

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 October 2021

Public Authority: Royston Town Council
Address: Town Hall
Melbourn Street
Royston
Herts SG8 7DA

Decision (including any steps ordered)

1. The complainant has requested that Royston Town Council (the council) provide information on the outcome of an investigation into the conduct of a particular employee.
2. The Commissioner's decision is that the council correctly relied on section 40(5B)(a)(i) of the FOIA to refuse to confirm or deny whether it held information falling within the scope of the request.
3. The Commissioner does not require the council to take any steps as a result of this decision notice.

Request and response

4. On 26 September 2020, the complainant wrote to the council and requested information in the following terms:
I would like to apply, under the FOI Act, for information on the outcome of the investigation of the curator of Royston Museum, one ['Person A'].
5. On 12 October 2020, the council provided its response. It referred to section 40(5B)(a)(i) of the FOIA, stating that it could neither confirm, nor deny, whether the information requested was held by the council.

6. On 19 October 2020, the complainant requested an internal review. The council provided its response on 17 November 2020, confirming that it had upheld its original decision of 12 October 2020.

Scope of the case

7. The complainant contacted the Commissioner on 17 December 2020, to complain about the way her request for information had been handled.
8. The Commissioner has considered whether the council is entitled to rely on section 40(5) of the FOIA in relation to this request.

Reasons for decision

9. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in a request. This is commonly known as 'the duty to confirm or deny' (NCND). However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would itself disclose sensitive or potentially exempt information. In these circumstances, section 2(1) of the FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.
10. The decision to use an 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. The Commissioner's guidance¹ 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. For example, where a request is made for information about staff disciplinary records in respect of a particular individual, to confirm or deny that that information is held would be likely to indicate that the person was, or was not, the subject of a disciplinary process. This is, of itself, a disclosure of information about that person.
11. 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

¹ [Neither confirm nor deny in relation to personal data \(section 40\(5\) and regulation 13\(5\)\) \(ico.org.uk\)](https://ico.org.uk/for-the-public/foia/section-40-5-13-5/)

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.

12. The council has taken the position of neither confirming nor denying whether it holds details of an investigation relating to Person A, citing section 40(5B)(i) of the 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 the information requested by the complainant.
13. Put simply, the Commissioner must consider whether or not, in this particular case, the council is entitled to NCND whether it holds any information about the investigation in relation to Person A that the complainant's information request refers to.

Section 40 - personal information

14. 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.
15. Therefore, 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, 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 any 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?

16. Section 3(2) of the Data Protection Act 2018 (the DPA 2018) 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. 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.
19. The Commissioner is satisfied that confirming or denying whether the information is held would result in the disclosure of a third party's personal data. This is because the request clearly specifies that the information relates to Person A, who is an identifiable living individual.
20. If the council confirmed that it did hold information, that would confirm that Person A had been the subject of an investigation. If the council denied that it held any information falling within scope, then that would mean that Person A had not been the subject of the investigation referred by the complainant.
21. Either response would reveal information that relates to and identifies Person A, and is therefore their personal data in accordance with the definition in section 3(2) of the DPA 2018.
22. For the reasons set out above the Commissioner is satisfied that, if the council confirmed whether or not it held the requested information, this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.
23. 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.

Would confirming whether or not the requested information is held contravene one of the data protection principles?

24. In this case, the Commissioner considers the most relevant data protection principle to be principle (a).
25. Article 5(1)(a) of the UK GDPR, which concerns this principle, states the following:

'Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.'
26. In the case of an 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 (meaning it would meet one of the conditions of lawful processing listed in Article 6(1) UK GDPR), be fair, and be transparent.

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

27. 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'* conditions listed in the Article applies.
28. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
29. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) UK GDPR which provides as follows:

'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'

30. In considering the application of Article 6(1)(f) 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 confirmation as to whether the requested information is held (or not) 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.
31. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) Legitimate interests

32. 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.

