

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

### **Decision notice**

**Date:** 10 December 2019

**Public Authority:** London Borough of Brent  
**Address:** Brent Town Hall  
Forty Lane  
Wembley  
Middlesex  
HA9 9HD

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

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1. The complainant made two requests for various items information about a decision taken to prosecute his brother for littering. The London Borough of Brent ("the London Borough") provided some information and withheld some information which it said would attract legal advice privilege. It also stated that it did not hold some of the requested information.
2. The Commissioner's decision is that all the information that has been withheld is the complainant's brother's personal data. As the complainant has made the request on behalf of his brother, with his brother's consent and knowledge, he was therefore standing in his brother's shoes when making the request. As such the Commissioner has applied section 40(1) of the FOIA to prevent disclosure. She also finds that the London Borough holds no further information in respect of Request 1 and has thus complied with its section 1 duty in respect of that request. As the London Borough failed to discharge its section 1(1) duty in respect of either request within 20 working days, it breached section 10 of the FOIA in responding to both requests. As it failed to issue a refusal notice in respect of Request 2 within 20 working days, it also breached section 17 of the FOIA in responding to that request.
3. The Commissioner does not require the London Borough to take any further steps.

## Background

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4. On 29 January 2019, the complainant's brother was parking his car in an on-street parking bay. The precise sequence of events which then followed is disputed. The London Borough claims that one of its officers witnessed the complainant's brother drop a small bottle out of the car, whilst it was stationary, before pulling his car out of the bay. The complainant's brother claims that, as he opened the door to ascertain whether or not he was lawfully and safely parked, the bottle fell out. He argued that he fully intended to pick it up, once he had completed his parking manoeuvre, but that he was not given the opportunity to do so.
5. What is not in dispute is that the officer proceeded to issue the complainant's brother with a Fixed Penalty Notice (FPN), pursuant to Section 87 of the Environmental Protection Act 1990, for littering. The complainant's brother had the option to pay an £80 fine or leave himself liable to being prosecuted for a criminal offence of littering.
6. The complainant's brother made representations to the London Borough as to why he believed the FPN had been issued unfairly. When these initial representations were unsuccessful, the complainant himself began acting on his brother's behalf.
7. As well as making representations, the complainant also attempted to bring judicial review proceedings against the London Borough and referred a complaint to the Local Government and Social Care Ombudsman (LGSCO), which was refused.
8. On 20 June 2019, four weeks before a magistrate's hearing was due to take place, a senior legal assistant at the London Borough wrote to the complainant's brother stating that she had considered whether or not to proceed with a prosecution and that:

*"Having considered the paperwork and analysed the case I am satisfied that both the Evidential [sic] and the Public interest tests have been met. However; as a gesture of good will the council has exercised its discretion and made a decision not to proceed with this matter."*

## Request and response

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### Request 1

9. On 25 September 2018 the complainant contacted the Council to complain about the way that his brother's case had been handled. He also requested information of the following description:

*"Please advise on the following and raise it with your FIO team if need be:*

- 1) How many officers were involved with this matter including complaints officers?*
  - 2) How many hours of officers times was spent in dealing with this matter including complaints officers?*
  - 3) Please quantify the total hours spent in terms of costs?*
  - 4) Please explain the legal costs incurred in this matter as the legal team involved. If in house, please advise of the inter departmental cost/charging?*
  - 5) Please advise of the total costs in officers time, legal team costs and all costs in pursuing this pointless matter?*
  - 6) Please advise of Brent Councils Official Complaints Policy as I still have not had it to date.*
  - 7) Please advise and explain the objectivity and independence in how this matter and complaint was handled.*
  - 8) Was the matter actually set for an official hearing at court? Who made this decision and why?*
  - 9) What was the cost for setting the hearing at court? Were those costs refund to Brent Council?*
  - 10) Please explain the entire process clearly about how a case passes from waste enforcement, appeal/representation to the legal team and then referred to court. Who makes the decisions and what arfe the costs involved?" [sic]*
10. The London Borough responded to Request 1 on 25 October 2018. It provided information in respect of elements [1], [6], [7], [8], [9] and

[10]. It denied holding information in respect of elements [2], [3], [4] and [5].

