

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 2 December 2015

**Public Authority:** Royal Borough of Kensington and Chelsea  
**Address:** The Town Hall  
Hornton Street  
London  
W8 7NX

#### Decision (including any steps ordered)

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1. The complainant has requested information from the Royal Borough of Kensington and Chelsea ("the Council") relating to the disciplinary file of an employee of the Council.
2. The Commissioner's decision is that the Council should have maintained its position that it was unable to confirm or deny that the requested information was held in accordance with section 40(5) of the FOIA.
3. The Commissioner requires the Council to take no steps.

#### Request and response

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4. On 23 June 2015, the complainant wrote to the Council and requested the following information:  
*"Furthermore I request [named director] disciplinary file under the Freedom of Information act I believe it's in the public interest to know how a Local Government Executive Director is performing in his/her duties".*
5. The Council responded later the same day and applied section 40(5)(b)(i) to the request.

## Scope of the case

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6. The complainant contacted the Commissioner on 26 June 2015 to complain about the way his request for information had been handled.
7. During the Commissioner's investigation, the Council complied with section 1(1) by either confirming or denying that the requested information was held.
8. The Commissioner has had to consider whether the information requested is exempt under section 40(5) or whether the Council was correct to confirm or deny whether the requested information was held in accordance with section 1(1).

## Reasons for decision

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9. Section 1 of the FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:
  - the duty to inform the applicant whether or not requested information is held and, if so,
  - the duty to communicate that information to the applicant.
10. Section 40(5)(b)(i) provides that:

*"The duty to confirm or deny –*

  - (a) *does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection(1), and*
  - (b) *does not arise in relation to other information if or to the extent that either –*
    - (i) *the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or...."*
11. Therefore, for the Council to be correct in relying on section 40(5)(b)(i) to neither confirm nor deny whether it holds information falling within

the scope of the complainant's request the following conditions must be met:

- Confirming or denying whether information is held would reveal personal data of a third party; and
  - That to confirm or deny whether information is held would contravene one of the data protection principles.
12. Section 1(1) of the Data Protection Act 1998 ("DPA") defines personal data as: 'data which relate to a living individual who can be identified – (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual'.
13. The Commissioner considers that the way in which the request is worded clearly indicates that the complainant is seeking personal information which can be linked to a named individual. The Commissioner is therefore satisfied that if the Council confirmed the requested information is held, it would constitute disclosure of personal data of a third party.

**Would confirming or denying that the requested information is held breach a data protection principle?**

14. Any authority must process (i.e. in this case confirm or deny if the information is held) that information in line with the data protection principles of the DPA. The first data protection principle requires that the data is processed fairly and lawfully, and in particular that one of the conditions in schedule 2 of the Act applies.
15. The Commissioner must consider whether confirming or denying whether relevant information is held would breach any of the data protection principles of the DPA. The relevant principle in this case would be the first data protection principle.
16. The first data protection principle states that:

*Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*

- (a) at least one of the conditions in Schedule 2 is met, and*
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.*

17. When considering whether confirming or denying if the requested information is held would be fair for the purposes of the first data protection principle the Council would need to consider whether the individual would have any expectation that the Council would confirm or deny if this kind of information were held about them. In this case the question is whether an employee at the Council would have an expectation that the Council would confirm or deny whether the named individual had a disciplinary file in response to an FOIA request.
18. When considering this it is important to note that when a request is received under the FOIA, a public authority must consider the request as if it has been received from any member of the public. It is not able to take into account any private or personal reasons which the requester may have for requesting the information. Nor can he take into account any prior knowledge that the requestor has about the issues that lie behind the request. Further to this, disclosures under the FOIA are intended to be global in nature and so the Council must consider a disclosure to the whole world rather than to a specific requester.
19. It is clear in this case that the individual concerned would have a reasonable expectation that information relating to a disciplinary file, if held, would not be disclose to the world in response to an information request.
20. The Commissioner has also considered the public's legitimate interests in knowing if the requested information is held against any prejudice to the rights, freedoms and legitimate interests of the data subject concerned. He has considered whether there is a legitimate interest in confirming whether the requested information is held. He has determined that there is no legitimate interest in confirming to the public whether the requested information is held.
21. Due to the matters considered above and in all of the circumstances of this case the Commissioner is satisfied that it would be unfair to confirm or deny whether the requested information is held. To do so would disclose information about the data subject which would represent an unwarranted infringement by the Council on the employee's privacy. The absolute exemption provided by section 40(5)(b)(i) is therefore engaged. The Commissioner has therefore determined that the Council was incorrect to comply with section 1(1).

## Right of appeal

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22. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

23. 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.
24. 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 .....**

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**