

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 13 April 2015

**Public Authority:** North East Lincolnshire Council  
**Address:** Municipal Offices  
Town Hall Square  
Grimsby  
DN31 1HU

#### Decision (including any steps ordered)

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1. The complainant has requested information which he believes was sent to a named person by North East Lincolnshire Council. The information is thought to concern the depositing of debris on the highway by the named individual. The Council responded to the complainant's request by neither confirming nor denying whether it held the requested information in reliance on section 40(5) of the FOIA.
2. The Commissioner's decision is that the Council has correctly applied the provisions of section 40(5) in the circumstances of this case.
3. The Commissioner does not require the public authority to take any further action in this matter.

#### Request and response

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4. On 14 November 2014, the complainant wrote to North East Lincolnshire Council ("the Council") and requested information in the following terms:

*"I understand from Humberside Police that North East Lincolnshire Council have provided information to an individual, known as [a named person] who resides at [a given address], that this particular person has two weeks to clean Walk Lane, Irby upon Humber, North East Lincolnshire following the date of each occurrence of mud, dirt and filth deposited on the said highway for which he is responsible for.*

*In the light of this I request a complete copy of the information provided to this individual by North East Lincolnshire Council and in particular which legislation, for example the Highways Act or the Environmental Protection Act, permits this."*

5. The Council responded to the complainant's request on 26 November 2014. The Council identified that the information sought by the complainant would, if it was held, constitute the personal data of a third party. The Council advised the complainant that section 1 of the Freedom of Information Act normally requires it to confirm or deny whether or not the information is held, however in this case the duty to confirm or deny does not apply by virtue of section 40(5).
6. On 26 November, the complainant wrote again to the Council: He asked the Council to review its decision to withhold the information he seeks.
7. The Council completed its review and informed the complainant of its final decision on 24 December. The review determined that the Council was satisfied that it had acted in accordance with the Freedom of Information Act in the handling of his request.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 24 December 2014 to complain about the Council's refusal of his request. The complainant asked the Commissioner to assess whether or not the Council has correctly applied section 40(2) of the FOIA.
9. This notice is the Commissioner's decision in respect of the Council's reliance on section 40(5) to withhold the information which is sought by the complainant.

### **Reasons for decision**

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### **Relevant background information**

10. Under section 149(1) of the Highways Act 1980 a highway authority may serve a notice on any person who is responsible for depositing material on a highway to the extent that it is causing a nuisance. Such a notice may require the responsible person to remove the deposited material forthwith and failure to comply with the notice may result in a complaint being made by the highway authority to a magistrate for a 'removal and disposal order'.

## **Section 40 – Personal information**

11. The council has relied on section 40(5) of the FOIA to neither confirm nor deny whether it holds the information which the complainant seeks. Section 40(5) states:

“The duty to confirm or deny —

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

12. In order to rely on the exemption provided by section 40, the information being sought must constitute personal data as defined by the Data Protection Act 1998 (“the DPA”). The DPA defines personal data as:

‘...data which relate to a living individual who can be identified

a) From those data, or

b) From those data and other information which is in the possession or, or is, likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect to the individual.’

13. The Commissioner has considered the nature of the information which the complainant seeks. He is satisfied that this information, if it is held, clearly relates to a living person, regardless of whether it is in his/her personal capacity or business capacity, and would satisfy the definition of personal data set out above.

14. Furthermore, because the information, if it is held, relates to the actions which may or may not have been taken by the Council in respect of its statutory powers, it would also constitute sensitive personal data by virtue of the definition provided by section 2 of the DPA. The relevant parts of section 2 of the DPA state:

“...sensitive personal data means personal data consisting of information as to—

(g) the commission or alleged commission by him of any offence,

or

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.”

15. The Commissioner must now consider whether disclosure of the requested information, if it is held, would breach any of the data protection principles contained in Schedule 1 of the DPA. He considers that the first data protection principle is the one most relevant in this case.

### **The first data protection principle**

16. The first data protection principle has two components:

1. Personal data must be processed fairly and lawfully, and
2. Personal data shall not be processed unless at least one of the conditions in Schedule 2 of the DPA is met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

17. In this case the Council has asserted the following position: Where the Council is undertaking, or is thought to be undertaking, enforcement activities against a person, he or she would expect a level of confidentiality in respect of that activity up to the point where a notice is issued under section 149 of the Highways Act 1980. Where a notice is issued by a magistrate's court the person's reasonable expectation of confidentiality would cease. To disclose information relating to enforcement activity could potentially prejudice any future prosecution which the Local Authority may wish to undertake.

18. The Commissioner accepts the Council's position and accordingly finds that it would be unfair to the named person, in the circumstances of this case, to have his or her information, if it is held, put into the public domain.

19. Although the Commissioner's finding means that he is not required to consider the conditions set out in Schedules 2 and 3 of the DPA, he has, for the sake of completeness gone on to do this.
20. The Commissioner has found no relevant condition in Schedule 3 which would permit disclosure of the type of information sought by the complainant in the circumstances of this case. The Commissioner therefore finds that the section 40(5) of the FOIA is engaged.

### **The public interest test**

21. The Council's reliance on section 40(5) is subject to consideration of the public interest test.

### **The public interest factors which favour disclosure**

22. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. In this case an argument can be made to the effect that it is in the public interest to be assured that the Council is carrying out its statutory duties in respect of the highways and that it is pursuing persons who leave debris on the roads in its area.

### **Arguments in favour of maintaining the exemption**

23. The Commissioner has already noted that the Council is able to refer any particular case to a Magistrates' Court and that a removal and disposal order may be subsequently made. This order is made public and the Commissioner considers that this is the point at which accountability and transparency is most properly achieved and where the Council can be seen to be prosecuting its duties under the Highways Act.
24. The Commissioner understands that press releases are made concerning the serving of notices or the prosecution of offenders in respect of the Council's formal highway enforcement. The press releases give details of the nuisance and its location.
25. The Commissioner considers that the public interest is not served by placing information into the public domain where such disclosure could prejudice a potential future prosecution.

### **Balance of the public interest**

26. The Commissioner has carefully considered the representations made by the complainant and the Council. The Commissioner has also weighed what he considers are the main arguments germane to the public

interest test. He has decided that greater weight must be given to the arguments which favour maintaining the Council's application of section 40(5) and therefore the Commissioner's decision is that the Council is entitled to neither confirm nor deny whether it holds the information sought by the complainant.

## Right of appeal

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27. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

28. 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.
29. 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**