

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: October 2022

Public Authority: Carmarthenshire County Council

Address: County Hall
Carmarthen
Carmarthenshire
SA31 1JP

Decision (including any steps ordered)

1. The complainant requested copies of correspondence between Carmarthenshire County Council ("the council"), the Regional Organised Crime Unit (Tarian), the Crime Prosecution Service ("CPS"), Dyfed Powys Police, South Wales Police, Gwent Police, Kent Police, and any other correspondence relating to the police investigation of the Llanelli Wellness Village.
2. The Commissioner's decision is that the council have correctly applied section 40(2) of FOIA to withhold the redacted information. However, the council failed to respond to the request within the statutory time frame of 20 working days and has therefore breached section 10(1) of FOIA.
3. The Commissioner does not require the council to take any further steps as a result of this decision notice.

Request and response

4. On 26 July 2021, the complainant made the following request via the What-do-they-know website for information under FOIA:

“1. Copies of all correspondence, (emails, letters, and telephone call notes), between the council and the Regional Organised Crime Unit (Tarian) relating to the Llanelli Wellness Village investigation.

The correspondence will also include communications with any other individuals, and bodies, e.g., CPS, Dyfed Powys, South Wales, Gwent, and Kent Police, in relation to the investigation.

2. Copies of all other documents held by the council relating to the Llanelli Wellness Village police investigation.”

5. The complainant contacted the council for a response to their request on 1 September 2021 and followed up again on 8 September 2021, as no response had been received.
6. The council acknowledged the request on 29 September 2021, confirming information was being gathered.
7. The complainant chased a response to their request on 5 October 2021.
8. On 12 October 2021, the complainant requested an internal review as they had received no response to their request.
9. The council acknowledged the request for an internal review on 13 October 2021.
10. The council provided the complainant with updates as to reasons for the delay in sending it's internal review on 9 and 15 November 2021.
11. On 21 December 2021, the council provided the complainant with an internal review response. The council advised following discussion with the police forces involved in the investigation, that it was it's intention to withhold the requested information. The council explained it believed the exemption of section 40(2) (personal information) of FOIA to be engaged. The council also indicated the police had advised section 30 (investigations and proceedings) would also be engaged, however, the council stated it would not apply that exemption.
12. Following the involvement of the ICO, the complainant made a further request for an internal review on 26 February 2022.

13. The council provided it's updated internal review on 15 March 2022. The council maintained it's position withholding the information under section 40(2) of FOIA.

Scope of the case

14. The complainant contacted the Commissioner on 15 March 2022 to complain about the way their request for information had been handled by the council.
15. The Commissioner considers the scope of his investigation is to establish whether the council is entitled to withhold the requested information under section 40(2) of FOIA.

Reasons for decision

Section 40 personal information

16. Section 40(2) of 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.
17. In this case the relevant condition is contained in section 40(3A)(a)¹. 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').
18. 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 FOIA cannot apply.
19. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

¹ As amended by Schedule 19 Paragraph 58(3) DPA

Is the information personal data?

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

“any information relating to an identified or identifiable living individual.”

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

22. 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.

23. 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.

24. The information requested relates to correspondence between employees of the council and employees of police forces and the CPS.

25. As part of his investigation, the Commissioner has requested sight of the withheld information and would confirm the information relates to third parties. The information contains names, job titles and place of employment.

26. The Commissioner notes that the information relates to a criminal investigation concerning the Wellness Village enquiry and enquiries made as part of that investigation by the agencies involved.

27. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information held would identify the people concerned. This information falls within the definition of “personal data” in section 3(2) of the DPA.

28. The fact that information constitutes the personal data of an identifiable living individual does not 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.

29. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

30. 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.”

31. In the case of a 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.
32. 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.
33. In addition, if the requested data is special category data or criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it also required disclosure meets the requirements of Article 9 and Article 10 of the UK GDPR respectively.

Is the information criminal offence data?

