

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 June 2022

Public Authority: Thanet District Council
Address: Hawley Square
Margate
Kent
CT9 1NY

Decision (including any steps ordered)

1. The complainant has requested from Thanet District Council (the Council) information in relation to a named individual.
2. The Commissioner's decision is that the Council were entitled to rely on Section 40(5B) of the FOIA to neither confirm nor deny holding the requested information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision.

Request and response

4. On 4 February 2020, the complainant wrote to Thanet District Council (the Council) and requested information in the following terms:

"Please confirm or deny whether Councillor (name redacted) has been required to pay money to the council in relation to any fly tipping incident(s).

If (name redacted) has paid the council any money in relation to any fly tipping incident(s) please tell me how much (redacted) paid to the council and when.

Please also provide me with copies of all communications between the council and (name redacted) about any fly tipping incidents which (redacted) has been linked to and any communications between officers, and/or any communications between council officers and

councillors (other than (name redacted) about (name redacted) and (redacted) links with any fly tipping incidents.

I understand that the council served a Section 108 (Environmental Protection Act 1990) on (name redacted) requesting (redacted) to provide information to assist in a criminal investigation into a fly tipping incident. I also understand that (name redacted) was interviewed under caution by officers of the council about a fly tipping incident. Please provide me with a copy of the Section 108 (Environmental Protection Act 1990) notice which was served on (name redacted) by the Council. Please provide me with a copy of the recording of the under caution interview or a transcript of that interview with (name redacted).

Please provide me with copies of ALL of the pictures taken by the council of any fly tipped rubbish with which (name redacted) has been linked.

I understand that the matters described above took place between 2016 -19".

5. The Council responded on 26 February 2020. It stated that:

'We neither confirm nor deny that we hold information falling within the description specified in your request. The duty in Section 1(1)(a) of the Freedom of Information Act 2000 does not apply, by virtue of section 40(5B)a of that Act. This is because the information you request might disclose personal information which is exempt from disclosure under the Data Protection Act 2018'.

6. The complainant first requested an internal review on 10 March 2020 and on 11 January 2021, in the absence of a response, had to remind the Council that his review request was outstanding.

7. Following an internal review the Council wrote to the complainant on 26 January 2021. It stated that:

'Further to your request for a review of our response, we have now conducted such a review and the decision has been upheld. Our response remains as previously stated, ie, we neither confirm nor deny that the Council holds the information for the reasons previously stated.'

Scope of the case

8. The complainant contacted the Commissioner 20 April 2021 to complain about the way his request for information had been handled. In

particular, he was unhappy with the Council's decision to neither confirm nor deny that it held the information requested and also, the time it took to complete the internal review.

9. The Commissioner contacted the Council on 30 November 2021 for any further arguments it wanted to raise in respect of its application of Section 40(5B)(a) of FOIA.
10. The Council responded on 7 January 2022 with further arguments in support of its original position.
11. The Commissioner contacted the Council again on 4 March in relation to a particular point which the Council clarified on 11 March 2022.
12. The scope of the Commissioner's investigation will be to assess the Council's application of Section 40(5B)(a) of FOIA to the complainant's request.

Reasons for decision

Section 40 – Personal data

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 set out in Article 5 of the General Data Protection Regulation EU2016/679 (GDPR) to provide that confirmation or denial.
14. Therefore, for the Council to be entitled to rely on Section 40(5B) of FOIA to refuse to confirm or deny whether they hold 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?

Is it personal data?

15. 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'.
16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
 17. 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.
 18. In submissions to the Commissioner, the Council contended that complying with Section 1(1)(a) of FOIA would reveal the personal data of the individual named in the request and the Council officers with whom that individual had contact. If held, disclosure would reveal the opinions of Council officers, observation of the named individual's conduct, names, email addresses and phone numbers of Council officers, communications between the Council and the named individual regarding the incident and any under caution interview recordings of the of the named individual or a transcript of the interview.
 19. The Council therefore concluded that the requested information if held would constitute the personal data of the individual named in the request and its employees.
 20. The complainant accepts the information he has requested, if held, would be personal data.
 21. The fact that confirming or denying whether the requested information is held would reveal the personal data of individuals does not automatically prevent the Council from refusing to confirm whether or not they hold the 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 confirmation or denial contravene one of the data protection principles?

22. Article 5(1)(a) 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 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 they hold the requested information – if to do so would be lawful (ie, it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR, be fair and be transparent).

Council's contention that the information is criminal offence category data

24. Under Section 33 of the Environmental Protection Act 1990 it is a criminal offence for a person to deposit controlled waste or knowingly allow or cause the unauthorised deposit of controlled waste¹.
25. The Council has argued that if the requested information was held, it would constitute criminal offence data in that it would relate to investigations into whether the criminal offence of fly tipping had been committed.
26. Information relating to criminal convictions and offences is given special status in the GDPR. Article 10 of GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences.
27. Under Section 11(2) of the DPA 2018 personal data relating to criminal convictions and offences includes personal data relating to-:
 - (a) The alleged commission of offences by the data subject; or
 - (b) Proceedings for an offence committed or alleged to have been committed by the data subject of the disposal of such proceedings including sentencing.
28. The Commissioner accepts if the requested information was held, it would constitute criminal offence data in that it relates to potential investigations of the commission of the criminal offence of fly tipping.
29. 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 FOI request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA 2018 can be met.

¹ <https://www.legislation.gov.uk/ukpga/1990/43/section/33>

30. When considering the disclosure to the world at large required by the FOIA, the Commissioner considers it likely that only two of the Schedule 1, Part 3, conditions might ever justify such processing of personal information of this type. These are:
 - (a) that the data subject had given their explicit consent for the public authority to provide a confirmation (or a denial) that information is held; or
 - (b) that the data subject has manifestly made the information public themselves.
31. The Commissioner therefore asked the Council to consider each of these conditions and whether either could be relied on to confirm or deny whether it held criminal offence data falling within the scope of this request.
32. In relation to consent, the Council has stated that in its communications with (name redacted), the individual concerned did not give their explicit consent to any information, if held, to be disclosed to the world at large.
33. With regard to making the information manifestly public, the Council has stated (name redacted) has not made any public comment on the alleged issue, adding the only public comment they are aware of was the one made by the complainant on his blog.
34. The Commissioner is satisfied from the information provided by the Council that none of the conditions required for the processing criminal offence data have been satisfied.
35. 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 principle (a) and therefore the second criterion of the test set out above is met. It follows that the Council is entitled to refuse to confirm or deny whether it holds the requested information under Section 40(5B)a of the FOIA.

Other matters

35. The Commissioner uses intelligence gathered from individual cases to inform the ICO's insight and compliance function. This aligns with the

goal in his draft "Openness by design"² strategy to improve standards of accountability, openness and transparency in a digital age.

36. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting systemic non-compliance, consistent with the approaches set out in the ICO's "Regulatory Action Policy"³.
37. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Internal reviews

38. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under Section 45 of FOIA.
39. Part VI of the Section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances, it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
40. The complainant requested an internal review on 10 March 2020 and the Council provided a response on 26 January 2021, more than 10 months later.
41. The Commissioner considers that by failing to complete the internal review within the timescales set out above, the Council did not comply

² <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

³ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

with the Section 45 code. He would refer the Council to his comments regarding his regulatory approach in paragraphs 35 and 36, above.

Right of appeal

42. 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: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

43. 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.
44. 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

**Laura Tomkinson
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