

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

### **Decision notice**

**Date:** 14 May 2015

**Public Authority:** London Councils  
**Address:** 59½ Southwark Street  
London  
SE1 0AL

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

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1. The complainant has requested information relating to Parking on Private Land Appeals (POPLA). London Councils (LC) disclosed some information but refused to disclose other information under sections 40 and 41 of the FOIA.
2. The Commissioner's decision is that LC has correctly applied sections 40 and 41 of the FOIA to all remaining withheld information. He therefore requires no further action to be taken.

#### **Background**

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3. This decision notice follows on from the LC's compliance with a former decision notice issued on 8 September 2014 under case reference FS50529300. Case reference FS50529300 considered the complainant's information request of 7 December 2013. The decision notice that was issued decided that sections 40 and 41 of the FOIA had been applied correctly to some information. However, the notice also considered LC's arguments that some of the information held is not held for the purposes of the FOIA. In the decision notice the Commissioner stated that he did not agree and that he considered this information is held by LC for the purposes of the FOIA. He therefore ordered LC to issue a fresh response under the FOIA for this information.
4. LC complied with the decision notice and issued a fresh response to the complainant. Some further information was disclosed to the complainant but other information was withheld under sections 40 and 41 of the FOIA.

5. Case reference FS50564182 was then set up to consider the complainant's information request of 7 December 2013 again and LC's recent application of sections 40 and 41 of the FOIA to the remaining withheld information. This decision notice is to outline the Commissioner's final decision.

## **Request and response**

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6. The complainant's request of 7 December 2013 to LC was worded as follows:

"Request #1

I refer you to the following Freedom of Information (FoI) request (link below) to which you assigned the reference #170856 (see your letter to [name redacted] dated 27 August 2013).

<https://www.whatdotheyknow.com/request/p...>

Within FoI request #170856 there is reference to an earlier FoI request, reference #S-2013-15, where similar information had previously been requested and provided.

There are documents that were provided pursuant to FoI request reference #S-2013-15 that were not provided pursuant to FoI request reference #170856. Please provide the missing correspondence/documents (listed below for ease of reference), together with an updated "Final Spreadsheet BPA correspondence" as provided with replies to FoI request reference #S-2013-15.

Missing documents/correspondence

E42  
E45 + enclosure  
N3  
N4  
N12  
N20  
N21 + enclosure  
N54  
N59  
N71

## Request #2

Please provide copies of all correspondence between London Councils' officers and representatives, both internal and with any other party (including the BPA Ltd, Patas, Popla and other BPA Ltd. members) regarding exclusion of the above named missing documents/correspondence."

7. Following the Commissioner's decision notice of 8 September 2014, LC issued a fresh refusal notice on 14 October 2014. LC disclosed some information but withheld other information under sections 40 and 41 of the FOIA.
8. The complainant requested an internal review on 18 October 2014.
9. LC carried out an internal review and notified the complainant of its findings on 14 November 2014. LC released some further information to the complainant but remained of the view that sections 40 and 41 applied to some of the information.

## Scope of the case

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10. The complainant contacted the Commissioner on 4 December 2014 to complain again about the way his request for information had been handled. He asked the Commissioner to consider the remaining withheld information and LC's application of sections 40 and 41 of the FOIA to see whether further information should be released under the FOIA.
11. The Commissioner's investigation has focussed on the remaining withheld information and LC's application of sections 40 and 41 of the FOIA. He will now address the application of each exemption in turn.

## Reasons for decision

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### Section 40 – personal data

12. Section 40(2) of the Act states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (DPA).
13. Firstly, the Commissioner must consider whether the requested information is personal data. Personal data is defined in Section 1 of the DPA as follows:

“personal data” means data which relate to a living individual who can be identified -

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

14. LC confirmed that it redacted the names and email addresses of two junior staff members within LC and the names and email addresses of several external individuals with whom it had been corresponding. It stated that it also redacted the names of individuals mentioned within the text of some emails. LC explained that these individuals can quite obviously be identified from the redacted information and so this information falls within the definition of personal data outlined in the DPA.
15. The Commissioner considers the names of the individuals concerned (whether LC’s employees or external individuals or those referred to in the text of some of the information) and the email addresses of some of these individuals is obviously personal data. It is information from which the individuals could be easily identified and so the information constitutes personal data.
16. As the Commissioner is satisfied that the information does constitute personal data, he now needs to consider whether disclosure of this information would breach any of the data protection principles outlined in the DPA or section 10 of the DPA.
17. LC argued that disclosure of this information would breach the first data protection principle outlined in the DPA. The first data protection principle states that:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -

  - (a) at least one of the conditions in schedule 2 is met, and
  - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”
18. For the two LC employees, LC explained that these individuals hold junior roles within LC and do not have public facing positions. It argued

that these two employees would therefore hold no expectation that their personal data could be disclosed to the world at large.

