

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

### **Decision notice**

**Date:** 28 May 2019

**Public Authority:** Hastings Borough Council  
**Address:** Town Hall  
Queens Road  
Hastings  
East Sussex  
TN34 1QR

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

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1. The complainant has requested the information for a council employee from the electoral register.
2. The Commissioner's decision is that Hastings Borough Council is entitled to rely upon FOIA section 40(2) – personal information, to withhold the information.
3. The Commissioner does not require the council to take any steps.

## Request and response

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4. On 1 November 2019, the complainant wrote to Hastings Borough Council ('the council') and requested information in the following terms:  
  
*"SUBJECT OF REQUEST*  
  
*VOTERS LIST*  
  
*IN REFERENCE TO*  
  
[name redacted]  
  
*RESIDING IN EAST SUSSEX"*
5. The council responded on 5 November 2018. It refused to provide the requested information and cited the following exemption as its basis for doing so: FOIA section 40 (2) – personal data.
6. Following an internal review the council wrote to the complainant on 13 December 2018. It upheld its original position.

## Scope of the case

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7. The complainant contacted the Commissioner on 13 December 2018 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of the case is to consider whether or not the council are correct to withhold the requested information on the basis of section 40(2).

## Reasons for decision

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### Section 40 personal information

9. 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.

10. 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').
11. 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.
12. 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?***

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

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

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. 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.
16. 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.
17. The "Voters List" referred to by the complainant is the Electoral Register. The council have confirmed that the data subject of the request is a council employee ('the council employee').
18. The Electoral Register lists the names and addresses of everyone who is registered to vote in public elections. As is normal practice in the UK, the Electoral Register is available for public inspection under supervision

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

and by appointment with the council. The Commissioner notes that the council have advised the complainant of the procedure for making an appointment to view the register. As stated, the Electoral Register holds name and address information. Critically, in regard to the circumstances of this case, the Commissioner notes that it does not identify details such as the employer of an individual or their location of employment.

19. The personal data in this case therefore is the identification of an entry in the Electoral Register that relates to a particular council employee.
20. Having considered the withheld information, the Commissioner is satisfied that the information relates to and identifies the council employee. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
21. 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.
22. The most relevant DP principle in this case is principle (a).

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

23. Article 5(1)(a) of the GDPR states that:

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

24. 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.
25. 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**

26. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.
27. 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>

28. In considering the application of Article 6(1)(f) of the 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.
29. 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*

30. In considering any legitimate interest(s) in the disclosure of the requested information under the 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.

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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".*

31. 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.
32. The complainant expressed the basis for his complaint as "*It seems the council is not complying with EU Law or if it is not then it must ignore the GDPR as we have signed article 50*". Following further enquiries from the Commissioner, the complainant advised that a correct personal address is required in order to make a complaint to the Solicitors Regulation Authority ('the SRA'). The Commissioner has deduced that the complainant wishes to make a complaint about the council employee to the SRA.
33. The Commissioner does not consider the pursuit of a complaint with the SRA to be viable legitimate interest argument for the identification of the council employee's entry in the Electoral Register and the subsequent release of private home address information under the auspices of the FOIA.
34. The Commissioner finds that the council is entitled to rely upon section 40(2) of the FOIA to withhold the information.

## Right of appeal

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35. 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@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)

36. 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.
37. 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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**