

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 September 2023

Public Authority: Bristol Waste Company
Address: Albert Road
St Philips
Bristol BS2 0XS

Decision (including any steps ordered)

1. The complainant has requested information about the expenses of three managing directors of Bristol Waste Company (BWC). The Commissioner's decision is that BWC has failed to demonstrate that section 40(2) of FOIA (personal data) is engaged in respect of the majority of the information. The Commissioner also finds that BWC's refusal notice didn't meet the requirements of section 17(1) of FOIA.
2. The Commissioner requires BWC to take the following steps to ensure compliance with the legislation:
 - Except for the one item described in the confidential annex to this notice, disclose the remainder of the requested information to the complainant. BWC must first redact personal vehicle registration numbers, bank account details, personal home and email addresses and a signature from the information it's disclosing.
3. BWC 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

4. BWC is a company wholly owned by Bristol City Council.
5. The complainant made the following information request to BWC:

“Please provide the copies of invoices for any expenses incurred by any and all of the last three managing directors of Bristol Waste, over the last two years.”
6. BWC responded to the request, advising only that, “In accordance with the provisions of the FOI Act, this request is refused.”
7. On 12 May 2023 the Commissioner instructed BWC to issue the complainant with a refusal notice that complied with FOIA [section 17].
8. BWC wrote to the complainant again on 7 June 2023. It told the complainant that it considered their request wasn’t a valid request under FOIA as they’d requested documents (“copies of invoices”) and not information. However, BWC then advised that it was “self-explanatory” that the request was for personal data, which would contain personal data of people to whom it would owe a duty under the Data Protection Act 2018 (DPA). BWC advised it doesn’t have an internal review process.
9. In its submission to the Commissioner, BWC said that it was prepared to send the complainant a spreadsheet that contained expenses information within scope of the request, but not in date order and without names or other identifying details.
10. The Commissioner put this possible compromise to the complainant. However, the complainant confirmed that they’d only be satisfied with the expenses information in the format they’ve requested ie copies of invoices.

Reasons for decision

11. In its submission to the Commissioner, BWC has confirmed that it’s withholding the requested information under section 40(2) of FOIA.
12. On 8 September 2023 BWC sent the Commissioner copies of invoices that it’s withholding. On 19 September 2023, BWC sent copies of two further relevant invoices it had identified. However, one of these duplicated an invoice that it had already sent, and which is discussed at paragraphs 30- 32.

13. This reasoning covers whether BWC is entitled to withhold the information the complainant has requested under that exemption. The Commissioner will also consider BWC's refusal of the request. Finally, he will discuss the matter of 'information' as opposed to 'documents' under 'Other Matters'.
14. Section 40(2) of FOIA provides that information is exempt from disclosure if it's 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.
15. In this case the relevant condition is contained in section 40(3A)(a). 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').
16. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it isn't personal data, then section 40 of FOIA can't apply.
17. Second, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosing that data would breach any of the DP principles.

Is the information personal data?

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

"any information relating to an identified or identifiable living individual".
19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
20. 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.
21. 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.
22. The complainant has requested information about the expenses of BWC's managing directors over the preceding two years. BWC has sent

the Commissioner a copy of the requested information that it's withholding.

23. In its submission to the Commissioner, BWC has noted that "the invoices", ie the information, will identify individuals either directly (by name) and/or indirectly by reference to the date that the applicable invoice is raised. This is because that will relate to the period of time each managing director was in post. BWC considers that the information will reveal personal information about each of those individuals, including but not limited to eating habits/preferences; professional memberships and/or subscriptions.
24. Having reviewed the withheld information, the Commissioner is satisfied that the requested information relates both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
25. The fact that information constitutes the personal data of identifiable living individuals doesn't automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
26. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

28. In the case of an FOIA request, the personal data is processed when it's 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.
29. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.
30. The Commissioner considers that one item within scope of the request can, in its entirety, be categorised as the special category personal information of a specific individual. This is because it concerns a broadly medical matter. Special category personal data is particularly sensitive and therefore warrants special protection.
31. The Commissioner has seen no evidence or indication that the individual concerned has specifically consented to this data being disclosed to the world in response to a FOIA request or that they have deliberately made this data public.

32. As none of the conditions required for processing special category data are satisfied there's no legal basis for disclosing it. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of FOIA. The Commissioner has gone on to consider the remaining information.

Lawful processing: Article 6(1)(f) of the UK GDPR

33. Article 6(1) of the UK 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.

34. 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".

35. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it's necessary to consider the following three-part test:

- **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information
- **Necessity test:** Whether disclosing the information is necessary to meet the legitimate interest in question
- **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subjects, the managing directors in this case.

36. 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

37. In considering any legitimate interest(s) in disclosing the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is

pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

38. In its submission BWC has said that it doesn't consider there's a legitimate interest in the disclosure of, "... not information, but copies of documents (invoices) for managing directors over the past three years." It says that the complainant hasn't made their legitimate interest clear, and it is "none the wiser." What's more, BWC says, it's "... perplexed about what, if any, legitimate interest lies, in the disclosure of the documents sought."
39. The Commissioner notes that the complainant could have explained their interest in the information they're seeking if BWC had cited section 40(2) and discussed this exemption more fully in its refusal notice, or if it had offered an internal review process.
40. The complainant has explained to the Commissioner that BWC has been the subject of public and media attention for the last few months¹. They say that a number of directors have left within a short space of time and that two of them were given undisclosed payoffs for loss of office.
41. The complainant goes on to say that after the directors resigned in quick succession, an interim director was paid £39k for 11 weeks, which is an equivalent salary of £170k. The complainant says that there are a "huge" number of unknowns concerning how BWC was run. In its annual accounts, Bristol City Council claims it has assurance that BWC's governance arrangements are "in place and effective". But, the complainant notes, BWC is now also subject to a police investigation for fraud².
42. The complainant considers it's important that, at the very least, the public is able to see what expenses it was paying for.
43. In addition to the above, there's also the general principle of accountability and transparency, which BWC doesn't appear to have considered when dealing with this request.

