

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 17 July 2014

**Public Authority:** Hampshire County Council  
**Address:** Ell Court South  
The Castle  
Winchester  
Hants  
SO23 8UJ

#### Decision (including any steps ordered)

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1. The complainant has requested to know what particular qualifications a council employee, who is now retired, had in surveying and cartography. Hampshire County Council (HCC) initially refused to provide the information relying on section 40(2) of the FOIA, but then amended its position during the Commissioner's investigation to neither confirm nor deny holding the information under section 40(5) of the FOIA.
2. The Commissioner's decision is that the council has correctly relied on section 40(5) of the FOIA to neither confirm nor deny holding the information.
3. The Commissioner does not require the council to take any steps.

#### Request and response

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4. On 19 October 2013 the complainant requested information of the following description:

*"Please could you inform me of what formal and professional qualifications in surveying and cartography were held by [name redacted]."*
5. The council responded on the 4 November 2013. It refused to provide the requested information, relying on section 40(2) and (3)(a)(i) of the FOIA. It considered the information to be exempt as it is personal information of a third party.

6. The complainant requested an internal review on the 10 November 2013. The council provided its internal review response on the 5 December 2013. It maintained its initial decision.

### **Scope of the case**

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7. The complainant contacted the Commissioner 12 December 2013 to complain about the way his request for information had been handled.
8. During the Commissioner's initial investigations, the council amended its position, to instead rely on section 40(5) of the FOIA to neither confirm nor deny that it holds the information requested rather than section 40(2) of the FOIA. The council advised the complainant of this on the 9 May 2014.
9. The Commissioner considers the scope of the case is to determine whether the council is able to rely on section 40(5) of the FOIA to neither confirm nor deny whether it holds the requested information.

### **Background**

10. The complainant has explained to the Commissioner that the council employee who the information has been requested about, and who retired from the council in (year redacted), held the position of (position redacted) for the council. The employee wrote a report to recommend an upgrade of the complainant's access to a restricted byway. The council's regulatory committee has made its decision to recommend the upgrade based on this report.
11. The complainant does not consider that the employee was properly qualified and so is questioning the validity of the report.

### **Reasons for decision**

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#### **Section 40(5) – Neither confirm nor deny**

12. Section 40(5) of FOIA states that

*"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)."*

13. The council is of the opinion that confirming or denying whether particular qualifications were held would in itself breach one of the data protection principles.
14. In order for the Commissioner to determine whether the council are correct to rely on section 40(5) of the FOIA, to neither confirm nor deny the information requested is held, the Commissioner will need to determine if the information requested, if it were held by the council, would constitute personal data. If it is personal data, then he must decide if disclosure would breach any of the data protection principles.

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

15. Personal data is defined by the Data Protection Act 1998 (DPA) as any information which relates to a living individual who can be identified from that data or from that data along with any other information in the possession or is likely to come into the possession of the data controller.
16. The Commissioner is satisfied that the information, if held by the council, would fall within the definition of personal data as set out in the DPA because it 'relates to' an identifiable living person.

### **Would disclosure contravene any of the Data Protection Principles?**

17. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focussed on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of disclosure against the legitimate public interest in disclosing information.

### **Reasonable expectations**

18. The information, if held by the council, would identify whether [name redacted] had formal and/ or professional qualifications in surveying and cartography. The council has stated to the Commissioner that [name redacted] job role did not require these qualifications. When positions are advertised the role profile is published, which includes the qualifications that are required.
19. The council has told the Commissioner that it would expect to confirm qualifications held by some officers where the qualification is required for the role they carry out such as solicitors, barristers, accountants and social workers.
20. So to confirm or deny whether [name redacted] had these qualifications would not be in his reasonable expectations.
21. The council also considers that the information would relate to the individuals private life considering that the qualifications in question are not relevant to the business of the council.
22. The Commissioner is of the opinion that individuals would generally have a reasonable expectation that information relating to their personal life, such as whether or not they hold non work related qualifications, would not be disclosed to the wider public.
23. The Commissioner considers that if these types of qualifications were not required for the individual's role, then the information would relate to the individuals private life.

### **Consequences of disclosure**

24. The council has told the Commissioner that to confirm or deny whether it holds the information would place information, about an individual, into the public domain which consists of personal data that bears no relevance to the role carried out in his public life.
25. The council has not asked the individual if he would consent to the council confirming whether or not the qualifications were held because he is now retired. He retired in (year redacted).
26. The council also consider for the individual to be judged on whether or not he held qualifications that were not required would cause some distress to him.
27. The Commissioner sees that the complainant is not satisfied with the report that has made them question the qualifications, so understands

the council's concern that either way, the individual may be scrutinised if he held the qualifications, or if he did not hold the qualifications.

28. The Commissioner considers that the complainant may be caused some distress if information about any personal qualifications he may or may not have were released into the public domain.

**Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure.**

29. The complainant states that the individual's report has been the research used by other members of the council. It is to be used by the council to form the basis of its justification which will be presented at the Public Enquiry. The complainant states the outcome will have significant consequences for many members of the general public. One hundred and seventy people objected at the public consultation stage.
30. The complainant considers that in view of the level of objections, the public has the right to know if the individual was qualified to undertake the study that forms the council's case.
31. The council consider that any public interest is met by knowing that the qualifications in question are not required for the role, so it is not relevant to know whether these qualifications are held.
32. The council also states that any challenge to upgrading the footpath to a byway can be made after the order has been made. It also states that there are sufficient opportunities for people's concerns to be formally registered and considered.
33. The Commissioner acknowledges the complainant's concerns about the public knowing if the individual had certain qualifications and was properly qualified to perform his role at the time of his employment.
34. However the council has explained that the qualifications in question were not a requirement for the role. So any public interest can be largely met in knowing that these qualifications were not a requirement.
35. Had the qualifications in question been a requirement for the role, then the Commissioner considers that there would be greater weight on the council confirming whether or not the information is held.
36. Therefore the Commissioner's decision is that the council are correct to rely on section 40(5) of the FOIA to neither confirm nor deny whether the individual had the qualifications in question.

## Right of appeal

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37. 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: 0116 249 4253

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)

38. 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.
39. 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**