

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

### **Decision notice**

**Date:** 10 February 2022

**Public Authority:** Westminster City Council  
**Address:** 64 Victoria Street  
London  
SW1E 6QP

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

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1. The complainant requested details of gifts received by officers in the planning department of Westminster City Council. The Council disclosed most of the requested information but withheld the names of the officers under section 40(2) of FOIA.
2. The Commissioner's decision is that the Council was entitled to rely on the exemption at section 40(2) in respect of the withheld information. No steps are required.

#### **Request and response**

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3. On 24 December 2019 the complainant requested the following information from the Council:

"A previous FOI was made to WCC regarding gifts to officers in the planning department between 2017 and 2019 as published in the press

<https://londonnewsonline.co.uk/westminster-defends-gifting-policy-for-senior-officers-who-received-test-match-tickets-and-hotel-dinners-from-property-developers-and-private-companies/>

Please can you send me a copy of this report and please can you conduct a second report for the years 2014 to 2016. The report should list names, dates, gift and value."

4. The Council issued a refusal notice on 12 February 2020 claiming reliance on the exemption at section 22 of FOIA. The complainant requested an internal review on 19 February 2020.
5. Following an internal review the Council advised the complainant on 30 April 2020 that it did not now consider section 22 applicable. It confirmed that it was willing to disclose the requested information but said that it could not do so at that time because "the resources required to process your request are primarily involved in responding to matters arising from the Coronavirus pandemic".
6. The complainant contacted the Commissioner on 13 May 2020 to complain about the way his request for information had been handled.
7. The Commissioner wrote to the Council on 17 September 2020 to request that it disclose the requested information as soon as possible or explain how the impact of the Covid-19 pandemic prevented it from doing so.
8. Following the Commissioner's intervention the Council issued a further response to the complainant on 19 November 2020. The Council disclosed a redacted version of the requested information to the complainant, withholding the names of the receiving officers from both reports in reliance on the exemption of section 40(2) of FOIA.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 12 December 2020 to confirm that he wished to pursue his complaint.
10. The Commissioner's investigation therefore focused on the Council's reliance on the exemption at section 40(2) of FOIA in respect of the outstanding withheld information.

### **Reasons for decision**

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

11. Section 40(2) of 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 General Data Protection Regulation 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 (the DPA). If it is not personal data, then section 40 of FOIA cannot apply.
14. 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?***

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.
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. In this case the withheld information comprises the names of the Council employees who received gifts. The Commissioner is satisfied that this information obviously relates to and identifies the individuals, or data subjects other than the complainant. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
20. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under

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

the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

21. The most relevant DP principle in this case is principle (a), which is set out at Article 5(1)(a) of the GDPR:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"*.

22. 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.
23. 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***

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"*<sup>2</sup>.

25. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under 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;

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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) 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 further considers that these tests should be considered in sequential order, ie if the legitimate interest is not met then there is no need to go on to consider the necessity test, and so on.

### *Legitimate interests*

27. In considering any legitimate interest(s) in the disclosure of the requested information under 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. The complainant argued that there was a clear legitimate interest in disclosing all of the requested information so that the public could be informed as to whether members of staff had received gifts which might compromise their independence in dealing with controversial planning matters.

30. The Council accepted that there is a legitimate interest in informing the public about gifts received by senior staff, or those receiving the more expensive or generous gifts. The Council's reasoning was that senior staff are more likely to be decision makers, therefore increased scrutiny is reasonable.

31. The Commissioner agrees with the Council's assessment. Therefore the Commissioner has gone on to consider the remaining tests in the context of the names of senior staff, ie those individuals at Head of Service or above. The Commissioner is not satisfied that there is in fact a legitimate interest in disclosure of the names of more junior members of staff, on the basis that they are likely to have less influence over decision making in planning matters than senior officers.

### *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 Commissioner accepts that the only way of knowing which individuals have received gifts would be to disclose the names of the individuals in question. The Commissioner is unable to identify a less intrusive means of achieving the legitimate aims identified. For example, the withheld information, ie the information held at the time of the request, did not include the job titles of the individuals concerned, which may have offered a reasonable alternative.

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

34. 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 FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are more likely to override legitimate interests in disclosure.
35. 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.
36. 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.
37. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

38. The Commissioner asked the Council what information is given to staff to inform their expectations. The Council confirmed that it does not give staff any specific information regarding disclosure of their names into the public domain. However the Council acknowledged that more senior staff would expect relevant information to be disclosed, whereas more junior and back-office staff would not. The Council also considered that the value of the gift, regardless of grade, would be a relevant factor in the disclosure of information.
39. The Commissioner asked the Council whether it had identified any adverse consequences of disclosure. The Council advised that the withheld information was up to seven years old at the time of the request. It was therefore not possible to consult with individuals who may no longer be employed by the Council. Nor was it possible for the Council to identify the job title of each individual at the time the gift was received. The Council was however concerned that if the names of all individuals were published, those individuals could be subject to distress or even harassment.
40. The Commissioner is mindful that there is no obligation for a public authority to consult individuals when considering whether to disclose their personal data under FOIA. An authority may feel it has sufficient information to make a decision without doing so. However, in the absence of consultation it may equally be more difficult for the authority to determine the expectations and concerns of those individuals.
41. Based on the above factors, the Commissioner has determined that the legitimate interest in disclosure is outweighed by the data subjects' fundamental rights and freedoms in the circumstances of this particular case. The Commissioner is of the opinion that it would normally be expected to disclose information relating to senior staff, and information relating to higher value gifts. The Council has accepted this point and advised the Commissioner that it has now reviewed its gifts and hospitality policy to ensure proper consideration in respect of future disclosures.
42. However, the Commissioner is mindful of the circumstances of this particular case. She accepts that the Council cannot readily distinguish between junior and senior staff, owing to the age of the information and way it was held at the time of the request. The Commissioner considers that it would be disproportionate to require the Council to undertake the work required to ascertain the seniority of each member of staff in this case. The Commissioner also acknowledges the difficulty in obtaining contact details for individuals who may have left the Council's employment over the past seven years. The Commissioner therefore accepts that it is not possible for the Council to form a comprehensive

view as to the potential consequences of disclosure on individuals who previously received gifts or hospitality.

43. The Commissioner therefore finds that there is no Article 6 basis for processing and so the disclosure of the information in this particular case would not be lawful. Given this conclusion, the Commissioner is not required to go on to consider whether disclosure would be fair or transparent.
44. Since the Commissioner is satisfied that disclosure would be unlawful, and would contravene the first DP principle, the Commissioner finds that the Council was entitled to rely on section 40(2) in respect of the withheld information.

### **Other matters**

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45. The Commissioner has advised the Council of his view that the way the withheld information was held at the time of the request is unsatisfactory. The Commissioner would expect public authorities to publish registers of gifts and hospitality proactively as part of a publication scheme. This is set out in the Commissioner's guidance and recently updated definition document for local government.<sup>3</sup>
46. The Council has confirmed to the Commissioner that it now has a new gifts and hospitality policy, and a new register which will include job titles. Consequently the Council should be able to identify seniority of staff and publish relevant information proactively in the future. The Commissioner welcomes this practice improvement.

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<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/definition-documents-2021/4018891/dd-principal-local-authorities-20211029.pdf>

## Right of appeal

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47. 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)

48. 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.
49. 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 .....**

**Sarah O’Cathain  
Senior Case Officer  
Information Commissioner’s Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**