

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 10 January 2022

**Public Authority:** Cheshire East Council  
**Address:** c/o Municipal Buildings  
Earle Street  
Crewe  
CW1 2BJ

#### **Decision (including any steps ordered)**

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1. The complainant has requested information from Cheshire East Council regarding a determination notice. The council refused to confirm or deny whether the information was held under section 40(5B) (third party personal information) of the FOIA.
2. The Commissioner's decision is that the council were correct to neither confirm nor deny whether the requested information was held on the basis of section 40(5B).
3. The Commissioner does not require any steps.

## **Request and response**

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4. On 9 October 2020, the complainant wrote to Cheshire East Council ("the council") and requested information in the following terms:  
  
    "*[Redacted]*  
  
    *I would like to request the release of the full determination notice above to me under the Freedom of Information Act 2000...*"
5. The council responded on 20 October 2020 and advised that it would neither confirm nor deny whether the information was held, and cited the exemptions at section 40(5A) and 40(2).
6. The complainant requested an internal review on 16 November 2020.
7. Following an internal review the council wrote to the complainant on 14 December 2020. It revised its response to cite section 40(5B) and additionally stated that the council could neither confirm nor deny whether the information requested was held, by virtue of section 41.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 6 February 2021 to complain about the way their request for information had been handled.
9. The scope of the case is to determine whether the council is entitled to rely on section 40(5) to refuse to either confirm or deny whether it holds the requested information.

## **Reasons for decision**

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10. Section 1(1)(a) of FOIA provides that where a public authority receives a request for information, it is obliged to tell the applicant whether it holds that information. This is commonly known as the duty to confirm or deny.
11. There are however exemptions from the duty to confirm or deny. It should be noted that when applying an exemption from the duty to confirm or deny, a public authority is not restricted to only considering the consequences of the actual response that it would be required to provide under section 1(1)(a). For example, if it does not hold the information, the public authority is not limited to only considering what

would be revealed by denying the information was held, it can also consider the consequences if it had to confirm it did hold the information and vice versa.

12. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny 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.
13. Therefore, for the Council to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny 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 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?**

14. Section 3(2) of the DPA 2018 defines personal data as:

*"any information relating to an identified or identifiable living individual".*

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. The council advised that to confirm or deny whether the requested information is held would reveal whether a complaint exists and if an individual or individuals, were involved in confidential complaint proceedings.
18. The Commissioner is therefore satisfied, that if the council were to either confirm or deny it held the information, this would be a disclosure of information that identifies and relates to an individual or individuals. It would therefore be a disclosure of personal data.
19. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party (or parties) does

not automatically prevent the council from refusing to confirm whether 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.

20. The Commissioner considers that the most relevant data protection principle is principal (a).

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

21. 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".*

22. In the case of a 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 (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair, and be transparent.

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

23. Article 6(1) of the 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. 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.

24. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) 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"<sup>1</sup>.*

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<sup>1</sup> 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".*

25. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under 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 confirming or denying that the requested 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).

26. 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**

27. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOI request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sake as well as case specific interests.

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

29. In this case, the complainant states that there is a legitimate interest in the accountability of public officials, and transparency and public confidence in the functioning of democracy in dealing with complaints.

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However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) 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".*

**Is confirming whether or not the requested information is held necessary?**

30. '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. 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.
31. The Commissioner considers that disclosure is necessary to meet the legitimate interest as there is no other way to achieve that purpose other than by providing the confirmation or denial that the information is held by the council.
32. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

33. 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 a 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.
34. Whilst the Commissioner notes the complainant's arguments regarding accountability and transparency, he is also mindful that information released under the FOIA is released to the world at large. Furthermore, should any such complaint exist, and the outcome be contested, then the Local Government Ombudsman processes are available to deal with such disputes.
35. Should the information exist, then it would be information that relates to an identifiable living person. The Commissioner therefore considers it would be personal data and that any individual, in such circumstances, would expect it to be treated as confidential.
36. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects'

fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.

37. 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 the FOIA.

## Right of appeal

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38. 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](mailto:grc@justice.gov.uk)

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

39. 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.
40. 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 .....**

**Janet Wyles**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**