

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 19 October 2023

**Public Authority:** London Borough of Lewisham

**Address:** Laurence House  
1 Catford Road  
London  
SE6 4RU

### **Decision (including any steps ordered)**

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1. The complainant has requested information about an employee of London Borough of Lewisham ("the Council"). The Council would neither confirm nor deny holding any information, citing section 40(5) (Personal information) of FOIA.
2. The Commissioner's decision is that the Council was correct to rely on section 40(5) of FOIA. No steps are required.

### **Request and response**

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3. On 6 May 2023, the complainant wrote to the Council and requested the following information:  
  
"You have recently employed [name redacted] as [details redacted]. Please confirm that this is the same [name redacted] who was dismissed from [details redacted]."

4. On 6 June 2023, the Council responded. It would neither confirm nor deny that information relevant to the request was held, citing section 40(5) of FOIA.
5. The complainant requested an internal review on 9 June 2023. The Council acknowledged the request for internal review on 22 June 2023 and stated that it would be provided within 20 working days, however an internal review response was never sent to the complainant. The Commissioner has accepted the complaint in the absence of an internal review.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 10 August 2023 to complain about the way their request for information had been handled, in particular the Council's application of section 40(5B)(a)(i) of FOIA. The complainant also stated that the complaint was about the Council not providing an internal review response to confirm whether it had carried out a public interest test.
7. The Commissioner has considered the Council's handling of the complainant's request.

### **Reasons for decision**

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#### **Neither confirm nor deny ("NCND")**

8. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. This is commonly known as "the duty to confirm or deny". However, there are exemptions to this duty, whereby a public authority may NCND whether it holds the requested information
9. The decision to use a NCND response will not be affected by whether a public authority does, or does not, in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.

10. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
11. The Council has taken the position of neither confirming nor denying whether it holds the requested information, citing section 40(5) of FOIA. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not the Council is entitled to NCND whether it holds any information of the type requested by the complainant.

### **Section 40 - Personal information**

12. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
13. Therefore, for the Council to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
  - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
  - Providing this confirmation or denial would contravene one of the data protection principles.

### **Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?**

14. Section 3(2) of the DPA 2018 defines personal data as:-

“any information relating to an identified or identifiable living individual”.
15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.

17. The Council advised that, to confirm or deny whether the requested information was held, would constitute disclosure of a third party's personal data and therefore contravene one of the data protection principles.
18. The Commissioner is satisfied that in the circumstances of this matter, if the information was held and was disclosed, this would lead to individual(s) being identified and would constitute personal data of the subject of the request and confirmation they were previously employed and dismissed at the named organisation.
19. 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. The most relevant DP principle in this case is principle (a).

### **Would principle (a) be contravened?**

20. 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".
21. 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.
22. 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.
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"<sup>1</sup>

25. 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 confirmation or denial of the information being held 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 the FOIA, 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

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

"Point (f) of the first sub-paragraph 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."

28. 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. The Commissioner accepts that there will be a public interest in transparency from the Council regarding its employees and that therefore there is both a legitimate public interest and a legitimate individual interest on the part of the complainant. As the Commissioner is satisfied that the complainant and the public have a legitimate interest in the requested information, he will now consider whether disclosure is necessary.

### **Necessity test**

28. '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 confirmation or denial of whether the requested information is held unnecessary. Confirmation or denial under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
29. The Commissioner recognises that the complainant and the wider public have a valid interest in the requested information, as there will be interest in the transparency around those employed in the public sector and being paid out of public funds. However he is not convinced that confirmation or denial is necessary in this matter to meet the legitimate interests above as there are other ways in which the complainant and the public can find the requested information, such as internet searches, and confirmation or denial under FOIA, i.e. into the public domain, is not the least intrusive manner in which this can be achieved.

### **The Commissioner's Decision**

30. The Commissioner is satisfied that the Council was entitled to rely on section 40(5B)(a)(i) when refusing to confirm or deny whether it held information within the scope of this request. He does not require any further steps.

### **Other matters**

31. The Commissioner also finds it necessary to record within this decision notice that the Council did not provide an internal review response. There is no obligation under FOIA for a public authority to provide an

internal review process. However, it is good practice to do so, and where an authority chooses to offer one, the code of practice<sup>2</sup> established under section 45 of FOIA sets out, in general terms, the procedure that should be followed.

32. The code states that reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances. In no case should the internal review exceed 40 working days.
33. The complainant asked for an internal review on 9 June 2023, specifically a review of whether a legitimate interest test had been carried out, and the internal review response was never provided, despite the Council stating on 22 June 2023 that it would be provided within 20 working days.
34. The Commissioner considers that in failing to conduct an internal review, despite stating it would do so, the Council did not act in accordance with the section 45 code. This is a matter that may be revisited should similar outcomes be noted by the Commissioner in any future cases relating to the Council.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/744071/CoP\\_FOI\\_Code\\_of\\_Practice\\_-\\_Minor\\_Amendments\\_20180926\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf)

## Right of appeal

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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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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 ... ..**

**Deirdre Collins**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**