

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 February 2024

Public Authority: Gedling Borough Council
Address: Civic Centre
Arnot Hill Park
Arnold
Nottingham NG5 6LU

Decision (including any steps ordered)

1. The complainant requested information relating to a specific court case. Gedling Borough Council (the "council") refused the request under the exemption for personal information (section 40(2)).
2. The Commissioner's decision is that the council wrongly applied the exemption in section 40(2) and that it should have relied on section 40(5B) of the FOIA to refuse to confirm or deny whether any information was held; the Commissioner has decided to apply this exemption himself proactively.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 6 October 2023, the complainant wrote to Gedling Borough Council (the "council") and requested the following information:

"Please send me the skeleton argument(s) submitted by Gedling Borough Council to the court, the skeleton argument(s) submitted by the defence to the court, the statement of the Licencing Officer, and the record of the interview under caution, including any audio recording of that interview, in relation to the conviction reported below:

<https://westbridgfordwire.com/council-prosecutes-nottingham-taxi-driver-for-fleeing-safety-check/>"
5. The council responded on 3 November 2023. It stated that it was refusing the request, citing the exemption for personal information (section 40(2)).
6. Following an internal review council wrote to the complainant on 23 November 2023. It confirmed that it was maintaining its position.

Scope of the case

7. On 30 November 2023 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to determine whether the council correctly withheld the requested information.

Reasons for decision

9. The Commissioner notes that the request identifies information relating to a criminal offence by a specific individual. The Commissioner has exercised his discretion and proactively applied section 40(5B) of FOIA to the request. He has set out the reasons for this below.

Section 40 – personal information

10. Section 40(5B)(a)(i) of the 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.

11. In order for the council to be entitled to rely on section 40(5B)(a)(i) of the FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request, it needs to be shown that confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and that providing this confirmation or denial would contravene one of the data protection principles.
12. 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 individual¹.
13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. 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. 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.
14. The requested information relates to criminal proceedings against a living individual who was identifiable from the information request. Therefore, disclosing whether or not any information was held would reveal something about that individual.
15. In the circumstances of this case the Commissioner accepts that, if held, any information within the scope of the request would clearly be the personal information of an identified or identifiable individual. Therefore, he is satisfied that if the council were to confirm or deny whether it holds the requested information, this would in turn be disclosing personal information to the world at large.

¹ <https://ico.org.uk/for-organisations/foi/section-40-and-regulation-13-personal-information/part-two-can-you-confirm-or-deny-holding-the-requested-information/>

16. The Commissioner also considers it appropriate to consider whether confirming or denying whether it holds the requested information would result in the council's disclosure of criminal offence information relating to identified or identifiable individuals.
17. Information relating to criminal convictions and offences is given special status in the UK GDPR. Article 10 of UK GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences.
18. 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; and
 - (b) proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings, including sentencing.
19. From the wording of the request, the Commissioner is satisfied that the requested information clearly relates to a criminal offence.
20. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes confirming or denying whether the information is held in response to a request for information under FOIA, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA 2018 can be met.
21. The Commissioner has considered each of these conditions and whether any of them could be relied on by the council to confirm or deny whether it holds criminal offence data falling within the scope of this request. The Commissioner has considered these on his own merit and finds that, having regard for the restrictive nature of the Schedule 1, Parts 1 to 3 conditions, none of the conditions can be met.
22. The Commissioner notes that the offence in question has been the subject of media reports. However, criminal offence data is particularly sensitive and it warrants special protection. Regardless of information which may, or may not, be in the public domain, the Commissioner's guidance on personal data² is clear that criminal offence data may only

² <https://ico.org.uk/media/for-organisations/documents/2619056/s40-personal-information-section-40-regulation-13.pdf>

be processed in response to a FOIA request if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA 2018 can be met.

23. As none of the conditions required for processing criminal offence data are satisfied there can be no legal basis for confirming whether or not the requested information is held; providing such a confirmation or denial would breach data protection principle (a).
24. The Commissioner, therefore, concludes that the council should have cited section 40(5B) of the FOIA to neither confirm nor deny holding information within the scope of the request, as it could not do so without disclosing personal information relating to the individual to whom the request relates. He now applies this exemption himself in order to prevent any further disclosure of personal information.
25. In taking this approach the Commissioner has considered both the facts of this case and the conclusions he has reached in a number of previous decision notices, which he considers also apply here³.

³ See, for example: <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4021232/ic-135384-n1d6.pdf>; <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4027933/ic-260007-s6w6.pdf>

Right of appeal

26. 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

27. 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.
28. 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