIA does not require a public authority to answer questions or provide explanations, unless this is held as recorded information. Therefore, it may be that the Council would not actually hold any recorded information about this point. The Commissioner has viewed the withheld information and can confirm, based on what she was provided, that the correct data has now been disclosed.
15. Point 2 again raises new information requests which fall outside the scope of this investigation so have not been further considered. However, in order to assist the complainant, the Commissioner enquired regarding the disparity and was advised as follows:

"We have looked into why [number removed] The Wynd did not receive a survey. This address was included in our initial map which was used to identify properties to be consulted. The map was sent onto another inhouse service to create the mail merge and it appears that address was omitted when the mail merge was created. We can only assume this was administrative error and

resulted in a survey not being posted to [number removed] The Wynd.

That address did not respond to our consultation with Wynyard Residents Association or through publication on the official Wynyard Matters website. We will obviously look at checks and measures that can be introduced to prevent any recurrence for future surveys”.

16. Point 3 relates partly to the citing of section 40 to withhold information, which will be considered below. As with the response to point 1, the Commissioner has viewed the withheld information and can confirm that the correct data has now been provided.

17. Point 4 relates partly to the citing of section 40 to withhold information, which will be considered below. The latter part raises a new information request which falls outside the scope of this investigation so has not been further considered.

18. The 'general' comment refers to errors, which is not something which the Commissioner can comment on other than to again say that she has seen the withheld information and is satisfied that what has now been disclosed accurately reflects the source data. The points relating to personal information will be considered below.

19. Regarding the wider consultation the Council advised the complainant:

“The Council’s consultation with the wider Wynyard community was through the Wynyard Matters website (Wynyard Residents Association online presence) and on their Facebook page. As a result of responses to that consultation and having further considered the properties we had identified to be fronting properties, 4 additional properties were included in our postal consultation. Those properties are included in the [figures provided]. Due to the low numbers the Council is unable to identify for you the streets of those properties as we consider this information is protected under the Data Protection Act 2018”.

20. To clarify what has been provided so far, the Council has disclosed the following: the street / postcode within the consultation, the total number of residential properties in that street, the total number of residential properties in that street that were consulted and the total numbers of properties from each street that commented on the consultation. It has also advised the overall numbers of those who responded in favour / against the traffic calming.

21. The Council advised that it has previously disclosed the consultation feedback comments to The Wynd Safety Group (the complainant is a member) which were anonymised to prevent reidentification.

22. To further assist, the Council has disclosed a copy of the consultation letter sent to the properties, together with the associated plans which identified the proposed measures.
23. The Commissioner will consider the application of section 40(2) to the request below.
24. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA. The FOIA is concerned with transparency of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. The FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

Reasons for decision

Section 40 – personal information

25. 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.
26. 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').
27. 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.
28. 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.

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

Is the information personal data?

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

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

30. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
31. 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.
32. 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.
33. On the face of it, the request seeks postal addresses, which have been selected by virtue of their location, and does not seek to ascertain any details about the occupiers of those addresses or any views they may have provided about the consultation. However, the Council believes that the requested information could be used to identify those householders consulted.
34. A test used by both the Commissioner and the First-tier tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.
35. The Commissioner considers that the proper approach to determining whether apparently 'anonymised' information is actually personal data, is to consider whether an individual, or individuals, could be identified from it, and other information which is in the possession of, or likely to come into the possession of, a person other than the data controller after disclosure.
36. On the face of it, the withheld information does not directly identify any individual. However, because the withheld information specifies individual addresses, the Commissioner has considered whether this information, when combined with other information, either already in the public domain, or known to the requester or others, may nevertheless make identification possible. The Commissioner is mindful

that disclosure under the FOIA is considered as being made to the world at large, rather than to the requester only, and this includes to those individuals who may have a particular interest in the information (and additional knowledge of the specific circumstances of the request) which is not shared by the wider public.

37. In considering this point, the Commissioner recognises that different members of the public will have different degrees of access to the 'other information' which would be needed for re-identification of apparently anonymous information to take place. In her Code of Practice on Anonymisation², she acknowledges that: *"...there is no doubt that nonrecorded personal knowledge, in combination with anonymised data, can lead to identification"*.

38. The Code of Practice goes on to state:

"Re-identification problems can arise where one individual or group of individuals already knows a great deal about another individual, for example a family member... These individuals may be able to determine that anonymised data relates to a particular individual, even though an 'ordinary' member of the public or an organisation would not be able to do this.

... The risk of re-identification posed by making anonymised data available to those with particular personal knowledge cannot be ruled out, particularly where someone might learn something 'sensitive' about another individual – if only by having an existing suspicion confirmed. However, the privacy risk posed could, in reality, be low where one individual would already require access to so much information about the other individual for re-identification to take place. Therefore a relevant factor is whether the other individual will learn anything new".

39. The Code states that it is also necessary to consider the likelihood of individuals having and using the prior knowledge necessary to facilitate re-identification and whether any new information would be learned from re-identification. The Code notes that:

"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".

² <https://ico.org.uk/media/1061/anonymisation-code.pdf>

40. In this particular decision, the Upper Tribunal concluded that there was no evidence that anyone would be sufficiently motivated to attempt re-identification, and that this rendered the risk of re-identification taking place 'negligible'. The Commissioner has considered whether the same can be said in this case.
41. The complainant is a local resident who is also a member of the local Wynd Safety Group. He has already been given the numbers of households consulted as well as the postcodes and street names. Although not as part of this request, he has also been given data about responses provided by those who responded to the consultation. Therefore, the Commissioner considers that, because of the circumstances of the request, the likelihood of identification is more than negligible as the complainant, being a local resident, would be able to identify the individuals who were approached as part of the consultation were he to be provided with their actual addresses.
42. Following on from this, the Commissioner has considered the consequences for the data subjects if identification were achieved. The Commissioner considers that the new information which would be learned as a result of identification in this case, is that the addresses of the individual households which were consulted would be confirmed. This is information which, hitherto, might merely have been a point of speculation which could only be 'second guessed' by interested parties. The resultant harm is that there is a possibility that they will be further contacted to ascertain what their views were, why they may not have responded to the consultation, or for further commentary. This type of approach would not be expected by the householders who would have no expectation that their addresses would be disclosed to the general public by way of a request under the FOIA.
43. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the householders who were consulted. She is satisfied that the information requested relates to and identifies those concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
44. 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.
45. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

46. 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".

47. 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.
48. 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

49. 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"³.

50. 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.

³ 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".

51. 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

52. 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.
53. 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.
54. The complainant is dissatisfied with local traffic-calming measures and is seeking removal of the installations. He wishes to challenge the validity and fairness of the consultation processes and has asked for the addresses to assist with this challenge. The Commissioner considers this to be a legitimate interest.

Is disclosure necessary?

55. '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.
56. Here the Commissioner notes the information that has already been disclosed to the complainant, as outlined in paragraph 20 above. Essentially this includes all the street names of the relevant households (including those from the wider consultation), the number of households written to, the number of responses and whether or not those responses were in favour of the scheme. Although there was initially some inaccuracy with the data provided, this has since been corrected. As such, the Commissioner fails to see why disclosing the actual house numbers is necessary and how it would add any significant value that would outweigh the concerns associated in disclosing the personal data of those households concerned.
57. As the Commissioner has decided in this case that 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). She therefore finds that the Council was correct to rely on section 40(2) to withhold the requested information.

Right of appeal

58. 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

59. 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.

60. 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

Carolyn Howes
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Wycliffe House
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