

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 June 2024

Public Authority: West Oxfordshire District Council
Address: Woodgreen
Witney
Oxfordshire
OX28 1NB

Decision (including any steps ordered)

1. The complainant requested the number of complaints that had been received about the tenants of a particular property. West Oxfordshire District Council (the Council) withheld the information requested under section 40 (personal information). During the course of the Commissioner's investigation the Council stated that it was now relying on the provisions of section 40(5) of the FOIA to refuse to confirm or deny whether the requested information is held. The Commissioner's decision is that the Council correctly cited section 40(5) of FOIA to neither confirm nor deny that it holds the requested information. The Commissioner does not require any further steps.

Request and response

2. On 19 December 2023 the complainant wrote to the Council and requested information in the following terms:

"Complaints tendered to the Council about the tenants of [property address redacted] before 2021".
3. The Council responded on 16 January 2024 and stated that the information requested was exempt under section 40 of the FOIA.

4. On 16 January 2024 the complainant wrote back to the Council and requested an internal review of the handling of their request. They provided a link to a media article in which the tenant in question was named. The complainant suggested that in light of this article, section 40 of the FOIA could not apply. They also explained that they required the information in order to pursue a court case against the owner of the property.
5. The Council provided the outcome of its internal review on 30 January 2024. The Council maintained that section 40 applied to information relating to the tenants. However, the Council did provide information relating to complaints received about the property itself.

Scope of the case

6. The complainant contacted the Commissioner on 31 January 2024 to complain about the way their request for information had been handled.
7. During the course of the Commissioner's investigation he asked the Council to confirm which subsection of section 40 of the FOIA it was relying on in relation to this case. The Council confirmed that it was relying on section 40(5) of the FOIA to neither confirm nor deny whether it held any information relevant to the request.
8. In light of the above, the scope of the Commissioner's investigation is to consider whether the Council correctly applied section 40(5) to the request.

Reasons for decision

Section 40 – personal information

9. Under section 1(1)(a) of FOIA, anyone who requests information from a public authority is entitled to be told if it holds the requested information. This is referred to as 'the duty to confirm or deny'.
10. However, under section 40(5B)(a)(i) of FOIA, the duty to confirm or deny does not arise if it would contravene any of the data protection principles set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial. The

Commissioner's guidance¹ on personal data explains that merely confirming or denying that a public authority holds information about an individual, can itself reveal something about that individual to the wider public.

11. In order for the Council to be entitled to rely on section 40(5B)(a)(i) of FOIA to neither confirm nor deny that it holds the requested information, the following criteria must be met:
 - confirming or denying whether the requested information is held must constitute the disclosure of a third party's personal data; and
 - providing the confirmation or denial would contravene one of the data protection principles.
12. It is not necessary to show that **both** confirming and denying would each result in the disclosure of personal data. The exemption will be engaged if confirming alone would meet the above criteria, and it may be applied even where the requested information is not, in fact, held.

Would confirming or denying constitute the disclosure of a third party's personal data?

13. Section 3(2) of the Data Protection Act 2018 ('the DPA') defines personal data as:-

"any information relating to an identified or identifiable living individual".
14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier, such as their name. 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.
16. The request in this case asks for the number of complaints received about the tenants of a specific property and it states an address for them. In their internal review request, the complainant provided a link to a media article about the tenants in question, which names the individuals concerned. Whilst the request did not name the individual concerned, it is clear that the complainant knows the name of the

¹ <https://ico.org.uk/for-organisations/foi/section-40-and-regulation-13-personal-information/>

individual and the individual is named in media articles. In addition, it is likely that persons living near to the property or friends and relatives of the individual concerned would be able to identify the individual concerned. In light of this the Commissioner is satisfied that the subject of the request is an identifiable living individual and the information requested, if held, would relate to that individual and would fall within the definition of 'personal data' in section 3(2) of the DPA. (The individual will be referred to in this notice as 'the data subject'.)

17. As stated in paragraph 4 of this notice, the request in this case appears to stem from a private concern the complainant is pursuing as they have indicated that they need the information in order to pursue a court case. However, disclosure under the FOIA is not a private matter between the requester and the public authority; rather, it is considered as being disclosure 'to the world at large'. Therefore, if the Council was to confirm whether it holds the requested information, it would place in the public domain specific information about the data subject (whether they were the subject of complaints that had been submitted to the Council). This is information which, as far as the Commissioner can ascertain, is not currently in the public domain.
18. For the reasons set out above, the Commissioner is satisfied that, if the Council confirmed or denied that it held the requested information, this would result in the disclosure of a third party's personal data. The first criterion set out in paragraph 11 is therefore met.
19. The second element of the test is to determine whether confirming or denying whether the information requested is held would contravene any of the data protection principles.

Would confirming or denying contravene principle (a)?

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 an FOIA request, 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/deny that it holds the requested information) 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.

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

23. 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 .

24. In considering the application of Article 6(1)(f) of the UK GDPR, 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.

25. 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

26. When considering any legitimate interests in confirming/denying that the requested information 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. These interests 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

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)(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”.

be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test

27. In this case, it is clear that the complainant is seeking information relating to complaints made against the data subject. The complainant has stated they have a personal interest in the information as they are seeking to pursue a court case involving the owner of the property in question. The Commissioner also considers that there may also be legitimate interests in the information to other residents in the local area.

Is confirming or denying whether the requested information is held necessary

28. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less intrusive. Confirmation or denial under FOIA that the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
29. The Commissioner is unaware of any other avenue by which the complainant could obtain this information. Therefore, confirmation or denial under FOIA is the only viable option open to him.

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

30. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm, in response to an FOIA request, whether or not it held the requested information, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying that information is held.
31. 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.
32. In the Commissioner's view, a key issue is whether the data subject has a reasonable expectation that their information will not be disclosed or that the public authority will not confirm whether or not it holds their personal data. 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.
 33. It is also important to consider whether disclosure (or confirmation or denial) would be likely to result in unwarranted damage or distress to that individual.
 34. In this case, the Commissioner is satisfied that the data subject would have a reasonable expectation that the Council would not confirm to the world at large whether or not it had received any complaints about them. They would expect such information to remain confidential to them and the Council given that any information that may be held is their personal data.
 35. The Commissioner is also satisfied that confirming or denying whether any complaints have been made about the data subject, when that is not expected, would be seen as intrusive, and would be likely to cause them distress.
 36. 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, and that confirming or denying whether the requested information is held would not be lawful.
 37. Given the above conclusion that confirming or denying whether the information requested is held would be unlawful, the Commissioner does not need to go on to separately consider whether confirmation or denial would be fair or transparent.
 38. The Commissioner has therefore decided that the Council was entitled to rely on section 40(5B)(a)(i) of the FOIA to refuse to confirm or deny whether the information requested is held.

Right of appeal

39. 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

40. 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.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Joanne Edwards
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