34. Information relating to criminal convictions and offences is given special status in the UK GDPR.
35. Article 10 of the UK GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:
 - (a) *The alleged commission of offences by the data subject; or*
 - (b) *Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.*
36. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information includes criminal offence data. It is information provided for the purposes of a police investigation. The data also includes discussion about allegations concerning individuals in relation to this investigation.
37. The council have stated that the subjects concerned have not released the details of the information into the public domain. It has not been provided with any consent for the information to be released. The council state no conditions under Article 10 of the UK GDPR in respect of the processing of criminal data have been met.
38. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.

39. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under the FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
40. The Commissioner has seen no evidence or indication that the individuals concerned have 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.
41. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

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

42. 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.
43. 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”²

² 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) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second subparagraph (displaying the legitimate interests gateway in relation to public authorities) were omitted”.

44. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under 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.
45. 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

46. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
47. 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.
48. In this case, information relates to communications between registered crime agencies and the council pertaining to allegations linked to the Llanelli Wellness Village police investigation.
49. Furthermore, the data is criminal offence data which is given additional protection under the UK GDPR Article 10. There is no indication any conditions under Article 10 of the UK GDPR are met in order to release this data. Whilst some details of the investigation were released by the police to the press, this did not include the information requested.

50. The complainant set out their reasoning to the Commissioner to explain why the information was sought, and why it would be in the public interest to do so:

“The request asked for information relating to an investigation regarding a proposed development, the 'Wellness Village', led by the council. Public funds from the council, the Welsh Government and the Swansea Bay City Deal are being used for the development. Considerable expenditure has already been made, prior and during the police investigation. Governance, audit, oversight, and scrutiny were also led by a democratically elected body, Carmarthenshire Council, at the time.”

51. The Commissioner acknowledges the need for transparency in relation to the council and that the public is entitled to know their council conducts itself appropriately. There is therefore a legitimate interest in the release of the information.

Is disclosure necessary?

52. '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.
53. It is clear there would appear to be no other means for the complainant to obtain the details of the information they requested other than through release of the information. The police forces involved have confirmed to the council they would not release the correspondence.

Balance between legitimate interests and the data subject's interests' fundamental rights and freedoms

54. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject 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.

55. 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.
56. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation 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.
57. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
58. As the requested information relates to a criminal investigation, the Commissioner considers it is likely that disclosure would cause harm and distress if the information was released to the world at large, without their knowledge and consent.
59. The Commissioner has not seen no evidence to suggest that the individuals involved would have a reasonable expectation that their personal data would be disclosed.
60. The Commissioner considers that disclosure of this information would be disproportionately intrusive to the data subjects as it would reveal information about the data subject which is not otherwise in the public domain.
61. The complainant advised the Commissioner that information was released into the public domain about the police investigation by way of an employment tribunal. However, this tribunal took place nine months after this request was made, therefore has no bearing on the request.
62. The law provides that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate.

63. The information requested relates to correspondence between the council and crime agencies about a criminal investigation and allegations made in connection with that investigation. The Commissioner therefore finds that the information is criminal offence data, even if no convictions were made and the case did not progress.
64. Without any evidence to the contrary, the Commissioner accepts the council's view that there is a duty of confidentiality to the people involved to ensure their identity remains confidential.
65. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms in this case. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
66. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that it is not necessary to go on to separately consider whether disclosure would be fair or transparent.
67. The Commissioner has therefore decided that the council was entitled to withhold the information under section 40(2) of FOIA by way of section 40(3A)(a).

Section 10 – time for compliance

68. Section 1(1) of FOIA states that:

Any person making a request for information to a public authority is entitled

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

69. Section 8(1) of the FOIA states:

In this Act any reference to a "request for information" is a reference to such a request which –

- (a) is in writing,
- (b) states the name of the applicant and an address for correspondence, and
- (c) describes the information requested.

70. The Commissioner considers that the request in question fulfilled these criteria and therefore constituted a valid request for recorded information under FOIA.
71. Section 10 of FOIA states that responses to requests made under the Act must be provided "promptly and in any event not later than the twentieth working day following the date of receipt."
72. From the evidence presented to the Commissioner in this case, in failing to issue a response to the request within 20 working days, the council has breached section 10 of FOIA.

Right of appeal

73. 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

74. 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.
75. 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
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