

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 February 2021

Public Authority: Sandwell Metropolitan Borough Council
Address: PO Box 2374
Oldbury
B69 3DE

Decision (including any steps ordered)

1. The complainant requested from Sandwell Metropolitan Borough Council ("the Council") a Counter Fraud Unit report regarding the allocation of a tenancy. The Council refused to provide the report in reliance on section 40(2) of the FOIA as it considered it to be the personal data of the tenant and Council officers involved in the process.
2. The Commissioner's decision is that the Council has correctly cited section 40(2) of the FOIA.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 3 September 2019, the complainant wrote to the Council and requested information in the following terms:

"Clear evidence was produced to SMBC linking Councillor A and Employee A to the allocation of council housing to Person A, who was a friend of Councillor A.

This led to a Counter Fraud Unit investigation which has apparently not been published.

SMBC will no doubt wish to claim that its internal investigations are not disclosable but given (a) the numerous allegations of fraud and corruption in respect of the allocation of council housing in the Borough and (b) the allegations of bullying of housing allocation staff at Wednesbury office by Councillor A it is clearly a matter of considerable public interest that this report is placed in the public domain subject to appropriate redactions.

Accordingly, please disclose the Counter Fraud Unit report dated 9th April, 2018 - Title X Remembrance Road."

5. The Council responded on 1 October 2019. It stated that it was withholding the information under section 40(2) of the FOIA (personal data).
6. Following an internal review the Council wrote to the complainant on 3 September 2020. It stated that it maintained the application of section 40(2).

Scope of the case

7. The complainant contacted the Commissioner on 10 September 2020 to complain about the way his request for information had been handled.
8. The scope of this notice is to determine whether the Council correctly applied section 40(2).

Reasons for decision

Section 40 - Personal information

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)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the

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

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 (“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 must establish whether disclosure of that data would breach any of the DP principles.

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. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects, that is the tenant, Council officers, Councillor and whistle-blower. She is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of “personal data” in section 3(2) of the DPA.
18. 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.
19. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

20. 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".

21. 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.
22. 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

23. 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.
24. 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.

25. 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;

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".

- 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.
26. 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

27. 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.
28. 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.
29. In his internal review request, the complainant argued that there is evidence of an allegation that a Councillor was involved in the allocation of this tenancy in the form of screenshots. He argued that there was also an investigation into an Council employee who is named in these screenshots. He stated that he did not accept that the report would identify the tenant.
30. The Council stated that the requester is seeking disclosure of this report in order to obtain information about the actions of a Councillor regarding a decision made by the Council to transfer a tenancy. The Council acknowledged that there is a legitimate interest in the actions of elected officials such as Councillors. However, it argued that in its initial response to the request it stated that the report did not find any evidence to substantiate an allegation that a Councillor had been improperly involved in the process. The Council therefore considers that there are no legitimate interests in disclosure because they have responded to the complainant's allegation regarding the conduct of the Councillor in question.
31. However, in the circumstances of this case, the Commissioner recognises that there is a legitimate interest in the information in question here in order to establish that investigations into allegations of fraud are conducted properly, Council processes are adhered to, and in the conduct of Councillors.

Is disclosure necessary?

32. "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.
33. The withheld information consists of a report which relates to a Council tenant and considered whether the officer who allocated the tenancy applied the correct procedure. The Council explained that this report was completed by its Counter Fraud team in response to a whistleblowing complaint that a Councillor had improperly interfered with the allocation of the tenancy. However, the Council argued that, *"whilst the report makes mention of that issue briefly, much of the report focusses on the details of the tenant, and how the tenancy was allocated"*. It added:

"The requestor has asked for a copy of the report as he is keen to see the evidence behind the Council's confirmation that there was no undue influence from a Councillor. The Council's view is that the report does not deal with that issue in any great detail and providing the confirmation to the requestor is sufficient to meet the purpose of the request."
34. In response to the Commissioner's investigation, the Council explained that the personal data requested is that of the tenant and the officers involved in the tenancy allocation process. It stated that the tenant and the officers have not provided consent for their information to be disclosed publicly. It argued that the interests and rights of the data subjects in this case would far outweigh the legitimate interest in the report.
35. The Council explained that the report also contains names of various officers who do not fall within the category of *"J grade and above"*, indicating that they are not senior members of staff at the Council. It explained that, in line with Council policy, these staff members would not expect their personal data to be disclosed in response to an information request.
36. The Council explained that it had confirmed to the complainant that there was no evidence to substantiate any undue influence by the Councillor in relation to the transfer of tenancy. The Council therefore considers that by explaining this to the requester it has sufficiently dealt with the overall purpose of the request by sharing the outcome of the report. It explained that the report does not contain much detail about this aspect of the allegation. Primarily, the report focusses on the

tenant's position and the Officer's decision making process. Ultimately, the Council argue that it is not necessary for the report to be disclosed publicly in order to meet the purpose of the request. It added, *"there is no pressing social need to justify the interference with privacy rights of the data subjects."*

37. The Council stated that it had considered disclosing a redacted version of the report but considered that this would render the report unreadable and incomprehensible. In addition, the Council argued that disclosure of this information would cause harm and distress to the individuals involved. The Council stated, *"it is likely in this case that the requestor would blog about the content of the report, potentially opening them up to even greater publicity which is unfair."* It concluded that there was no legal basis for disclosing this information.
38. The Council added that it, *"had not previously considered whether disclosure would be otherwise more generally unlawful. However, has since done so and believes that the Council may be open to challenge in relation to the tenant's privacy rights under Article 8 ECHR."*
39. In the circumstances of this case, the Commissioner accepts the Council's arguments that it has satisfied the legitimate interest in this case by disclosing the outcome of the report to the complainant. Having viewed the withheld information, she accepts that the report could not be anonymised in such a way that it could be rendered not personal data. The report is the personal data of the tenant, the Councillor and the officers involved. The Commissioner notes that the majority of the information contained within the report relates to the tenant as a private individual. As there was no finding of wrongdoing on the part of the Councillor, and as this outcome has been communicated to the requestor, the Commissioner does not consider that disclosure of this information is necessary.
40. The Commissioner is satisfied in this case that there are less intrusive means of achieving the legitimate aims identified and that these aims have been met.
41. 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 therefore does not meet the requirements of principle (a).

The Commissioner's view

42. 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).

Right of appeal

43. 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

44. 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.
45. 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
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