

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 June 2021

Public Authority: London Borough of Waltham Forest
Address: Forest Road
Walthamstow
E17 4JF

Decision (including any steps ordered)

1. The complainant submitted a 16 part request to the London Borough of Waltham Forest (the Council) seeking information related to Council properties and the "Right to Buy" scheme. The Council provided some of the information requested, refused to comply with one part of the request based on extensive costs it would incur, relying on section 12(1) of FOIA, and withheld the remainder of the information citing section 40(2) (personal information) of FOIA.
2. The Commissioner's decision is that the Council:
 - incorrectly applied section 12(1) of FOIA in relation to part 6 of the request;
 - breached section 16 of FOIA because it failed to fulfil its duty to provide advice and assistance in relation to part 6 of the request; and
 - was entitled to rely on the exemption under section 40(2) FOIA in relation to parts 8-16 of the request;
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation:
 - Issue a fresh response to part 6 of the request which does not rely on section 12 of FOIA.

4. The Council 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

5. On 18 February 2020, the complainant wrote to the Council to submit a 16 part request for information related to Council properties and the "Right to Buy" scheme¹.
6. The Council responded on 24 April 2020.
 - It provided the complainant with information requested in parts 1, 2, 3, 4, 5 and 7;
 - In response to part 6 of the request, the Council stated that *"this information is not recorded or filed in a format that will allow it to be produced within the Freedom of Information cost threshold."* Although the Council did not specify, it indicated that it was relying on section 12 of FOIA in relation to this part of the request;
 - In relation to the remaining parts 8 to 16, the Council refused to provide the information requested, stating that it contained personal data of third parties, therefore the Council cited section 40(2) of FOIA as its basis for this refusal.
7. Remaining dissatisfied with the response, the complainant wrote back to the Council on 25 April 2020, objecting to its partial refusal of his request for information. For the purposes of FOIA, this objection submitted by the requester following the refusal notice was treated as a request for internal review.
8. On 11 May 2020, the Council provided the complainant with the outcome of its internal review. The Council provided additional reasoning on the application of section 40(2) of FOIA, but it did not change its position in relation to any part of the initial refusal.

¹ The wording of this request has been reproduced and attached to this decision notice – see Annex 1

Scope of the case

9. The complainant contacted the Commissioner on 20 May 2020 to complain about the way his request for information had been handled. During the course of the Commissioner's investigation, the complainant confirmed that his complaint was in relation to both grounds of the Council's refusal notice, sections 12(1) and 40(2) of FOIA and asked the Commissioner to make a determination whether these FOIA provisions were engaged in this case.
10. Therefore, the following analysis determines whether the Council was correct to:
 - refuse to comply with part 6 of the complainant's request based on costs and relying on section 12(1); and
 - apply section 40(2) in relation to parts 8-16 of the complainant's request.

Reasons for decision

Section 12 – cost of compliance exceeds the appropriate limit

11. Section 12 of FOIA allows a public authority to refuse to deal with a request where it estimates that it would exceed the appropriate cost limit to:
 - either comply with the request in its entirety, or
 - confirm or deny whether the requested information is held.
12. In this case the Council relied on section 12(1), meaning that it estimated that it would exceed the cost limit to comply with part 6 of the complainant's request in its entirety.
13. The estimate must be reasonable in the circumstances of the case. The appropriate limit is £600 for central government departments and £450 for all other public authorities. The cost of complying with a request should be calculated at the rate of £25 per hour - 24 hours work for central government departments; 18 hours work for all other public authorities. In forming a cost estimate a public authority can take into account the time taken to:
 - (a) determine whether it holds the information

- (b) locate the information, or a document which may contain the information
 - (c) retrieve the information, or a document which may contain the information, and
 - (d) extract the information from a document containing it.
14. The appropriate limit for the Council is £450 or the equivalent of 18 hours work.
 15. The Commissioner notes that the Council stated that in order to comply with part 6 of the complainant's request, it would need to individually examine files for 63 properties. The Council added that the file sizes of the properties in question vary, and the process of examination would take at least 20 minutes for each property. Therefore, the Council concluded that it would take more than 21 hours or more than £525 to comply with this part of the request.
 16. The Commissioner asked the Council to provide her with a detailed estimate of the time it would take to comply with the requests and the costs that would be incurred as a result of this process.
 17. In its response, the Council told the Commissioner that *"the property files are stored in the archive and in order to search for the file the Council would need to find the property reference number details."* The Council also asserted that the estimate is based on the quickest method of retrieval. However, apart from stating that it would *"need to go through each page, until finding the offer notice in order to establish the discount amount"*, the Council did not provide any supporting evidence to prove that it had carried out adequate searches to establish whether it could comply with this part of the complainant's request within the cost limit.
 18. Section 12 explicitly states that public authorities are only required to estimate the cost of compliance with a request, not give a precise calculation. However, it must be evidenced that the estimate is reasonable. The Commissioner follows the approach set out by the Information Tribunal in the case of *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency (EA/2006/0004)*² which stated that a reasonable estimate is one that is "sensible, realistic and supported by cogent evidence."

