

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 31 January 2017

**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 from North East Lincolnshire Council ("the Council") about actions undertaken in response to a specific complaint reference. The Council initially refused to comply with the request on the basis that it would disclose information that would be exempt under sections 40(1), 40(2) and 41(1). The Council subsequently clarified to the Commissioner that it had incorrectly cited these exemptions and instead should have refused to confirm or deny that it held relevant information under the exemption provided by section 40(5)(b).
2. The Commissioner's decision is that the Council has correctly applied the exemption provided by section 40(5)(b).
3. The Commissioner does not require the public authority to take any steps.

#### Request and response

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4. On 20 April 2016 the complainant wrote to the Council and requested information in the following terms:

*The council's Fraud Response Plan (see link below) outlines at the bottom of page 5 what action a member of the complaints team should*

*take if they suspect fraud or corruption on receiving a complaint or comment.*

<https://www.nelincs.gov.uk/wp-content/up...>

*"Complaints officers should consider all allegations of irregularity that may be included in a complaint or comment and refer all cases to the Audit, Risk, Insurance and Corporate Fraud team immediately on receipt. Allegations of this nature should be treated through this policy rather than the corporate complaints procedure as the timetable for investigating and reporting on complaints does not apply to complaints of financial misconduct."*

*Complaint Reference: NEL/1172/1516 contained an allegation of fraud but was dealt with through the corporate complaints procedure where the Council flatly refused to address it, asserting that the concerns raised fell outside the scope of the complaints process.*

*In that case, details should have been referred to the Audit, Risk, Insurance and Corporate Fraud team immediately in accordance with the 'Fraud Response Plan'.*

*Please disclose any records held in connection with the referral.*

5. The Council responded on 25 April 2016. It refused to comply with the request citing reliance upon sections 40(1), 40(2) and 41(1).
6. The complainant expressed dissatisfaction with this response on 12 June 2016, which the Council interpreted to be a request for an internal review.
7. The Council provided the outcome of its internal review on 1 July 2016. In this the Council maintained its original response.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 4 July 2016 to complain about the way his request for information had been handled.
9. The ICO subsequently wrote to the Council on 14 September 2016 to request its submissions on the applied exemptions. The Council advised the ICO on 3 October 2016 that it no longer considered the exemptions applied to be correct. Following clarification sought by the ICO, the Council advised that it should have applied the exemption provided by section 40(5)(b).

10. The Commissioner therefore considers the scope of this case to be the determination of whether the Council is correct to apply section 40(5)(b) to the request.

## Reasons for decision

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### Section 40(5) – exemptions from the duty to confirm or deny

11. Section 40(5) 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 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. Section 40(5)(b) provides that the duty to confirm or deny does not apply to situations where the act of doing so would disclose the personal data of third parties. This is subject to consideration of the data protection principles, and whether such disclosure would breach any one of them.

Is the requested information the personal data of third parties?

13. In the circumstances of this case, the request is for information about a specific complaint reference.
14. It is reasonable for the Commissioner to consider that there are a diverse range of circumstances by which a complaint reference, and the identity of the third party to which it relates, might become known to the requestor and wider public. The Commissioner must therefore address this possibility.

15. The confirmation or denial that the requested information is held would indicate whether certain actions had been undertaken in respect of the third party's complaint. Should the identity of the third party be known to the requestor or wider public, this confirmation or denial would disclose the third party's personal data.

Would disclosure breach the data protection principles?

16. The data protection principles are set out in schedule 1 of the DPA. The Commissioner considers that the first data protection principle is most relevant in this case. The first principle states that personal data should only be disclosed in fair and lawful circumstances, the conditions of which are set out in schedule 2 of the DPA.
17. The Commissioner's considerations below have focused on the issues of fairness in relation to the first principle. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the data subject and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

*The reasonable expectations of the data subject*

18. When considering whether the disclosure of personal information is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the data subject. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.
19. In this case the Council considers that any third party who has made a complaint would not reasonably expect the actions taken in respect of it to be made publicly available without their explicit consent. This is particularly so in relation to serious complaints regarding allegations of inappropriate activities, which any third party would expect to be treated and investigated in confidence through established procedures, and relevant information made publically available only when appropriate.

*The consequences of disclosure*

20. The disclosure of information about any third party's complaint outside these established procedures may place such individuals at risk of harm, distress or reputational damage; particularly if a complaint was found to be unfounded or malicious in nature.

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

21. In the circumstances of this case, the confirmation or denial that information is held would disclose the personal data of a third party.
22. There is no indication that this disclosure would be reasonably expected by the third party. The Commissioner recognises that individuals who have submitted complaints to a public authority would reasonably expect the nature and status of their complaint to be treated confidentially and in accordance with the DPA. It is also recognised that individuals will have various routes of appeal should they disagree with the way in which a public authority has handled a complaint that they have made.
23. Having considered the above factors, the Commissioner recognises that such disclosure would infringe on the rights and freedoms of the third party, and considers that there is limited legitimate interest to warrant this.
24. The Commissioner therefore finds that section 40(5)(b) applies to the request.

## Reasons for decision

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25. 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)

26. 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.
27. 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**