

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 31 January 2020

**Public Authority:** City of York Council  
**Address:** West Offices  
Station Rise  
York  
YO1 6GA

#### Decision (including any steps ordered)

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1. The complainant has requested information from the City of York Council ("the Council") regarding the professional qualifications of its Flood Risk Management and Conservation Officers. The Council withheld the information under section 40(2) of the FOIA.
2. The Commissioner's decision is that the Council has correctly applied section 40(2) of the FOIA to withhold the information.
3. The Commissioner does not require any further steps to be taken in respect of this request.

#### Request and response

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4. On 10 and 11 June 2019 the complainant wrote to the Council to request information in the following terms:

*"Dear City of York Council,*

*Please advise on the Conservation Officers currently employed by City of York Council:*

- 1 How many - whether full time or part time.*
- 2 How long employed by the Council*
- 3 What are their professional qualifications."*

And:

*"Dear City of York Council,*

*Please advise the following in regard to the Flood Risk Management Team:*

- 1 How many are in the team*
- 2 What are their professional qualifications*
- 3 What salary's do they earn*

*Obviously I am not seeking individuals names."*

5. The Council responded on 5 July 2019 advising that the information requested constitutes another person's personal data.
6. Following an internal review the public authority wrote to the complainant on 19 July 2019 and upheld its original decision.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 4 November 2019 to complain about the way his request for information had been handled.
8. Having clarified the complainant's stance on the matter regarding what information he required, the Commissioner provided her preliminary view on the case where she advised that the information is personal data and that it is unlikely that it would be lawful to release the requested information. The complainant disagreed with her preliminary findings.
9. The Commissioner considers that the scope of her investigation is to determine whether the requested information is personal data and, if it is, whether disclosure of this information would contravene the data protection principles.
10. The Council set out, in its internal review, why it considered the withheld information to be personal data and why it considered that disclosure of that information would be unlawful.
11. As the Commissioner is also the regulator of data protection legislation, she has decided that she has sufficient information to reach a decision in this case, based on the Council's internal review arguments and her own expertise, without seeking further arguments from the Council.

12. Therefore the Commissioner considers the scope of her investigation to be to establish whether the public authority is entitled to withhold the requested information under section 40(2) of the FOIA.

## Reasons for decision

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### Section 40 personal information

13. 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.
14. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</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 General Data Protection Regulation ('GDPR').
15. 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.
16. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

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

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

*"any information relating to an identified or identifiable living individual".*

18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. 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

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

20. 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.
21. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects.
22. She understands that the complainant is of the opinion that because he has highlighted the fact that he does not wish to have the names, anything else is not personal data. However, he has clarified with the Commissioner that the information he requires is a profile for each officer and which qualifications they have; so essentially the profiles would consist of a set of qualifications per officer. Given that the Council had responded to his request to advise that there are only two officers in the Flood Risk Management Team and only two Conservation Officers within the Council, it is likely that using information regarding their qualifications, in conjunction with other information, would make those involved identifiable. Having this information in the public domain could assist a motivated individual to work out which profile related to any particular officer.
23. Despite not having names of the officers, having the number of officers in a specific team and then which officer has which qualification is information that both relates to and identifies those concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
24. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
25. The most relevant DP principle in this case is principle (a).

***Would disclosure contravene principle (a)?***

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

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

27. In the case of an FOIA request, the personal data is processed when it is 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.

28. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

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

29. 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"<sup>2</sup>.*

30. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
31. 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*

32. In considering any legitimate interests in the disclosure of the requested information under the FOIA, the Commissioner recognises that such

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<sup>2</sup> Article 6(1) goes on to state that:-

*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

interests can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.

33. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
34. The complainant is of the view that personal qualifications of staff members and length of service should be made public. He did not explain why this is however the Commissioner can appreciate that there would be a legitimate interest in knowing officers working on important matters were appropriately qualified. The complainant had not identified any further legitimate interests.

*Is disclosure necessary?*

35. '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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
36. The Commissioner is mindful that disclosure under the FOIA is disclosure to the world at large and not just to the requestor. It is the equivalent of the Council publishing the information on its website.
37. It is likely that when these officers were appointed the roles they hold, they will have gone through a recruitment process and checks will have been made to ensure the Council was satisfied the officers have the appropriate qualifications. Therefore it would be less intrusive to understand that all of the officers in post are appropriately qualified rather than receiving each officer's qualifications.
38. Due to the alternative option explained in the above paragraph, the Commissioner believes that it shows that knowing exactly which qualifications a nameless person has, in a profile format, is not the least intrusive means of achieving the legitimate aim in question.
39. The Commissioner has investigated cases with similar circumstances where requestors were asking for records of employees qualifications,

such as FS50819174<sup>3</sup>, FS50849126<sup>4</sup>, and FS50668506<sup>5</sup>. The Commissioner has taken a consistent line relating to these issues as within these cases, there is a clear precedent that despite there being some legitimate interest in releasing the qualifications of employees, there are less intrusive means of achieving the legitimate aims, so there is not a lawful basis for processing of this type of personal data.

40. The Commissioner is satisfied in this case that there are less intrusive means of achieving the legitimate aims identified.
41. Based on the above factors, the Commissioner has determined that as disclosure of the information is not necessary. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
42. Given disclosure would not be lawful, the Commissioner does not need to go on to separately consider whether disclosure would be fair or transparent.
43. The Commissioner is therefore satisfied that the Council has correctly applied section 40(2) to the request.

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<sup>3</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2616304/fs50819174.pdf>

<sup>4</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2615914/fs50849126-1.pdf>

<sup>5</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014311/fs50668506.pdf>

## Right of appeal

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44. 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@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)

45. 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.
46. 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 .....**

**Phillip Angell**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**