

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 February 2024

Public Authority: Rotherham Metropolitan Borough Council
Address: Riverside House
Main Street
Rotherham
S60 1AE

Decision (including any steps ordered)

1. The complainant requested information from Rotherham Metropolitan Borough Council ("the Council") about the action the Council had taken to establish whether an unauthorised business was being run at a particular address. The Council has refused to confirm or deny whether it holds information which falls within the scope of the request, citing section 40(5) as its basis for doing so.
2. The Commissioner's decision is that the Council is entitled to rely on section 40(5) to refuse to confirm or deny whether it holds information which falls within the scope of the request.
3. The Commissioner does not require further steps.

Request and response

4. On 14 November 2021, the complainant wrote to the Council and requested information in the following terms:

"Information required Regarding: [address redacted]. Under the freedom of information act I require you, please, to supply me with evidence of what efforts and analysis you have made to establish whether the above premises are being run as an unauthorised business."
5. The Council responded on 9 December 2021. It stated that it was withholding the requested information under section 40(2) of FOIA. It

also stated that, "the Council can confirm that appropriate investigations have been undertaken."

6. The complainant requested an internal review on 21 December 2021.
7. The Council provided an internal review on 19 June 2023. It revised its position to neither confirm nor deny whether the requested information is held (under section 40(5) of FOIA).
8. It also addressed the statement made in the original response that, "the Council can confirm that appropriate investigations have been undertaken". Regarding this previous statement, it said, "When the Council receives a complaint about any property – for any reason – the established processes are followed to investigate and substantiate any levied complaint. I have spoken with the original reviewing officer and this is what was being advised via the statement, "the Council can confirm that appropriate investigations have been undertaken"".

Reasons for decision

Section 40(5) (personal information)

9. Section 1(1)(a) of FOIA states that anyone who requests information from a public authority is entitled to be told whether or not the authority holds that information.
10. However, section 40(5B)(a)(i) of FOIA states that a public authority doesn't have to confirm or deny that it holds information if to do so 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.')
11. For the public authority to accurately rely on section 40(5B)(a)(i), 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.
12. When considering a neither confirm nor deny response, the Commissioner will not consider whether or not the requested information is actually held. He'll just consider the hypothetical effects of either confirming or denying the requested information is held.

Would confirming or denying that the requested information is held constitute the disclosure of a third party's personal data?

13. Section 3(2) of the Data Protection Act 2018 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. 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 is for information about any action the Council had taken to establish whether an unauthorised business was being run at a particular address.
17. The Council's position is that to confirm or deny whether the requested information is held would disclose the personal data of the occupants of the residential address named in the request, as to confirm or deny whether any such information is held would reveal to the world at large whether or not the Council had investigated their activities.
18. The Commissioner is satisfied that, if the public authority confirms it holds information within scope of the request, it's effectively confirming to the world at large that it has investigated the activities of the occupants of the property.
19. If the public authority denies holding the requested information, it's effectively confirming to the world at large that it has not investigated the activities of the occupants of the property.
20. The Commissioner is satisfied that individuals (the occupants of the property) are identifiable from the request and that the requested information, if held, would relate to them. He is therefore satisfied that confirming whether or not the requested information is held would disclose those individuals' personal data as it would indicate whether or not they have been subject to investigation.

Would confirming or denying the information is held contravene one of the data protection principles?

21. 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".

22. In the case of a FOIA request, personal data is processed when it's disclosed in response to the request or, as in this case, if the authority confirms or denies it holds the personal data. This means that the public authority can only confirm or deny it holds the information if to do so would be lawful, fair and transparent.
23. 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.
24. The lawful basis most applicable is Article 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".
25. In considering the application of Article 6(1)(f) in the context of a request for information made under FOIA, it's 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/denial that the information is held 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(s) (in this case, the individuals named in the request)
26. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Is a legitimate interest being pursued?

27. The Commissioner understands that the complainant is concerned that the Council has not taken appropriate action to deal with what they believe to be an unauthorised business being run from a residential address.
28. With the above in mind, the Commissioner is satisfied that in seeking the requested information, the complainant is pursuing a legitimate interest in transparency regarding how the Council has dealt with this matter.

Is confirmation/denial necessary to meet the legitimate interests?

29. The Commissioner accepts that confirmation or denial would be necessary in this case in order to meet the legitimate interests identified above.
30. Because the Commissioner has found that confirming or denying the information is held is necessary to meet the complainant's legitimate interests, it's necessary to carry out the third test and balance the legitimate interests against the data subjects' interests or rights and freedoms.

Do the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject(s).

31. In this case, it's necessary to consider the hypothetical impact of confirming or denying the information is held. For example, if the data subjects 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, the data subjects' interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
32. The Council argues that individuals would not reasonably expect it to disclose to the world at large information about whether or not they were subject to investigation by the Council.
33. The Council also argues that, in confirming that it has followed the relevant process and procedure with respect to this matter, it partially met the legitimate interest in transparency regarding how it has dealt with this matter.
34. The Commissioner accepts the Council's argument that individuals would not reasonably expect it to disclose to the world at large information about whether or not they were subject to investigation by the Council. Unlike, for example, individuals against who planning enforcement action has been taken, individuals who have merely been investigated by the Council in relation to a planning matter may not have breached any aspect of planning control.
35. He also accepts that, in confirming that it has followed the relevant process and procedure with respect to this matter, the Council has partially met the legitimate interest in transparency regarding how it has dealt with this matter.

36. In addition the Commissioner notes that the Council's Planning Enforcement Plan¹ clearly sets out the avenues available to the complainant to pursue this matter outside of FOIA. It states that complaints about planning services can be raised with the Development Manager or the Council's Corporate Complaints Procedure. If not resolved they can be raised with the Local Government Ombudsman.
37. The Commissioner considers that the other avenues open to the complainant to pursue their underlying concern as well as the confirmation from the Council that it has followed the relevant process and procedure with respect to this matter mean that the legitimate interest in confirming or denying whether the requested information is held is relatively limited.
38. The Commissioner has therefore determined that there is insufficient legitimate interest in this case to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and disclosure of personal information in this instance.
39. As a result, the Commissioner is satisfied that the public authority was entitled to rely on section 40(5B)(a)(i) of FOIA. This means that it was not obliged to confirm or deny whether the information requested was held.
40. Since disclosure would be unlawful, the Commissioner doesn't need to consider whether confirmation or denial would be fair or transparent.

¹ <https://www.rotherham.gov.uk/downloads/file/1386/planning-enforcement-plan>

Other matters

41. The Commissioner finds it necessary to record within this decision notice the time taken by the Council to provide its internal review response. There is no obligation under FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where an authority chooses to offer one, the code of practice² established under section 45 of FOIA sets out, in general terms, the procedure that should be followed.
42. The code states that reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances. In no case should the internal review exceed 40 working days.
43. The complainant asked for an internal review on 21 December 2021. An internal review was provided on 19 June 2023. This was well outside of 40 working days. Almost eighteen months had elapsed since the complainant requested the internal review.
44. The Commissioner considers that in failing to conduct an internal review within the timescales set out above, the Council has not acted in accordance with the section 45 code. This is a matter that may be revisited should similar outcomes be noted by the Commissioner in any future cases relating to the Council.
45. In addition, when responding to future requests, if the Council's position is that it should not confirm or deny whether the information is held, it should ensure that responses are worded carefully to avoid appearing to either confirm or deny whether the information is held. Although in this case the Council clarified at internal review what it had meant by a statement made in the original response, such ambiguity should be avoided in the first place.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

46. 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

47. 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.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Victoria James
Senior Case Officer
Information Commissioner's Office
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