¹ <https://www.bristolpost.co.uk/news/bristol-news/two-top-bristol-waste-bosses-8495622>

² <https://www.bbc.co.uk/news/uk-england-bristol-64860734>

Is disclosure necessary?

44. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
45. In its submission, BWC has said that because it can't identify a legitimate interest in disclosure, it can't answer the necessity test. But it has noted the Commissioner's own directive, which states:
- "The fact that there is a right of access to information under FOIA and the EIR does not in itself constitute a pressing social need for disclosure."
46. Bristol City Council discloses the executive salaries for its wholly owned companies in its annual accounts, and the Commissioner assumes it also publishes this information for its own senior officers. But as far as the Commissioner can see, neither Bristol City Council nor BWC publish (on their respective websites) information about BWC's senior managers' expenses.
47. As such, disclosing the requested information would be necessary to meet the complainant's legitimate interests and the legitimate interest in transparency.

Balance between legitimate interests and the data subjects' interests or fundamental rights and freedoms

48. It's necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it's necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
49. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause
 - whether the information is already in the public domain
 - whether the information is already known to some individuals
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.

50. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
51. It's also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
52. In this case the Commissioner notes that the former and current managing directors of BWC were and are the most senior paid public official in that organisation, with a remuneration package that is ultimately funded by public taxes. That package will include the right to have reasonably incurred expenses reimbursed. There is a legitimate interest in making public what expenses payments have been made to the individuals who were and are in that role so that they can be held accountable.
53. The Commissioner publishes information about his own expenses and those of his Executive Team³. It's not uncommon for expenses information as well as salary information associated with public authorities' most senior officers to be put in the public domain.
54. The withheld material being discussed includes personal vehicle registration numbers, bank account details, personal home and email addresses and a signature. The Commissioner considers that the data subjects would reasonably expect that this particular information would not be disclosed to the world at large under FOIA.
55. However, the Commissioner considers that the former and current managing directors in this case should have the reasonable expectation that the remaining information about their expenses payments, relating to their professional lives, could be made public.
56. In respect of the information that the data subjects might expect could be released, based on the above factors the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner

³ <https://ico.org.uk/media/about-the-ico/documents/4022688/ico-executive-team-corporate-expenditure-2022-23.pdf>

therefore considers that there is an Article 6 basis for processing that particular information and so disclosing it would be lawful.

Fairness and transparency

57. Even though it has been demonstrated that disclosing the requested information under FOIA would be lawful, it's still necessary to show that disclosure would be fair and transparent to satisfy principle (a).
58. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, disclosure will usually be fair for the same reasons. No reasons have been put forward to suggest why disclosure would be unfair even if it were lawful.
59. The requirement for transparency is met because as a public authority, BWC is subject to FOIA. Disclosure is therefore consistent with principle (a) of the UK GDPR.

The Commissioner's view

60. In this instance, the Commissioner has decided that BWC has failed to demonstrate that the exemption at section 40(2) is engaged in respect of most of the remaining information BWC is withholding.
61. To address a point that BWC has made, BWC has the option of providing context to the information it discloses, as necessary.

Procedural matters

62. On 12 May 2023 the Commissioner instructed BWC to issue the complainant with a refusal notice that complies with FOIA.
63. Under section 17(1) of FOIA, a public authority that intends to withhold information under an exemption must issue the applicant with a refusal notice, within 20 working days following the date of receipt of the request. The refusal notice should (i) state that the authority's withholding the information, (ii) cite the exemption being relied on and (iii) explain why the exemption applies.
64. In this case, the refusal notice that BWC finally provided to the complainant first discussed the validity of the complainant's request. When it turned to information it was withholding, BWC referred to personal data but didn't cite the exemption on which it was relying. BWC's initial response to the request hadn't provided any reason for refusal at all.

65. In terms of its content and when it was provided, the Commissioner doesn't consider BWC's refusal notice was adequate and finds that BWC breached section 17(1) of FOIA.

Other matters

66. Members of the public can't be expected to know the format in which a public authority holds particular records.
67. It's quite clear in this case what the complainant is requesting – information about directors' reimbursable expenses: who was reimbursed how much, for what, why and when. As such, the Commissioner considers that BWC's attempt to claim the request is not valid, as the complainant has requested documents and not information, is specious – as well as incorrect.
68. As the Commissioner's guidance makes clear, where a public authority receives a request for a document, it should treat the request as a valid request for all the information contained in that document.⁴
69. In practice it will usually be more convenient to simply provide a copy of the document, rather than extracting the information it contains. But there may be occasions where, for example, only a small section of a large document is not covered by an exemption. Where that is the case, the public authority may provide only the non-exempt information, rather than the whole document – but it must issue a refusal notice explaining why the remainder of the document cannot be provided.

⁴ https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/the-right-to-recorded-information-and-requests-for-documents/#_Dealing_How_should

Right of appeal

70. 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

71. 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.
72. 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

Cressida Woodall
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