33. 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.
34. The complainant has provided the Commissioner with copies of media articles that report that Person A posted a number of tweets about household substances which she claimed could be used to cause irreparable damage to statues. Person A was, at that time, employed by the council as a curator within a museum, and the complainant was concerned that such comments could influence others, and lead to damage to statues.
35. The complainant indicates that, given the position held by Person A, they consider it to be a matter of public interest for the council to confirm the outcome of any investigation which has taken place.
36. The council states that it acknowledges that Person A's actions caused some public reaction and that it led to a petition requesting their removal from the position of curator. The council also understands that, given the comments made by Person A, there may have been some public interest in any investigation that might have been carried out.
37. The council has confirmed that it accepts that it has a general duty of openness and transparency, and that there is a wider legitimate interest in maintaining public confidence in the council's dealings with its staff and the processes that it follows.
38. It is the Commissioner's view that there is a legitimate interest that could be met by a confirmation or denial in this case. It would go some way towards informing the public about the council's accountability in terms of the investigations that it carries out, and how it dealt with a matter which had clearly generated some public interest.

(ii) Is confirming whether or not the requested information is held necessary?

39. '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.

40. Confirmation or denial under the FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
41. The council has confirmed that it treats its duty to be open and transparent about the processes which it follows very seriously. It states that it publishes a wide number of policies, including significant details of its disciplinary process, and also publishes a social media policy which relates to its employees.
42. The council goes on to say that it also accepts that confirmation or denial of the information requested may be desirable. However, it argues that it does not view it to be of reasonable necessity that it confirm or deny that an investigation has taken place, either for the public to have sufficient information to have confidence that the council is dealing with staff disciplinary action, or to ascertain what disciplinary processes were followed by the council in this specific case.
43. It is the Commissioner's view that whilst the council may publish information about its policies and procedures, this will not confirm whether or not an investigation was conducted in this case; it is therefore not clear to the public how the council has dealt with the matter, and what action, if any, was taken.
44. The Commissioner is therefore satisfied that confirmation or denial of whether the requested information is held is the least intrusive means of achieving the legitimate aim in question.

(iii) Balance between legitimate interest and the data subject's interests or fundamental rights and freedoms

45. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject's interests, 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 whether or not it held the requested information in response to a FOI request, 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 whether information is held.
46. The council states that it does not, as a matter of practice, share details about individual employment related matters with the public at large, and its data protection policy does not specifically refer to any such processing. It argues that Person A would have a legitimate expectation that the council, as an employer, would not disclose to members of the

public information about whether an investigation in relation to her had been carried out or not.

47. The council goes on to say that it does recognise that as a public authority it is required to be accountable and transparent, and that there must be some expectation of disclosure in relation to employees conducting the business of the council. However, it regards it to be pertinent that Person A's position was a junior role within the council, and therefore there would not have been any expectation that details about her employment in a situation such as this, would become publicly available. It has also voiced concerns about the damage and distress disclosure would cause to Person A.
48. The Commissioner is satisfied that Person A would have no reasonable expectation that the council would confirm or deny whether it held the information that has been requested in this case. She is also satisfied that confirming or denying whether or not the information is held may potentially cause damage and distress to Person A.
49. The Commissioner has therefore weighed this against the legitimate interest in disclosure in this case.
50. The Commissioner accepts that confirmation as to whether the requested information is held would inform the public about how the council dealt with a matter which was the subject of some public controversy. She also considers that there is some legitimate interest in the public being able to scrutinise whether the council has taken action in a particular case.
51. However, whilst the Commissioner considers there to be a legitimate interest in maintaining public confidence in the procedures followed by the council, she is not persuaded that revealing under the FOIA whether the council carried out an investigation in this particular instance, and if so, its outcome, is necessary in order to maintain that public confidence.
52. Based on the circumstances of this case, the Commissioner has determined that there is not sufficient legitimate interest to outweigh Person A's fundamental rights and freedoms in this instance.
53. She has therefore determined that confirming whether or not the requested information is held would not be lawful.

Fairness/ Transparency.

54. Given the conclusion the Commissioner has reached on lawfulness, which included consideration of fairness, she considers that she does not need to go on to separately to decide whether confirming or denying whether the information is held would be fair and/or transparent.

55. The Commissioner has therefore decided that the Council was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5B)(a)(i) of FOIA.

Right of appeal

56. 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

57. 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.
58. 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

Ben Tomes
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