

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 6 December 2021

**Public Authority:** London Borough of Lambeth  
**Address:** Lambeth Town Hall  
Brixton Hall  
London  
SW2 1RW

### Decision (including any steps ordered)

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1. The complainant has requested information from the London Borough of Lambeth (the Council) in relation to council tax payments for a particular property during a specified period of time. The Council withheld the information requested citing section 40(2) (personal information) of FOIA as the basis for this refusal.
2. The Commissioner's decision is that the information requested at part one of the request falls within the definition of personal data. The Council was therefore entitled to withhold this information under section 40(2).
3. The Commissioner does not require the Council to take any steps as a result of this decision notice.

### Request and response

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4. On 20 October 2020, the complainant wrote to the Council and requested information in the following terms:

*"Details of any exemptions granted or gaps in council tax payments for [property address] from 1995 - 2016- if it assists we believe the property and possible the property below, number 99 were squatted during this time and presumably after had refurbishment works carried out."*

5. The Council responded on 27 October 2020. It confirmed that it held the information requested. However, the Council stated that if it were to disclose the information sought, it would be in breach of the Data Protection Act 2018. Therefore, the Council refused to provide the information requested, relying on the exemption provided in section 40(2) of FOIA.
6. Remaining dissatisfied with the response received, on the same date the complainant asked the Council to conduct an internal review.
7. Following an internal review, the Council wrote to the complainant on 26 November 2020. The Council did not change its position.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 4 December 2020 to complain about the way their request for information had been handled.
9. The Commissioner considers the scope of -his investigation is to establish whether the Council is entitled to withhold the requested information under section 40(2) of the FOIA.

### **Reasons for decision**

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#### **Section 40 – personal information**

10. 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.
11. 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 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').
12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection

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

Act 2018 ('DPA'). If it is not personal data, then section 40 of the FOIA cannot apply.

13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

**Is the information personal data?**

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

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. 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.
18. The information which has been requested relates to the council tax payments made in relation to a specific property over a particular period of time. Whilst the charge itself is based on the value of a property, the payments which are, or are not, made are considered to directly relate to that individual who is registered for council tax liability for that property. Furthermore, it provides us with details about a personal financial activity; that is how and when the relevant individual has made payments towards their council tax liability.
19. As part of his investigation, the Commissioner asked the Council to identify whose personal data it considered the requested information to be. The Council stated that it considered the withheld information to be the personal data of individuals who inhabited the specified property during a certain period of time. The Council, further explained:

*"We note that some of the information relates to times when the property was uninhabited but consider that disclosure of this information, combined with other information which may be in the public domain, could allow an individual to assess who lived at the property and when, which would constitute personal data."*

20. During the course of his investigation, the Commissioner asked the Council further questions as to how the requested information could be linked to one or more individuals.
21. The Council responded, advising that it believed that the complainant may already know, or could easily find out who the previous sellers were and, therefore, if the information were to be provided, it could be linked to the personal data of the previous sellers, including how the property was used.
22. With regards to whether that person(s) is identifiable, the Commissioner has considered if it would be possible to directly identify an individual from the address itself, or from such detail when it is linked to other information which is in the public domain.
23. The Commissioner accepts that different members of the public may have different degrees of access to the 'other information' needed for identification to take place. 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 an individual, or individuals, but begins without any prior knowledge.
24. The ICO's Code of Practice on Anonymisation<sup>2</sup> notes that The High Court in R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)<sup>3</sup> 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.
25. In summary, the motivated intruder test is that if the risk of identification is 'reasonably likely', the information should be regarded as personal data.
26. In the circumstances of this case, the Commissioner has used his own discretion to determine if the withheld information is personal data. This is due to the Council's poor response, that did not clearly explain why individuals could be identified. He is satisfied that, in this instance, it is 'reasonably likely' that the individual(s) liable for council tax at the property, throughout the specified timeframe, would be identifiable from a combination of the address and other information, which is likely to be

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

<sup>3</sup> [https://informationrights.decisions.tribunals.gov.uk/DBFiles/Appeal/i344/CO-13544-2009\\_HC\\_Judgment\\_20110420.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Appeal/i344/CO-13544-2009_HC_Judgment_20110420.pdf)

in, or come into, the possession of others. Therefore, the information could both relate to and identify any individuals who previously owned the property. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

27. 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.

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

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

29. 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".

30. 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.

31. In order 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**

32. Article 6(1) of the UK 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.

33. 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"<sup>4</sup>.*

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<sup>4</sup> Article 6(1) goes on to state that:-

34. 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.
35. 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*

36. 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.
37. 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.
38. In this case, the complainant has advised that they are requesting the information about the property, as they now own it and want to know

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*"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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".*

about periods of time where the property was empty and/or without lawful occupiers for court proceedings.

39. In any event, it is the Commissioner's view that both the complainant's interests, and the broader principles of accountability and transparency (in relation to the council's activities) appear to be relevant in this instance.
40. Given this, the Commissioner is satisfied that it can be considered that a legitimate interest is being pursued.

*Is disclosure necessary?*

41. '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.
42. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

43. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject 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.
44. 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.
45. 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.

46. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
47. The information which has been requested relates to the council tax payments for one specified property. Should this information be disclosed, it would reveal something about the private financial activities of that individual who is liable for the council tax at that property.
48. The Council explained to the Commissioner that it had not asked the individual(s) if they consent to disclosure of the information. However, it does not consider that they would consent to disclosure of this information, as it may allow them to be identified and also relates to private financial matters.
49. The Commissioner has not seen any evidence to suggest that the individuals involved would have a reasonable expectation that their personal data would be disclosed in response to an information request. The Commissioner therefore considers that disclosure of this information would be disproportionately intrusive to the data subjects as it would reveal information about the data subjects which is not otherwise in the public domain.
50. The law provides that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate.
51. Whilst the Commissioner understands the complainant's needs for wanting to obtain this information, he is mindful that disclosure under the FOIA is disclosure to the world at large and not just to the requester.
52. The Commissioner accepts that the complainant may have a private legitimate interest in having access to the withheld information. In addition, there is also a broader public interest in accountability and openness with regards to the council's operations and activities in relation to the collection of council tax, which has a direct impact on the public purse. However, in the circumstances of this case, the Commissioner does not regard either of these to carry sufficient weight to justify the disclosure of the requested information.
53. 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.

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

## Other matters

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55. The Council's letter to the complainant setting out the outcome of the internal review, was limited to one paragraph, "*We consider that the requested information was correctly refused in accordance with s40(2) FOIA as disclosure may allow an individual or individuals to be identified when combined with other information in the public domain*". The FOIA section 45 Code of Practice provides guidance to public authorities on their responsibilities under the FOIA<sup>5</sup>. Paragraphs 5.8 – 5.10 explain that the internal review procedure should provide a fair and thorough review of procedures and decisions taken in relation to the FOIA. It says that the public authority should "in all cases re-evaluate their handling of the request and pay particular attention to concerns raised by the applicant".
56. The Commissioner has set out on his website the positive benefits for public authorities of conforming with the section 45 Code of Practice.<sup>6</sup> These include improved public perception of an organisation, saving of staff time and potentially less resource being spent on dealing with complaints to the Commissioner.
57. It is far from clear to the Commissioner whether the Council conducted a fair and thorough review of the decisions taken in respect of the request in accordance with the section 45 Code of Practice. This is because the Council only provided a cursory response to the complainant regarding the outcome of its internal review. However, while the Council may have conducted a thorough internal review, the correspondence it has had with both the complainant and the Commissioner, do not demonstrate this.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/744071/CoP\\_FOI Code of Practice - Minor Amendments 20180926 .pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf)

<sup>6</sup> [Section 45 – Code of Practice, request handling | ICO](#)

58. The Commissioner expects the Council to take steps to improve its searches when receiving requests for information. He also expects the Council to perform detailed internal reviews which address the concerns raised by the requester.
59. The Commissioner is also disappointed in the level of communication the Council has had with him. The Commissioner has had to ask the Council several times for the same information, which has still not been provided fully. However, the Commissioner used his own discretion to complete this Decision Notice.
60. The Commissioner is a reasonable regulator and understands, during the circumstances of Covid-19, that there will be staff shortages. However, he does not find it reasonable that the Council should advise there will be delays due to shortages and when a response is finally provided, it consists of only a few sentences which fail to address all of the questions posed.
61. The above concerns will be logged and used by the Commissioner when considering the overall compliance of the Council.
62. We will use intelligence gathered from individual cases to inform our insight and compliance function. This will align with the goal in our Openness by design strategy to improve standards of accountability, openness and transparency in a digital age. We aim to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our Regulatory Action Policy<sup>7</sup>.

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<sup>7</sup> [Regulatory Action Policy \(ico.org.uk\)](https://ico.org.uk/regulatory-action-policy)

## Right of appeal

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

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

64. 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.
65. 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 .....**

**Michael Lea**  
**Team Manager**  
**Information Commissioner's Office**  
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