19. For those external individuals, LC confirmed that they have not consented to the disclosure of their personal data and again do not hold senior positions in the organisations they work for or public facing roles. LC explained that these individuals would have no expectation that their names and email addresses could be disclosed by LC in response to an FOIA request. To the contrary, these individuals would be of the understanding that their identity and contact details would remain private and confidential.
20. LC advised that the names of some individuals discussed within the information have also been redacted under section 40 of the FOIA. LC explained that these individuals were not responsible for the email exchanges concerned and were simply mentioned in the body of these exchanges by other individuals. LC argued that these individuals would have no expectation that their names would be released into the public domain in connection with these email communications. They may have no knowledge of these communications or their connections to them and had no control over how they were mentioned in connection with this matter.
21. LC confirmed that it considers disclosure of this information would therefore be an invasion of the privacy of these data subjects and given the context of the request itself may cause them distress and upset. As such LC believes disclosure would be unfair and in breach of the first data protection principle.
22. LC advised the Commissioner that the information disclosed in this case and other information disclosed in response to very similar requests has been written about on several occasions on the websites of parking campaigners. It considers that it is likely that if this personal data was disclosed it would be publicised in a similar way and discussed on such campaigner's websites. In the past these websites have attacked the personal integrity of employees at LC, the British Parking Association (BPA) and parking organisations. It therefore has significant concerns that the disclosure of this information may lead to similar attacks on staff which will cause these individuals distress and upset.
23. LC stated that it understood there was a legitimate public interest in the work of senior officers of public authorities and accepted there should be transparency and accountability. It added that such individuals are responsible for decision making and the proper functioning of the service areas they are responsible for and should be individually accountable for the activities they undertake. However, in this case the redacted information is either the personal data of junior staff at LC, the personal

data of employees in the private sector over which it has no control or the personal data of individuals that have been named by others in the email communications falling within the scope of this request. LC does not consider any legitimate interest in this information outweighs the prejudice to the rights and freedoms of the data subjects concerned that disclosure would cause.

24. The Commissioner considers LC has explained in detail why it considers the disclosure of the remaining withheld information would be unfair. He has given the matter careful consideration and he agrees with LC. He will now explain why.
25. The Commissioner accepts that within a public sector organisation junior staff will generally have the expectation that their personal data will remain private and confidential by their employer. It is only more senior staff or those employees with a public facing role which have some expectation of public scrutiny due to the decisions they make within a public sector role or due to frequency they meet and address the public and publicly represent the organisation they work for.
26. In this case LC has confirmed that the remaining withheld personal data relates to junior members of staff or those employees who do not hold a public facing role.
27. In relation to private sector personal data, the Commissioner accepts that these individuals will have communicated information to LC with an expectation of privacy and confidence. They may hold the expectation that the information they supply may be used and disclosed to others in the course of LC's functions but they would not have any expectation that their names and email addresses could be disclosed to the world at large. LC has also explained that it believes some of these individuals hold more junior roles within the company they work for and for the same reasons explained above they will have even less expectation that their personal data could be released into the public domain.
28. The Commissioner also agrees that the names of individuals quoted in the emails communications by others should not be disclosed. He considers disclosure of this information would be unfair on those individuals concerned. They may not have any knowledge of their names being dropped into such emails communications and have had no control over the fact that they have been referred to. Such emails often discuss a particular topic or issue and these individuals have been mentioned in these communications in a particular context. Again they have had no control over the way they have been mentioned or the context in which they are referred to and so disclosure would be unfair. The Commissioner is making no reference to the contents of the remaining withheld information but in general terms he can envisage similar

situations where disclosure of this sort of information could lead to reputational damage and considerable distress.

29. For all remaining personal data, the Commissioner accepts that disclosure would be an unwarranted intrusion into the private lives of the individuals concerned and could lead to distress and upset.
30. The Commissioner also notes the council's concerns about campaigners' websites and its prior experience of some staff being victimised and challenged due to their connection with parking matters. He accepts the information in question here would be useful to such individuals wishing to victimise those involved in parking matters and that such incidences would cause the data subjects distress and upset when they are simply either carrying out a public function for the public authority concerned or following the instructions of their private sector employer.
31. The Commissioner acknowledges that there is a legitimate public interest in the disclosure of some personal data when this relates to senior members of staff in a public sector organisation. These employees generally make important and significant policy making decisions. He also accepts that public sector employees with public facing roles should also expect some level of transparency and accountability.
32. However, the Commissioner considers any legitimate public interest in the disclosure of the personal data of junior staff is much more limited. They often hold more administrative roles and are generally connected to a particular topic such as parking in this case because they are carrying out administrative functions on behalf of the more senior members of staff in the organisations they work for who have overall responsibility. Such members of staff do not have the expectation that they will need to be publicly accountable for the administrative functions they perform. Whereas more senior staff do as a result of the important decisions they make and the level of responsibility they have.
33. The Commissioner does not consider any legitimate interest in the disclosure of this information outweighs the prejudice to the rights and freedoms of these individuals.
34. For similar reasons, the Commissioner does not consider any legitimate public interest in the disclosure of private sector employees' personal data and the names of those individuals referred to in the contents of some of the email communications outweighs the prejudice to the rights and freedoms of these individuals. The Commissioner has explained above why he considers disclosure would be unfair on these individuals and he is not aware of any overwhelming legitimate public interest in

the disclosure of this information that would warrant the prejudice and intrusion disclosure may cause.

### **Section 41 – information provided in confidence**

35. Section 41(1) of the FOIA stated that information is exempt from disclosure if:
  - (a) it was obtained by the public authority from any other person (including another public authority); and
  - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
36. LC confirmed that the requested information consists of a number of emails it received from either the BPA or some parking companies. Some of the emails are communications between LC itself and BPA or a parking company and some emails communications are communications between the BPA itself and the parking companies to which LC has been copied into in confidence.
37. The Commissioner has reviewed the information and he is satisfied in this case that the requested information was obtained by LC from another person or organisation. In this case the requested information was obtained from either the BPA or some parking companies and so the first element of this exemption is met.
38. The Commissioner now needs to consider whether disclosure of this information would constitute an actionable breach of confidence. The Commissioner considers the relevant consideration here is whether the requested information has the necessary quality of confidence, was imparted in circumstances that gave rise to a duty of confidence and whether disclosure would cause any detriment to the confider – the BPA and the parking companies in this case.
39. For the information to have the necessary quality of confidence it must not be trivial and otherwise available to the public. Information which is of a trivial nature or already available to the public cannot be regarded as having the necessary quality of confidence.
40. The Commissioner notes that this information is information supplied to LC in its role as the body conducting Parking on Private Land Appeals (POPLA). It is information that was shared with LC in confidence for the purposes of carrying out this function only. The information is not trivial or otherwise publicly available and so it has the necessary quality of confidence.

41. The Commissioner also accepts that the withheld information was imparted to LC in circumstances importing an obligation of confidence. Although he has not seen any contractual confidentiality clause which may be applicable to the requested information, the Commissioner is nonetheless satisfied that the requested information was supplied under an implicit duty of confidence. LC confirmed that the information was supplied to it in accordance with its functions as the body conducting POPLA and with the understanding that it would only be used for these purposes and would remain confidential. Given the contents of the information and the manner in which it was supplied to LC, the Commissioner is satisfied that LC owes the BPA and the parking companies concerned a common law duty of confidence.
42. As the Commissioner is satisfied that the information was imparted in circumstances giving rise to a duty of confidence, he now needs to consider whether there would be any detriment to the confider (BPA and the parking companies concerned) if this confidence was breached. As the Commissioner has already considered all redacted personal data under section 40 of the FOIA above and agreed this exemption applies, the relevant consideration here is whether there would be any commercial detriment to the confider (BPA and the parking companies concerned) if the confidence owed was breached by the disclosure of the remaining information.
43. Where commercial information is purported to have been imparted in confidence (which is the case here) the Commissioner considers that there would have to be a detrimental impact to the commercial interests of the confider (BPA and the parking companies concerned) for the exemption to be engaged.
44. The Commissioner has reviewed the remaining withheld information and he is satisfied that disclosure would be likely to cause commercial detriment to the confiders (BPA and the parking companies concerned). The Commissioner considers the remaining withheld information is a series of free and frank exchanges of views between BPA, some parking companies and the council relating to the operation of POPLA. The Commissioner cannot refer to the contents in any detail because to do so would defeat the purpose of this investigation. However, he is satisfied that the disclosure of the remaining withheld information would be likely to cause some commercial detriment to the confiders, whether the BPA or the private parking companies concerned.
45. Although section 41 of the FOIA is an absolute exemption and is therefore not subject to the public interest test outlined in the FOIA, case law on the common law concept of confidence suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence.

46. The Commissioner must therefore now consider whether there is a public interest defence on which the council could rely. Public interest considerations under section 41 are different to the considerations of the public interest test outlined in the FOIA. In the FOIA a presumption in favour of disclosure must always be applied. However, under section 41 the starting point is that the information must not be disclosed *unless* the public interest arguments in favour of disclosure exceed the public interest arguments in favour of maintaining the confidence.
47. The Commissioner considers there is a public interest in transparency and accountability and in disclosing information to enable the public to assess how POPLA is managed and how LC is carrying out its role. However, this must be weighed against the potential commercial damage which disclosure may cause.
48. The courts have taken the view that the grounds for breaching confidentiality must be valid and very strong, since the duty of confidence is not one which should be overridden lightly. As decisions taken by the courts have shown, very serious public interest matters must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality.
49. Although the complainant has drawn the Commissioner's attention to a draft audit letter issued by LC's auditor and to a related party relationship being identified (the council's Corporate Director of Services was also a Director for the BPA), the Commissioner does not consider this fact alone carries sufficient weight as a public interest defence to warrant breaching the duty of confidence that is owed to the confiders in this case. The Commissioner has seen no evidence of misconduct, illegality or gross morality and notes from the conclusion of this letter that LC's auditor overall considered in their professional judgement that LC complied with UK regulatory and professional requirements, including the Ethical Standards issued by the Auditing Practices Board and its objectivity was not compromised.
50. The Commissioner has therefore concluded that section 41 of the FOIA applies in this case.

## Right of appeal

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51. 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: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

52. 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.
53. 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 .....**

**Rachael Cragg**  
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**Information Commissioner's Office**  
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