### Request 2

11. On 18 October 2018, the complainant added to his request as follows:

*"I would also now like to now request the full file/s in this matter, with all the correspondence between all the teams and officers. In particular I would like to see evidence of the decision making, deliberations, and reasons for deciding to progress this matter as far as Brent Council officers did."*

12. The London Borough responded to Request 2 on 6 December 2018. It refused to provide the requested information. It stated that, as the information was not the complainant's but his brother's, it was therefore the personal data of a third party and thus exempt under section 40(2) of the FOIA. It also stated that the legal file would be covered by legal professional privilege and thus the exemption at section 42 of the FOIA.

13. The complainant requested an internal review of both responses on 21 December 2018. He argued that he had been representing his brother for some time and that the London Borough had corresponding with him on that basis. Therefore to "hide behind" data protection laws would be unfair.

14. The London Borough sent the outcome of its internal review on 23 January 2019. It upheld its original position in relation to Request 1 but did not appear to mention Request 2.

### **Scope of the case**

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15. The complainant contacted the Commissioner on 23 April 2019 to complain about the way his request for information had been handled.

16. In lengthy grounds of complaint, he argued that his brother had been a victim of maladministration on behalf of the London Borough and that they both wished to investigate why this had happened. The complainant argued that he had his brother's consent to handle the whole matter including the making of FOIA requests – and therefore it was illogical for the London Borough to state that it could not supply his brother's personal information. He also argued that the London Borough should hold information within the scope of elements [2] to [5] of Request 1.

17. At the outset of her investigation, the Commissioner wrote to the London Borough setting out that she considered that, given the wording of Request 2, it seemed likely that any information the London Borough held would be the complainant's brother's personal data. Given that the complainant was standing in his brother's shoes for the purposes of the request, it was therefore likely that any information falling within the scope of Request 2 would attract the exemption at section 40(1) of the FOIA (personal data of the requestor), rather than section 40(2). She therefore asked the London Borough to separate out any information which it did not consider to be personal data and advised it to treat any residual information as a subject access request.
18. The London Borough responded on 3 November 2019. It still maintained that some of the information would attract legal professional privilege and noted that a considerable amount of information had already been disclosed under SAR. The Commissioner therefore asked that the London Borough furnish her with copies of any withheld information which was not the personal data of either the complainant or his brother.
19. The London Borough responded to the Commissioner on 27 November 2019. It highlighted four documents to which it was seeking to apply section 42 of the FOIA – along with arguments to demonstrate why the exemption was engaged.
20. Having considered the withheld information, the Commissioner notes that some, if not all, of the information might attract privilege (although she makes no formal finding in this notice). However more fundamentally the withheld information, when read with the request, was clearly the personal data of the complainant's brother.
21. The Commissioner has therefore taken the decision to apply section 40(1) proactively to the withheld information in its entirety, preventing its disclosure.
22. The analysis that follows explains why the Commissioner has exercised her discretion in this manner.
23. For completeness, the Commissioner has also considered whether the London Borough holds more information within the scope of Request 1 as well as commenting on the procedural handling of both requests.

## Reasons for decision

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### Section 40(1) – personal data of the requestor

24. Section 1(1) of the FOIA states that:

*Any person making a request for information to a public authority is entitled –*

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

25. Section 40(1) of the FOIA states that:

*"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."*

26. The Commissioner notes that, whilst the precise wording of the request itself did not name the complainant's brother, his name did appear in the subject line of the email – along with his case reference number. The email in question also followed a longer chain of emails in which the complainant and his brother discussed the FPN with the London Borough.

27. When read in context, "*this matter*" could therefore only be understood to refer to the impending prosecution of the complainant's brother. Thus the *only* information which the London Borough could have provided, which would have fallen within the scope of the request, would be information concerned with "*this matter*." Such information would both "relate to" the complainant's brother and, when read together with the request, identify him.

28. The Commissioner also notes that the complainant's brother is named in two of the documents – further confirming that the information will be his personal data. It is disappointing that, despite being asked to look at this on two separate occasions, the London Borough was unable to identify this.