² <https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf>

19. The Commissioner notes that, when she asked the Council for its submissions, she advised the Council about the importance of providing a detailed and well-reasoned response, stating:

"When providing these calculations please include a description of the nature and the type of work that would need to be undertaken (e.g. searching X number of files– 1 hour).

In providing this estimate please be aware that a number of Information Tribunals have made it clear that an estimate for the purposes of section 12 has to be 'reasonable' which means that it is not sufficient for a public authority to simply assert that the appropriate limit has been met; rather the estimate should be realistic, sensible and supported by cogent evidence."

20. In the present case, the Council has only described, in general terms, the areas in which searches would have to be carried out. It has not provided any sufficient information regarding why it would take that long to extract the requested information from each area, such as the volume of records that would need to be searched, and whether or not keyword searches could be used. Without any detailed explanation as to how it has calculated that it would take on average of 20 minutes to examine a property file, the Commissioner cannot conclude that it is a reasonable estimate of the time and work required.
21. The Commissioner also wishes to emphasise that the estimated cost provided by the Council (21.5 hours) is just over the appropriate limit (18 hours). Bearing in mind the proximity between the estimated cost and the cost limit, the Commissioner considers that the Council has not provided sufficient evidence that its cost estimate was reasonable.
22. Apart from just stating that it has carried out a sampling exercise, the Council also failed to provide details of such a process and the Commissioner, therefore, finds that she has not been provided with cogent evidence to support the Council's reliance on section 12(1).
23. For the reasons above, the Commissioner is not convinced that the Council's cost estimate was reasonable and it is the Commissioner's decision that the Council was not entitled to rely on section 12(1) in relation to part 6 of the complainant's request.
24. At paragraph 3 of this decision notice the Commissioner requires the Council to provide the complainant with a fresh response in relation to part 6 of his information request, which does not rely on section 12(1) of FOIA.

Section 16 – Advice and Assistance

25. Under section 16(1) of FOIA the Council is obliged to provide the complainant with advice and assistance to enable the complainant to refine the request to bring it within the cost limit or explain why this would not be possible.
26. The Commissioner asked the Council whether it has provided the complainant with advice and assistance in relation to this part of the request.
27. The Council stated that no advice was provided "*as mechanisms of advice were not identified*".
28. The Commissioner's guidance provides that where it is reasonable to provide advice and assistance in the particular circumstances of the case, the minimum a public authority should do in order to satisfy section 16 is:
 - Either indicate if it is not able to provide any information at all within the appropriate limit; or
 - Provide an indication what information could be provided within the appropriate limit; and
 - Provide advice and assistance to enable the requestor to make a refined request.
29. Having considered the wording of the request and the way in which the Council records such information, the Commissioner is of the opinion that there are ways in which this part of the complainant's request could have been narrowed down so it could be responded to within the cost limit. For example by shortening the time-frame for which the information was requested, especially taking into account the proximity of the estimated costs to the cost limit.
30. Therefore, the Commissioner does not consider the Council to have discharged its duty to provide advice and assistance and so it finds that it breached section 16(1) of FOIA. Given the finding about the application of section 12(1) above and the step ordered in relation to this, the Commissioner has not ordered any step in relation to this section 16 finding.

Section 40 - personal information

31. 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.

32. In this case the relevant condition is contained in section 40(3A)(a)³. 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 UK General Data Protection Regulation ("UK GDPR").
33. 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.
34. 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 DPA principles.

Is the information personal data?

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

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

36. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. The Commissioner's guidance on what is personal data⁴ states that if information "relates to" an "identifiable individual" it is "personal data" regulated by the DPA.
37. 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.

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

⁴ <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

https://ico.org.uk/media/fororganisations/documents/1549/determining_what_is_personal_data_quick_reference_guide.pdf

38. 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.
39. In the present case, the information withheld by the Council consists of details about specific properties. The Council confirmed that all the withheld information contains personal data of various individuals, such as: contractors, Council staff, tenants and residents. It explained that *"Some of the information withheld would relate to identifiable individuals in their capacities as either employees of the Council or contractors. Other aspects of the information sought would relate to the residents and tenants of the properties in their personal capacities."*
40. In his request for internal review, the complainant told the Council that he was not seeking personal data of third parties and that *"Any sensitive or personal information can be redacted."*
41. The Commissioner's guidance on personal information⁵ states:
"The DPA defines personal data as any information relating to an identified or identifiable living individual. If an individual cannot be directly identified from the information, it may still be possible to identify them. You need to consider all the means reasonably likely to be used to identify an individual"
42. The Commissioner notes that the withheld information include details related to three specific properties and from the circumstantial information, the complainant seems to be aware of the identity of individuals residing in these properties.
43. 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's request in parts 8-16 focus on specific properties. Combining the existing information already known to the complainant with the information withheld, even if it were to be redacted, it would enable disclosure of personal information of third parties. In this case, that would be details about works carried out, price of properties, discounts applied, repairs history, which would be the personal data of the individuals residing in those properties.

⁵ <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-regulation-13.pdf>

44. As it was previously held, in her decision notices, *"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 apartment door numbers could be combined with the information already disclosed to the complainant 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."*⁶

45. 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.

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

Would disclosure contravene principle (a)?

47. Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

48. 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.

49. In order for disclosure to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

50. 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 basis for processing listed in the Article applies.

51. The Commissioner considers that the lawful basis most applicable here is basis 6(1)(f) which states:

⁶ [IC-49792-Q2P6 \(ico.org.uk\)](https://ico.org.uk)

"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"⁷.

52. In considering the application of Article 6(1)(f) of the UK 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.
53. 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

54. 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.

⁷ 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".

55. 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. The Council stated that it found no legitimate interest grounds upon which disclosing the information requested in parts 8-16 into the public domain would be lawful processing in the interest of the public.
57. The Commissioner considers that, in general, there is a legitimate interest in having access to information in relation the operation of the Right to Buy scheme. The Commissioner notes that information on this subject matter has been disclosed by the Council in response to other parts of the request. However, she 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?

58. "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.
59. In addition, the Commissioner refers to her guidance on personal information, which states that when determining necessity, consideration must be put on "*whether disclosure under FOIA or the EIR is necessary to achieve these needs or interests, or whether there is another way to address them that would interfere less with the privacy of individuals.*"
60. As mentioned above, in its response to parts 1, 2, 3, 4, 5 and 7, the Council has disclosed information in relation to the number of the properties in its ownership, type of the ownership over its properties and other statistical information in relation to the Right to Buy scheme. The Commissioner considers that the Council has struck the right balance in the circumstances of this case by revealing this information but withholding the remainder, which would make it possible to reveal the identity of other individuals.
61. The Commissioner maintains that disclosing the withheld information is not the least restrictive means of satisfying this legitimate interest of the public to know about the Council's properties and how are they managed.

62. The Commissioner also appreciates that the complainant may have a personal interest in disclosure of the withheld information based on the circumstantial information related to this case. However, she does not consider that there is a pressing social need to interfere with the privacy rights of other individuals in order to satisfy the legitimate interest in obtaining detailed information about specific properties under the Council's ownership.
63. As disclosure is not necessary, the Commissioner has decided that there is no lawful basis for this processing. It therefore does not meet the requirements of principle (a).
64. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest of transparency, she does not need to go on to conduct the balancing test and has not done so.
65. Therefore, the Commissioner finds that section 40(2) of the FOIA is engaged in respect of the withheld information.

Right of appeal

66. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

67. 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.
68. 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

Ben Tomes
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex 1

The formulation of the information request submitted by the complainant to the Council on 18 February 2020 was as follows:

"Under the Freedom of Information Act 2000, I am requesting documents which contain the following:

The Right To Buy is a policy introduced in 1980 through which the Council tenants can buy their home at a discount which increase with the length of time they have lived there. This can be a maximum of 70% off the value of the home.

(1) How many residential properties LBWF hold the freehold of?

(2) How many (LBWF) hold the freehold but not the leasehold?

(3) How many of the above have a leaseholder with a different correspondence address to the property.

(4) How many individuals own the leasehold of 5 or more homes sold through RIGHT TO BUY in the borough.

(5) How many homes has the Council bought back that it sold under the RIGHT TO BUY in the last 5 years?

(6) Of these buy backs ,if the Council could provide the amount spent on the repurchase the home ; the original RIGHT TO BUY sales price, and the size of the RIGHT TO BUY discount in the last 5 years in line with the Council's document retention policy.

(7) Total number of Council Homes sold between 2016 - 2018 under the RIGHT TO BUY SCHEME.

(8) A full list of all properties sold under the RIGHT TO BUY between 2013 - 2018.

*(9) **1 Waterhall Close E17.** the date this property became void and the total cost of voids work.*

*(10) **1 Waterhall Close E17** the date the application was made for Right to BUY by Council tenant.*

*(11) **1 Waterhall Close E17** the date this was processed from the date of application.*

*(12) **1 Waterhall Close** total sales cost of property under RIGHT TO BUY SCHEME including total discount.*

*(13) **147 Forest Road E11** please provide void date for the above property.*

*(14) **147 Forest Road E11** please provided specification of any voids work carried out to the above property and the date between 2016 - 2017.*

*(15) **147 Forest Road E11** please provide the cost for voids work to the above property.*

(16) Repairs History of 1 Maple House, The Drive E17 between 2013-2017 in line with document retention policy."