

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 February 2024

Public Authority: London Borough of Brent
Address: Civic Centre
Engineers Way
Wembley Park
Wembley
HA9 0FJ

Decision (including any steps ordered)

1. The complainant submitted a request to the London Borough of Brent (the council) for information relating to the identity of a freeholder.
2. The Commissioner's decision is that the council was entitled to refuse part two of the request under section 21 (information readily available), and correctly relied upon section 40(5) of FOIA to refuse to confirm or deny whether it held the information, in relation to part three of the request. However, in failing to issue an appropriate refusal notice, confirming the exemptions which the council ultimately came to rely on, the Commissioner has determined that the council has breached section 17(1) of FOIA.
3. The Commissioner does not require further steps as a result of this decision notice.

Request and response

4. On 11 July 2023, the complainant wrote to the council and requested information in the following terms. For ease, the Commissioner has numbered them to align with the council's response:

"To facilitate a comprehensive understanding of the situation, I kindly request that you provide the following information:

1. Confirmation of the method through which the details of the freeholder were ascertained.
 2. Any evidence or documentation available that can corroborate the identity of the freeholder.
 3. A summary of the communication that has been examined, relating to tenant, freeholder, tenant's friend."
5. A response was provided on 11 July 2023, in which the council confirmed that, in relation to part one, it holds the information, but cannot release it due to third party data. Regarding parts two and three, the council explained that it cannot release information concerning third party data. The council also confirmed that, in relation to part three, information that did not contain third party data had already been provided to the complainant.
6. Upon receiving this response, the complainant submitted an internal review request on 11 July 2023, and on 15 August 2023, the council provided its internal review response, in which it stated it could neither confirm nor deny holding communications between the investigating officer and occupants of the neighbouring property. The council also disclosed a further record of conversation between the investigating officer and the complainant.

Scope of the case

7. The complainant contacted the Commissioner on 26 September 2023 to complain about the way their request for information had been handled.
8. During the Commissioner's investigation, the council provided a revised response to the complainant, in which, in relation to part one of the request, it confirmed the method used to ascertain the identity of the freeholder. Regarding part two, the council applied section 21, and neither confirmed nor denied holding the information, in relation to part three, and therefore applied section 40(5) of FOIA.

9. The Commissioner wrote to the complainant, to see if they were satisfied with the revised response. The complainant expressed dissatisfaction with it, stating that "it is not acceptable as it is too generic" and that "each layer in the management team is covering up the facts".
10. The Commissioner, therefore, has considered the council's handling of the request, and in particular its application of sections 21 and 40(5) of FOIA to the request.

Reasons for decision

Section 21 – information accessible to applicant by other means

11. Section 21 of FOIA provides that information which is reasonably accessible to the applicant is exempt information.
12. Section 21 is an absolute exemption which means that there is no requirement to carry out a public interest test, if the requested information is exempt.
13. Unlike most exemptions, the circumstances of the applicant can be considered, as the information must be deemed readily accessible to the particular applicant.
14. It is reasonable for a public authority to assume that information is reasonably accessible to the applicant as a member of the general public, until it becomes aware of any particular circumstances or evidence to the contrary.
15. In its revised response, and in relation to part two of the request, the council provided the complainant with a link to the HM Land Registry website¹.
16. The council informed the complainant that any evidence or documentation that can identify the freeholder can be obtained from Land Registry.

¹ <https://www.gov.uk/government/organisations/land-registry>

17. Upon accessing the main page of Land Registry (using the link provided to the complainant), a list of main options are provided, the first being 'search property ownership information.' Clicking this link begins a process where an individual can submit an application to obtain property ownership information by ordering a 'Title Register' of a property; this requires payment of a fee of £3.
18. The council confirmed that the information was available, via this link, at the time of the request and that the complainant has stated that they had accessed the information.
19. Therefore, it is the Commissioner's decision that the council was entitled to apply section 21 of FOIA to the information requested in part two of the request.

Section 40(5)-neither confirm nor deny

20. Section 1(1)(a) of FOIA provides that where a public authority receives a request for information, it is obliged to tell the applicant whether it holds that information. This is commonly known as the 'duty to confirm or deny'.
21. There are, however, exemptions from the duty to confirm or deny. It should be noted that when applying an exemption from the duty to confirm or deny, a public authority is not restricted to only considering the consequences of the actual response that it would be required to provide under s1(1)(a). For example, if it does not hold the information, the public authority is not limited to only considering what would be revealed by denying the information was held, it can also consider the consequences if it had to confirm it did hold the information and vice versa.
22. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny does not arise if it would contravene any of the principles relating to the processing of personal data, set out in Article 5 of the UK General Data Protection Regulation EU2016/679 ('UK GDPR') to provide that confirmation or denial.
23. Therefore, for the council to be entitled to rely upon section 40(5) of FOIA to refuse to confirm or deny whether it holds information falling within scope of part three of the request, the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and

- Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

24. Section 3(2) of the Data Protection Act 2018 defines personal data as:

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

25. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
26. 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.
27. The Commissioner is satisfied, from reviewing the request and having considered the submissions provided by the council, that if the council were to either confirm or deny it held the information, it would, in effect, publicly confirm that there had been communications between the council, tenant, freeholder, and tenant's friend. The first criterion is therefore met.
28. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party (or parties) does not automatically prevent the council from refusing to confirm whether it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
29. The Commissioner agrees that should the council either confirm or deny holding information in relation to part three of the request, it could lead to individual(s) being identified and information being released about them.
30. The Commissioner recognises that individuals have a clear and strong expectation that their personal data will be held in accordance with data protection laws. In this case, the Commissioner is satisfied that the individual(s) concerned would not reasonably expect the council to confirm to the world at large, whether it held particular personal information about them in response to a FOIA request.
31. He has also determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.

32. Whilst the Commissioner notes that this is an important and personal issue to the complainant, and he notes their additional arguments about the identity of the freeholder, he can only address whether the council is correct to say that there is no lawful basis, under data protection, to confirm or deny that it holds the requested information.
33. As there is no lawful basis for doing so, confirming or denying would be unlawful and therefore the council was correct to rely on section 40(5) of FOIA to neither confirm nor deny that the requested information is held.

Procedural matters

34. Under section 17(1) a public authority that is relying on an exemption to neither confirm nor deny that information is held, must issue a refusal notice within 20 working days.
35. As the council did not provide a refusal notice specifying any exemptions being relied upon, within 20 working days, it breached section 17(1) of FOIA.

Right of appeal

36. 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

37. 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.
38. 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

Joanna Marshall
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF