

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

### **Decision notice**

**Date:** 28 March 2022

**Public Authority:** Bath & North East Somerset Council

**Address:** Lewis House  
Manvers Street  
Bath  
BA1 1JG

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

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1. The complainant has requested information with regards to a traffic proposal for double yellow lines. Bath & North East Somerset Council (the council) provided the information but redacted third party personal data under section 40(2) of the FOIA.
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 7 February 2021 the complainant made the following information request to the council:

“...to supply me with ALL and the FULL Objections and BY WHOM they were made that were submitted to the council as a response to Traffic Proposal. 20-002 dated 1/10/20. The only and partial information he has given me to date is : that there were 13 objections and gave 6 to me. Of these 6 objections, most were comments and without substance for an objection. Supply me with the FULL information I have requested. I.e. The 13 objections as communicated to you and who the objectors were.”

5. The council responded on 6 May 2021 and provided the complainant with a redacted copy of the “Officer Decision Report – Traffic Regulation”, a “Road Restriction Notice”, and a “spreadsheet of Comments”. The council explained that the redacted information was redacted under section 40(2) of the FOIA - third party personal data.
6. On 8 May 2021 the complainant requested an internal review stating that he wants to know who objected to the double yellow lines and to receive an unredacted version of the comments.
7. The council provided its internal review on 10 June 2021 maintaining its initial response.

## **Scope of the case**

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8. The complainant brought his complaint to the Commissioner on 23 July 2021 stating that he wants the council to provide an unredacted version of the comments relating to a traffic proposal for double yellow lines and the names and addresses of the people who submitted them.
9. The complainant has not disputed the redacted names and signatures of council employees on these documents, so the Commissioner will not be determining these redactions in this decision notice. As the only redaction on the “Road Restriction Notice” is a council employee’s signature, the Commissioner will not be considering this document further.
10. The scope of the case is for the Commissioner to determine whether the council is correct to rely on section 40(2) of the FOIA to make the redactions it has to the “Officer Decision Report – Traffic Regulation

Order” and “spreadsheet of comments” and to refuse to provide the names and addresses of the people who made the comments.

## **Reasons for decision**

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

11. 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.
12. 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’).
13. 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.
14. 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?**

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

“any information relating to an identified or identifiable living individual”.

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.

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

18. 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.
19. The requested names and addresses of the members of public who have made comments in relation to the double yellow lines are clearly the personal data of those individuals.
20. With regards to the redacted sections of the comments, the council state that these have been submitted by the residents living within the proximity of the location to the double yellow lines traffic proposal and would likely identify those individuals to other neighbours and the complainant.
21. The Commissioner has reviewed the redacted parts of the comments and accepts the council's view that they contain specific details or descriptions that would be likely to identify the individuals who submitted them from a combination of the requested information and other information, which is likely to be, or come into, the possession of others due to familiarity with this location and the individuals who reside in or frequent that location.
22. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the individuals that made the comments. She is satisfied that this information both relates to and identifies those individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
23. 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.
24. The most relevant DP principle in this case is principle (a).

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

25. 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".*

26. 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.

27. 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**

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”<sup>2</sup>.

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.

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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”.*

### Legitimate interests

31. 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.
32. The complainant has told the Commissioner he requires the redacted information along with the names and addresses of the individuals so that he can judge whether they are valid or not.
33. The council acknowledges that there is some legitimate interest in the public being able to access the full unredacted comments along with the names and addresses of the individuals who submitted them to ensure that the comments are submitted fairly and are relevant to those individuals to which the traffic proposal would impact.
34. The Commissioner also sees that for the public to have access to the full comments and names and addresses of the individuals would increase transparency and accountability in relation to the decisions made on the traffic proposal.

### Is disclosure necessary?

35. '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.
36. The Commissioner has considered whether disclosure of the requested information is necessary to meet the requester's specific legitimate interest and the wider legitimate interest in openness and transparency by public authorities.
37. It is important to make clear at this point that disclosure under the FOIA is disclosure into the public domain, not just specifically to the requester. The Commissioner has therefore considered whether

disclosure of the third party individuals' personal data to the world at large is necessary to meet the legitimate interests identified above.

38. The Commissioner considers that the disclosure of the withheld information is necessary to meet the legitimate interests identified above.

Balance between legitimate interests in disclosure and the data subjects' interests or fundamental rights and freedoms

39. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects 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.
40. 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.
41. 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.
42. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
43. The complainant has argued that the rules stated by the council, to those submitting comments, say that "ALL representations received may be considered in public by the council and the substance of any representation together with the name and address of the person making it could become available for public inspection".
44. The council's response to this point is that although the notice states that names and addresses may become available for public inspection, this is included in case some details are required to be disclosed as part of a committee meeting or similar.

45. The council submits that disclosure would cause unnecessary and unjustified damage and distress to the individuals to whom the information relate as they would not expect their personal information to be placed in to the public domain and the comments, although released in redacted form, allows the public to view and understand the representations made and the decision making process carried out.
46. It has explained that there is a clear process, via a Traffic Regulation Order. As part of this process, a report is produced which incorporates comments from the chief constable, ward members, cabinet members as appropriate.
47. This report is then considered by the Director of Place Management who then makes a decision as to whether the proposals should be progressed to the public advertisement stage (as proposed or modified) or is abandoned.
48. If progressed, they are 'advertised' by placing a Notice of Intent on lamp columns in the affected area (as enclosed), publishing the Notice in the press and on our website, and relevant documents are 'put on deposit' in our One Stop Shops in Bath, Keynsham and Midsomer Norton. The Notices invite comments and objections to the proposal.
49. The comments and objections that are received are added to a further report, which is then forwarded to the Director of Place Management to decide whether the proposals should be introduced as advertised, modified or abandoned. If the proposals are to be introduced, a further Notice is advertised, which confirms what is to be introduced and when . A copy of the final decision report is also forwarded to everyone who commented on the proposals. The TRO is 'sealed' by the council's Legal Team and the measures can be introduced
50. The council does not consider that the information being withheld under section 40(2), which relates to the private life of the individuals, is necessary in ensuring the process is carried out correctly.
51. The council is of the position that disclosure of this information would constitute a breach of the fairness requirement of the first principle because the individuals in question have not consented to disclosure of their personal information and would have a reasonable expectation that the council will keep their information confidential and not disclosed in to the public domain.
52. The council therefore considers that disclosure would cause unnecessary and unjustified damage and distress to the individuals concerned.
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.

**The Commissioner's view**

54. 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

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55. 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)

56. 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.
57. 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**