

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 May 2023

Public Authority: Durham County Council
Address: inforights@imt.durham.gov.uk

Decision (including any steps ordered)

1. The complainant requested information relating to a complaint about their neighbour. Durham County Council (the "council") refused to confirm or deny whether any relevant information was held, citing section 40(5B)a(i) of the FOIA.
2. The Commissioner's decision is that the council was entitled to rely on section 40(5B)a(i) of the FOIA to refuse to confirm or deny whether any information was held.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 27 February 2023 the complainant requested the following information from Durham County Council (the "council"):

"Noise complaint - and further investigations Safe guarding Children Under the FOI Act I require further information in relation to Safeguarding and HR issues with your one of YOUR employees

1. Did the following investigators forward or raise issues with [redacted] the main person reported to the council is respect of safeguarding and noise complaints

2. Did the following investigators forward or raise issues with the Council HR team that [redacted] received a safeguarding report.

3. Did the following investigators investigate if the person failed to notify the council of other employment or notify HR of the illegal business at the property listed below [redacted]"
5. The council responded on 28 February 2023 and refused to confirm or deny whether the information was held, citing section 40(5B)a(i) of the FOIA.
6. On 30 March 2023 the council issued an internal review response which upheld its original position.

Reasons for decision

7. The following analysis explains why the Commissioner is satisfied that the council was entitled to neither confirm nor deny holding the information that has been requested.
8. Section 40(5B) of FOIA allows a public authority to refuse to confirm or deny that it holds particular information if the mere act of confirming (or denying) that information is held would, in itself, reveal personal data about an identifiable individual and would contravene one of the data protection (DP) principles.
9. The request identifies specific individuals, namely the residents of a neighbouring property to the complainant. The Commissioner therefore considers that the request identifies third parties.

10. The Commissioner understands that the request relates to noise and safeguarding complaints the complainant has made to the council regarding their neighbours.

Would confirming or denying that the requested information is held constitute the disclosure of a third party's personal data?

11. If the council was to confirm or deny it held any information within scope of any part of the request it would be indicating whether or not a complaint had been made about a named individual/individuals. Given that a family is named in the request, it would be possible to identify that family, and whether or not a complaint has been made about them.
12. The Commissioner therefore considers that confirming or denying whether the information is held constitutes the disclosure of third parties' personal data. If the council was to confirm or deny it held the requested information, it would be disclosing to the wider world whether or not particular individuals had been the subject of a complaint.
13. The Commissioner has next considered whether confirming or denying that the information is held would contravene one of the data protection principles.
14. 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 – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so would be:
 - lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) UK GDPR);
 - fair; and
 - transparent.
15. The Commissioner recognises that individuals have a clear and strong expectation that their personal data will be held in accordance with data protection laws. In this case, he is satisfied that the persons concerned would not reasonably expect the council to confirm to the world at large whether or not it held the requested information in response to an FOI request.
16. The Commissioner is, therefore, satisfied that confirming or denying that the information is held constitutes the disclosure of personal data.
17. The fact that confirmation or denial constitutes the disclosure of 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 confirmation or denial would contravene any of the DP principles.

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

Would disclosure contravene principle (a)?

19. 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”.

20. 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.

21. 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.

22. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

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

23. 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.

24. 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”¹.

¹ 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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:- “In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR

25. In considering the application of Article 6(1)(f) of the UK 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/confirmation or denial 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.
26. 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

27. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, or confirmation or denial that it is held, the Commissioner recognises that 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.
28. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
29. In this case the complainant has an interest in complaints they have made about their neighbours. In the Commissioner's view, the complainant's interest is a private concern that has limited wider public interest. However, it is nonetheless a valid interest for the complainant to have.

would be contravened by the disclosure of information, Article 6(1) of the UK 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".

Is disclosure necessary?

30. '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.
31. The Commissioner appreciates that the complainant may have exhausted some or all of them, but he considers that there will exist other, more appropriate, routes through which they can pursue their complaint with the council. Such routes would not involve disclosing other people's personal data to the wider world under FOIA, which the Commissioner considers would be unnecessarily intrusive.
32. The Commissioner has therefore decided in this case that confirmation or denial is not necessary to meet the legitimate interest in disclosure and he has not gone on to conduct the balancing test. As confirmation or denial is not necessary, there is no lawful basis for this processing, and it is unlawful. It therefore does not meet the requirements of principle (a).
33. Given the above conclusion that confirmation or denial would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether confirmation or denial would be fair or transparent.
34. The Commissioner has therefore decided that the council correctly relied on section 40(5B)(a)(i) of FOIA to neither confirm nor deny it holds information within scope of any part of the request.

Right of appeal

35. 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

36. 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.
37. 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

Christopher Williams
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF