

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 24 August 2021

**Public Authority:** Southend-on-Sea Borough Council  
**Address:** Civic Centre  
Victoria Avenue  
Southend-on-Sea  
Essex  
SS2 6ER

#### **Decision (including any steps ordered)**

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1. The complainant has requested information with regards to an allotment society. Southend-on-Sea Borough Council (the council) responded to part of the request, but refused to provide the names of the committee members of the allotment society under section 40(2) of the FOIA as it considered it to be third party personal data.
2. The Commissioner's decision is that section 40(2) of the FOIA is engaged.
3. The Commissioner does not require the council to take any steps.

## Request and response

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4. On 11 November 2020 the complainant requested the following information:

*"My request refers to the Eastern Avenue Allotment Society, Southend-on-Sea. The committee of that society manage the allotment site on behalf of Southend Borough Council. If permitted under the Freedom of Information Act, I would appreciate you providing the following information:*

*1. The total number of complaints received by Southend Borough Council about Eastern Avenue Allotment Society and its committee members.*

*2. Copies of internal review documents relating to the complaints.*

*3. Copies of internal review documents relating to the efficacy and maintenance of Eastern Avenue Allotment Society.*

*4. The dates of any meetings between Southend Borough Council and representatives of Eastern Avenue Allotment Society, the topics that were discussed and the outcome of those meetings e.g. the agenda and minutes of such meetings.*

*5. The current number of committee members for Eastern Avenue Allotment Society.*

*6. The names of the current committee members of Eastern Avenue Allotment Society. I understand this information is already in the public domain, displayed on the wall of the trading hut at the site, however, due to Covid-19, the hut is not currently open and therefore, I cannot obtain this data."*

5. The council responded on the 11 December 2020 to each part of the request. For part 1, the council advised that no complaints were received, which therefore made parts 2 and 3 not applicable.
6. For part 4 of the request, it advised that there were two meetings in 2019 and provided extracts of them.
7. For parts 5 and 6 of the request, the council stated that it did not hold this information and advised the complainant to direct these parts of his request to the Eastern Avenue Allotment Society.

8. The complainant requested an internal review on 29 January 2021, specifically to parts 5 and 6 of the request as they considered that the council should provide the information because the committee is managing the site on behalf of the council and so the council could acquire the committee members names.
9. The complainant also asked the council to extend its search for any complaints back to 2017.
10. The council provided its internal review on 3 March 2021. It confirmed there were no complaints logged with the council.
11. With regards to parts 5 and 6 of the request, the council amended its response to advise that it held details of the allotment committee members but refused to provide them under section 40 of the FOIA as it considered this information to be the personal data of third parties.

### **Scope of the case**

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12. The complainant contacted the Commissioner on 12 April 2021 disputing the council's application of section 40 to parts 5 and 6 of his request.
13. During the Commissioner's investigations, the council no longer sought to refuse part 5 of the request, and provided the number of committee members to the complainant on 20 August 2021.
14. The scope of the case is to determine whether section 40(2) of the FOIA is engaged to part 6 of the request – the names of the committee members.

### **Reasons for decision**

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#### **Section 40(2) of the FOIA – Third party personal data**

15. 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.

16. 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').
17. 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.
18. 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?***

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

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

20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. 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.
22. 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.
23. In this case, the information being requested is the names of the committee members to an allotment.
24. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to named individuals. 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.

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

25. The fact that information constitutes the personal data of identifiable living individuals 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.
26. The most relevant DP principle in this case is principle (a).

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

27. 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".*

28. 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.
29. 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**

30. 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>2</sup>.*

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<sup>2</sup> 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 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".*

31. 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.
32. 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*

33. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
34. The council acknowledges the general principle of the public interest in transparency, but considers the committee members' names to be only of personal interest to the complainant, with no wider interest being identified or advanced.
35. The complainant states that plot holders need to know the names of committee members in the event they need to complain about a senior committee member, so they can address the complaint to a member who is impartial and could deal with the matter objectively.
36. It would appear that the most legitimate interest in this case is for plot holders having access to the names of the allotment committee members in order to direct a complaint to a particular individual.

*Is disclosure necessary?*

37. '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.
38. The complainant has stated that there is a list of the committee members available onsite at the allotment, but was unable to visit it at the time of the request due to the ongoing pandemic and associated restrictions in place, which is why the request was made.
39. As stated previously, knowing the names of the committee members would allow a plot holder to direct correspondence, such as a complaint, to a particular committee member.
40. The council has confirmed that ordinarily, the information could be obtained by a plot holder by going to the hut at the allotment, but at the time of the request, this was not an option due to restrictions on access.
41. The council has told the Commissioner that the committee members are members of the public volunteering and they have expressed concern about their names being published to the world at large and have refused their consent.
42. Whilst the information was not readily available to plot holders at the time of the request, that is not the fault of the committee members.
43. In usual circumstances, the committee members names can be obtained by plot holders – and potentially other members of the public attending the allotments with a plot holder. But, who is able to access their names in normal circumstances, is, by and large, limited.
44. The Commissioner does not see it would be necessary for the wider public to have access to the names of the allotment committee members, who are operating on a voluntary basis as it would appear that it is only plot holders that would need to know who the committee members are by name.
45. In considering whether their names should be made public knowledge, the Commissioner does not consider that disclosure is necessary to meet any legitimate interest in disclosure, and so she has not gone on to conduct a balancing test.

46. 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).
47. The Commissioner has therefore decided that the council was entitled to withhold the names of the committee members under section 40(2), by way of section 40(3A)(a) of the FOIA.



## Right of appeal

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48. 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)

49. 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.
50. 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**  
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**SK9 5AF**