

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

### **Decision notice**

**Date:** 11 October 2023

**Public Authority:** Exeter City Council  
**Address:** Civic Centre  
Paris Street  
Exeter  
EX1 1JN

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

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1. The complainant has requested information on council tax rebate payments. Exeter City Council ("the council") refused the request, applying section 40(2) (personal data of third parties), and section 44 (statutory prohibition on disclosure) to withhold the information.
2. The Commissioner's decision is that the council was not correct to apply either section 40(2) or section 44(1) to withhold the information.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
  - To disclose the withheld information to the complainant.
4. The council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. Following an earlier request for information which was partially refused on the grounds that it would exceed the appropriate limit, on 26 April 2023 the complainant wrote to the council and requested information in the following terms:

"Given the restrictions you have set out, please can you provide the following information:

6) How many properties under your council tax jurisdiction have a credit balance of £150 on their council tax account as at today (or at the closest available date in the 2023/24 council tax year, specifying which date has been used);

7) How many of the properties in "6)" had at least one individual in council tax exemption class N as at 1 April 2022?

If this data is not available, please provide the figures as at the date used in "6)" (specifying which date has been used)."

6. The council again refused part 7 of the request on the grounds it would exceed the appropriate limit to respond to it. It responded to part 6 of the request providing the figure 1084 properties as at 2 May 2023.
7. Following the council's refusal of part 7 of the request, the complainant again submitted a narrower request for information on 5 May 2023:
- "Given the restrictions you have set out, please can you provide the information requested in question 7 for the first 100 (one hundred) properties in alphabetical order you have identified in your answer to question 6."
8. On the basis of the chain of requests, therefore, the complainant has requested how many houses from the alphabetical first 100 of records falling within the scope of part 6 of the request had at least one person in council tax exemption class N. The class N exemption applies to a property occupied only by students, school or college leavers (until 31 October in the year of leaving), or non-British partners and dependants of students who are not allowed to work or claim benefit.
9. The council responded on 22 May 2023 and refused the request on the basis that section 40(2) of FOIA applied.

10. The complainant requested an internal review on the basis that he was not asking for any personal data. After carrying out an internal review of its decision, the council wrote to the complainant on 19 June 2023. It amended its response and applied section 40(2) and section 44(1) of FOIA.

### **Scope of the case**

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11. The complainant contacted the Commissioner on 20 June 2023 to complain about the council's response to his request.
12. During the course of the Commissioner's investigation the council also sought to argue that it does not hold the requested information as this would require the creation of new information from other sources. The Commissioner will therefore also consider whether the information is held by the council for the purposes of section 1 of FOIA.
13. The council also argued that if it is required to create the information, then it will require further clarification from the complainant regarding the order he would like the cases in. It said that it is not clear whether it should be ordered by taxpayer name or address (road name). The complainant had stated that he wished the information to be provided by property in alphabetical order. The Commissioner therefore does not consider this argument to be correct – the data should be calculated by addresses (road names), in alphabetical order.
14. It also argued that it is unable to confirm whether either ordering is possible as the current report from the Council Tax system runs in Council Tax reference numerical order and the original listing to give the 1,084 cases it has located only gives the account reference as an identification.
15. The Commissioner considers that this is not an argument in relation to section 1, but an argument that responding to the request would exceed the appropriate cost limit. However, the council has not applied section 12 to refuse the request following the further narrowing of its scope by the complainant. Nor has it provided any estimates or evidence to the Commissioner demonstrating why it considers that responding to the narrowed request would exceed the appropriate limit. Therefore, the Commissioner has not considered this argument further within this decision notice.

16. The scope of the following analysis is to initially consider whether the information is held by the council for the purposes of section 1. If the Commissioner decides that the information is held, then he must also consider whether the council was correct to withhold the information under section 40(2) and 44(1).

## Reasons for decision

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### **Section 1 – General right of access to information**

17. Section 1(1) requires that a public authority must inform a requestor, in writing, whether it holds information falling within the scope of the request. If it does hold relevant information, it also requires that it communicates the information to the requestor, subject to any exclusions or exemptions applying.
18. In scenarios where there is some dispute between the amount of information which a public authority says it holds, and the amount of information that a complainant believes is held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
19. In other words, in order to determine such complaints, the Commissioner must decide whether, on the balance of probabilities, a public authority holds any - or additional - information which falls within the scope of the request.

