

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

### **Decision notice**

**Date:** 10 January 2024

**Public Authority:** Westminster City Council  
**Address:** Westminster City Hall  
64 Victoria Street  
London SW1E 6QP

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

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1. The complainant has requested information relating to filming permits issued to a named individual.
2. Westminster City Council (the "Council") relied on section 40(2) (third party personal information) of FOIA to refuse the request.
3. The Commissioner's decision is that the Council should have relied on section 40(5B) of FOIA to refuse to confirm or deny whether any information was held and has applied this exemption himself proactively.
4. The Commissioner does not require further steps.

#### **Request and response**

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5. On 11 September May 2023, the complainant submitted the following request to the Council:  
  
"Can you please confirm if XXX or XXX has applied for any filming permits for the Borough of Westminster. If so could you list the dates of each filming permit was valid from and to for".
6. The Council responded on 13 September 2023, withholding the information requested pursuant to section 40(2) of FOIA.

7. The complainant made a request for an internal review on 14 September 2023 in the following terms:

"I have not requested any personal information and any personal information could be redacted in your reply. This is due to XXX /XXX has stated on TV recently that he receives a financial gain for his videos that he makes so he makes them on commercial interest bases in order to make money. He also portrays himself as whiter than white and does not break any laws or by-laws.

He makes short video of motorists possibly breaking the law when holding a mobile phone or a driver failing to comply with a directional arrow when XXX drove in front of the car to challenge and confront the driver yet a cyclist who done the same thing he said nothing too.

Some of the persons he reported to the Police have been found not guilty and in one video he talks about the stress the driver must of suffered during the legal process. As you know stress is classed as a mental health illness so why is WCC giving permission to someone to inflict mental health issues upon the public?

In most of his videos he films the person and approach's the individual by knock on the vehicle window and then informs the individual that he will be reporting the incident to the Police and that he will upload the video to You Tube at a later date. This will cause anyone he has filmed to have anxiety and stress. Is this not itself mental torture and harm as some people has lost their job and income as a result of his actions.

I am sure that all the persons above, the TV audience and the general public at large would be interested to see if XXX/XXX Mikey is indeed complying with laws and by-laws himself when filming by having the necessary filming permits when filming these actions for commercial and financial gain for himself."

8. The Council provided an internal review on 28 September 2023 upholding its original position.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 3 October 2023 to complain about the way their request for information had been handled.
10. In this case, the Commissioner has exercised his discretion and proactively applied section 40(5B) of FOIA to the request. The reasons for the Commissioner's decision are explained below.

## Reasons for decision

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### Section 40(5) - neither confirm nor deny

11. Section 1(1)(a) of FOIA provides that where a public authority receives a request for information, it is obliged to tell the applicant whether it holds that information. This is commonly known as the 'duty to confirm or deny'.
12. There are, however, exemptions from the duty to confirm or deny. It should be noted that when applying an exemption from the duty to confirm or deny, a public authority is not restricted to only considering the consequences of the actual response that it would be required to provide under s1(1)(a) of FOIA. For example, if it does not hold the information, the public authority is not limited to only considering what would be revealed by denying the information was held, it can also consider the consequences if it had to confirm it did hold the information and vice versa.
13. 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 (the "DP Principles") set out in Article 5 of the UK General Data Protection Regulation EU2016/679 ("UK GDPR") to provide that confirmation or denial.
14. The decision to use a 'neither confirm nor deny' 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 a 'neither confirm nor deny' response in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not particular information is held. The Commissioner's guidance explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds information about an individual can itself reveal something about that individual.<sup>1</sup>
15. 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:

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<sup>1</sup> [When can we refuse a request for information? | ICO](#)

- a. Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
- b. Providing this confirmation or denial would contravene one of the DP Principles.

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

16. Section 3(2) of the Data Protection Act 2018 ("DPA") defines personal data as:  
"any information relating to an identified or identifiable living individual".
17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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.
19. In the circumstances of this case, as the request identifies XXX, the Commissioner is satisfied that all the requested information both relates to and identifies XXX, otherwise it would not fall within the scope of the request. The requested information therefore falls within the definition of "personal data" in section 3(2) of the DPA and the first criterion in paragraph 15 above is therefore met.
20. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent the Council from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
21. In the Commissioner's opinion, the most relevant DP Principle in this case is principle (a).

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

22. 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".

23. 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, fair, and transparent.
24. 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.

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

25. 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. One of the conditions in Article 6(1) must therefore be met before disclosure of the information – or as in this case confirming or denying whether the requested information is held - in response to the request would be considered lawful.
26. 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>
27. 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:-

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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 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 sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

- 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 legitimate interests override the interests or fundamental rights and freedoms of the data subject.

28. 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**

29. 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. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the public is unlikely to be proportionate.

30. 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.

31. The complainant has argued that:

"There is a public interest in this case if XXX did not have the necessary filming permits then how can he claim the moral high ground and be acting within the law when he films Data Subjects and places them on his You Tube Channel on the worldwide web without the consent of the Data Subjects he films."

32. The Council has not put forward any specific legitimate interests in the disclosure of the information in this case.

33. The Commissioner accepts that there may be a general, albeit narrow, interest in the whether XXX is acting within the law.

### **Is disclosure necessary?**

34. '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.

35. The Commissioner is satisfied that the narrow general interest in whether XXX is acting within the law whilst filming would be adequately met by the Council's processes for ensuring that filming is carried out pursuant to any necessary regulations and by the police with their powers of arrest. The Commissioner is satisfied that these are the appropriate processes to ensure that individuals are acting within the law whilst filming.
36. The Commissioner notes that the Council has directed the complainant to information on its website as to when filming permits are required<sup>3</sup>.
37. Therefore, the Commissioner does not consider it to be a necessary or proportionate step for the Council to disclose the personal information of an individual to the world at large in order to establish whether that individual is acting within the law whilst filming.
38. As the test of necessity has not been met, the Commissioner does not need to go on to consider the balance between the legitimate interests and the interests or fundamental rights and freedoms of the data subject.
39. As disclosure is not necessary, there is no lawful basis for the disclosure of the requested information. Disclosure would be unlawful and would therefore breach the first DP principle. The Commissioner finds that the Council is entitled to rely on section 40(5) of FOIA to refuse to confirm or deny whether any information was held in relation to the request.

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<sup>3</sup> [Before you apply | Westminster City Council](#)

## Right of appeal

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40. 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)

41. 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.
42. 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 .....**

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