

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 September 2021

Public Authority: Winchester City Council
Address: City Offices
Colebrook Street
Winchester
Hampshire
S023 9LJ

Decision (including any steps ordered)

1. The complainant has requested from Winchester City Council ("the Council") the names and addresses of persons to whom penalty charge notices ("PCNs") had been issued in respect of loading bays in Acorn Close (for the year 2020) and in Fromund Road Spur (for the years 2015-2020). The Council withheld the requested information under section 40(2) FOIA.
2. The Commissioner's decision is that the Council correctly withheld the information under section 40(2) FOIA.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 16 December 2020, the complainant wrote to the Council and made a request for information in the following terms:
 - "1. The names and addresses of the 35 persons who received the 35 PCNs for Acorn Close Loading "Bay" and listed in your 12 August 2020 response to my earlier RFI.*
 - 2. The names and addresses of any persons who received PCNs at Acorn Close Loading "Bay" for the year 2020 (so far).*

3. For the years 2015-2020 (so far), the names and addresses of any persons who received PCNs at the Fromund Spur Loading "Bay".

5. The Council responded to the request for information on 5 February 2021 and stated that the request, whilst dated 16 December 2020, had not been received until 17 January 2021. The Council applied section 40(2) FOIA to withhold the information about the names and addresses of persons who had received PCNs in the locations in question.
6. On 9 February 2021, the complainant requested an internal review.
7. In its internal review dated 4 March 2021, the Council upheld the application of section 40(2) FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 5 March 2021 to complain about the way his request for information had been handled.
9. the Commissioner has to take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public. She must therefore consider the wider public interest issues and fairness to the persons involved when deciding whether or not the information is suitable for disclosure.
10. The Commissioner considers the scope of her investigation to be to establish whether the public authority is entitled to withhold the requested information under section 40(2) of the FOIA.
11. As the Commissioner is also the regulator of data protection legislation, she has decided that she has sufficient information to reach a decision in this case, based on the internal review arguments and her own expertise, without seeking further arguments from the Council. She has also not sought the withheld information as she does not consider that the content of the information itself would affect her decision.

Reasons for decision

Section 40 personal information

12. 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.

13. 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').
14. 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.
15. 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?

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

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

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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.
19. 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.
20. The Commissioner is satisfied that the information requested (the names and addresses of the persons to whom PCNs had been issued), if it were disclosed, would identify the individuals.
21. Therefore, the Commissioner accepts that the information falls within the definition of 'personal data' in section 3(2) of the DPA.

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

22. 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.
23. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

24. 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".

25. 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.
26. 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 UK GDPR

27. 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*" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
28. 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.

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".

29. 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.
30. 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

31. 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 sake, as well as case specific interests.
32. 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.
33. In this case, complainant indicated that the requested information was needed so that he could notify the persons that they had been fined illegally. Therefore, the Commissioner can appreciate that there may be a legitimate interest in ensuring the Council is operating legally and fairly.

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".

34. The Commissioner has to take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public. She must therefore consider the wider public interest issues and fairness to the persons involved when deciding whether or not the information is suitable for disclosure.
35. The Commissioner does consider that there is a legitimate interest in disclosure of information which may hold the Council to account and promote transparency in relation to its issuing of PCNs.

Is disclosure necessary?

36. '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.
37. The Commissioner notes that she is only able to consider the disclosure of the names and addresses of the persons who had received PCNs notices to the world at large. Disclosure under the FOIA must be the least intrusive means of achieving the legitimate aim in question at that time.
38. While the Commissioner appreciates that, in order to notify the persons regarding the legality of their PCNs, the complainant may need their names and addresses; in this particular case, the Commissioner is satisfied that there was a less intrusive means of achieving the legitimate aims identified than disclosing the information under FOIA. For example, the complainant could submit an article to the local press or post on social media regarding the legality of the PCNs issued by the Council and then each person could make their own decision on whether to pursue the matter.
39. The Commissioner also appreciates that the legitimate interest identified is to make sure the Council is operating in the correct and legal manner and that the Council has an appeals process for the PCNs issued. So, whilst the complainant is concerned that there are people who have received these PCNs who have not been reimbursed, these people will have been made aware of any appeals process if they did not feel that the notice was justified. The obligation is on the driver to challenge a PCN they believe it is unfair.
40. The Commissioner agrees that the Council *could* write to the affected persons to notify them that their PCNs might be unfair, but it is not her role to determine whether or not it *should* do so. However, even if the

Council had outright refused, she still does not consider that that would justify the names and addresses of the 35 individuals being placed indefinitely into the public domain. The Commissioner also notes that, even if the complainant's PCN was issued incorrectly, it does not mean that none of the other 35 PCNs were issued correctly.

41. As the Commissioner has decided in this case that disclosure to the world at large 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).
42. The Commissioner has therefore decided that the Council was entitled to withhold the information under section 40(2) FOIA.

Procedural Matters

43. Section 17(1) of the FOIA states that when a public authority wishes to withhold information or to neither confirm nor deny holding information it must:

within the time for complying with section 1(1), give the applicant a notice which—

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

44. The Commissioner notes that there is a conflict between the date on which the complainant believes the request should have been received and the date on which the Council says it did receive it. If the complainant is correct, the Council would not have issued its refusal notice within 20 working days and would have breached section 17 of the FOIA. If the Council is correct, no breach would have occurred. Given her decision not to seek submissions in respect of section 40(2) and that no remedial steps would be required even if a breach had occurred, the Commissioner considered that it would be disproportionate to seek submissions solely on this issue. As there is no definitive evidence to demonstrate that a breach has occurred, the Commissioner has not recorded one – although she notes that the complainant disputes the Council's timeline of events.

Right of appeal

45. 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

46. 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.
47. 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

**Catherine Fletcher
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