#### The council's position

20. The council confirmed that it holds the requested information in the form of raw data. It argued, however, that responding to the request would require it to extract relevant data from two different screens of its database and collate information from these to create new information. It therefore argues that the requested information is not held for the purposes of section 1(1) of the Act.

#### The Commissioner's analysis

21. The Commissioner has considered the council's argument. Whether information is held or not is determined as an issue of fact. The council has demonstrated that it holds the raw data necessary to respond to the complainant's request for information.

22. The Commissioner's guidance<sup>1</sup> on such situations is that where the "building blocks" necessary to produce the requested information are held, an authority is likely to hold that information unless it requires particular skills or expertise to put the building blocks together to provide the requested information.
23. The council argues that the information requested would need to be compiled by an officer with expert knowledge of the council tax service and software and it is therefore information not held by the council.
24. The Commissioner, however, does not consider that ordering the properties into alphabetical order and counting how many of these are subject to exemption N for the relevant dates is such a complex task that it amounts to the information not being held.
25. The Commissioner has not therefore been persuaded by the council's arguments, and he has therefore decided that it holds the information for the purposes of FOIA.

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

26. 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.
27. In this case the relevant condition is contained in section 40(3A)(a)<sup>2</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 UK General Data Protection Regulation ('UK GDPR').
28. 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.
29. 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.

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/determining-whether-we-hold-information/>

<sup>2</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

***Is the information personal data?***

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

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

31. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

32. 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.

33. 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.

34. The requested data is a number which is in an anonymised format. The council also accepts that when disclosed, the data would not identify any individuals.

As the council has itself stated that the requested information would not identify any individuals, the Commissioner is satisfied that the information is not personal data for the purposes of the DPA 2018. As the information is not personal data, section 40(2) cannot apply in this instance.

35. The Commissioner has therefore decided that the council’s application of section 40(2) was not correct in this instance.

**Section 44(1) prohibition on disclosure**

36. The following analysis explains why the Commissioner is satisfied that the public authority was not entitled to apply section 44(1)(a) of FOIA to refuse the request for information.

37. Section 44(1)(a) provides that:

*“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it -*

*(a) is prohibited by or under any enactment,”*

38. The council argues that it is prohibited from disclosing the requested information as personal data would need to be processed in order to analyse and collate the information necessary to respond to the request. It argues that this processing would be in breach of the individuals' rights under the UK GDPR, and therefore, there is a statutory prohibition on it processing the data in this way in order to respond to the request.

39. It argues that the personal data is held by the council so that it can perform its statutory duty of administering and collecting Council Tax. It has published [Council Tax Privacy Notices](#) which set out the purpose for processing Council Tax information, and notifies individuals how their information will be used. It argues that these notices do not inform individuals that their information may be processed for the purposes of responding to information access requests, and therefore processing their personal data for this purpose would be in breach of both the first and second data protection principles.

a) Principle (a) states that personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency').

The council argues that accessing personal Council Tax records for the purpose of responding to the request would not be fair and transparent. Council tax payers have not been advised that their personal information may be used for this purpose, and council tax payers would not therefore expect their personal information to be accessed for this purpose.

b) Principle (b) states that personal data shall be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes.

The council argues that accessing personal council tax records to determine whether an individual has claimed a council tax exemption is incompatible with the purpose that it was collected for.

40. The council therefore argues that there is a statutory prohibition on it carrying out the work necessary in order to respond to the request.

#### The Commissioner's analysis

41. The Commissioner notes that the exemption in section 44 specifically applies to the disclosure of information which is subject to a statutory bar. In order for the exemption to be engaged, therefore, the council must demonstrate that the *disclosure* of the requested information is prohibited.

42. The council's argument, however, is not that there is statutory bar on it disclosing the requested information. It argues that there is a statutory bar on it processing personal data in order to collate the requested information.
43. The requested data is not personal data, and the council has not argued that the specific information which would be disclosed falls under any statutory bar.
44. The Commissioner's decision is therefore that the council was not correct to apply section 44(1) of FOIA to withhold the information from disclosure. He therefore requires the council to disclose the requested information to the complainant.

### **Other matters**

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45. The Commissioner notes the council's arguments that its council tax privacy notices do not inform individuals that their personal data may be processed for the purposes of responding to information requests.
46. Personal data may often need to be processed in order to respond to information access requests. The Commissioner therefore suggests that the council considers whether it needs to update its privacy notices to include this purpose.



## 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 .....**

**Ian Walley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**