29. Whilst the Commissioner has not, herself, received a formal Letter of Authority from the complainant's brother, she has been provided with a copy of a letter authorising the complainant to act on his brother's behalf in pursuing the FPN with the London Borough. The Commissioner also notes that the email address which the complainant's brother

initially used to correspond with the London Borough has been copied into most of the correspondence which the complainant has had with both the London Borough and herself in relation to the FOIA requests.

30. The Commissioner therefore takes the view that the complainant's brother is fully aware of the request and is content for the complainant to make the request on his behalf. Given that, the Commissioner considers that the complainant was standing in the shoes of his brother when making the request and hence the London Borough should have responded as if the request had been made by the complainant's brother himself.
31. The Commissioner is also responsible for regulating Data Protection legislation and, as such, takes her responsibility to protect personal data seriously when considering information which can be disclosed under either the FOIA or the EIR. She will therefore step in and apply exceptions (or exemptions) herself to prevent disclosure of personal data where she considers this necessary in order to avoid a breach of data protection legislation.
32. Disclosure under the FOIA is considered to be disclosure to the world at large and not to the complainant (or his brother) specifically. It is the equivalent of the London Borough publishing the information on its website.
33. In this case, the Commissioner considers that the London Borough should not be publishing such information and she has thus applied section 40(1) to prevent the information being disclosed. Section 40(1) is an absolute exemption and the Commissioner is not required to consider either the balance of public interest or the complainant's wishes.
34. The Commissioner therefore concludes that, as the information in question is the personal data of the complainant's brother, on whose behalf the request has been made, section 40(1) is engaged and the London Borough was not obliged by the FOIA to disclose the withheld information.

Is further information held?

35. In relation to elements [2]-[5] of Request 1, the complainant argued that the London Borough must hold information on the amount of time (and, therefore, money) spent on the prosecution.
36. In both its response and its internal review, the London Borough argued that it did not hold the requested information because it did not record officer time against specific cases.

37. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, she will consider any reason why it is inherently likely or unlikely that information is not held.
38. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
39. The London Borough explained to the Commissioner that it did not ask its officers to fill in time sheets which would allow the requested information to be deduced. It noted that its officers would deal with multiple different cases in the same day and a single case would stretch over multiple days – making costs difficult to calculate.
40. The Commissioner accepts that it is not unusual for a public authority not to record the amount of officer time spent on particular matters as there will often be no business need for the information to be recorded. She accepts that the London Borough holds no recorded information from which the requested information could be derived and therefore she is satisfied that, on the balance of probabilities, the London Borough does not hold further information within the scope of the request.
41. The complainant also sought to have the London Borough supply him with an estimate of the time spent. Such a request would fall outside the scope of the FOIA. A public authority is not required to "guess" what a particular number might be. It must either hold the information in recorded form already, or it must hold, in recorded form, the "building blocks" from which the information could be constructed or derived (such as calculating an average from a set of raw data).

## Procedural Matters

### *Section 10 – Timeliness*

42. Section 10 of the FOIA states that a public authority must comply with its section 1(1) duty "*promptly and in any event not later than the twentieth working day following the date of receipt.*"
43. The London Borough failed to confirm or deny holding information and failed to provide information it held in respect of Request 1 within 20 working days. It also failed to confirm or deny what information it held within the scope of Request 2 within 20 working days.

44. From the evidence presented to the Commissioner in this case, it is clear that, in failing to issue a response to either request within 20 working days, the London Borough has breached section 10 of the FOIA.

*Section 17 – Refusal Notice*

45. Section 17(1) of the FOIA states that when a public authority wishes to withhold information or to neither confirm nor deny holding information it must:

*within the time for complying with section 1(1), give the applicant a notice which—*

- (a) states that fact,*
  - (b) specifies the exemption in question, and*
  - (c) states (if that would not otherwise be apparent) why the exemption applies.*
46. By failing to issue its refusal notice to Request 2 within 20 working days, the London Borough also breached section 17 of the FOIA.

## 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: 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)

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 .....**

**Phillip Angell  
Group Manager  
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