

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

### **Decision notice**

**Date:** 16 February 2023

**Public Authority:** North East Lincolnshire Council

**Address:** Municipal Offices  
Town Hall Square  
Grimsby  
North East Lincolnshire  
DN31 1HU

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

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1. The complainant requested from North East Lincolnshire Council ('the council') information relating to any investigation carried out by the council in respect of a named company, including correspondence with third parties and other information. The council applied section 12 (appropriate limit) to part of the request. It also applied section 40(5A) to refuse to confirm or deny whether personal data is held about two named individuals. Furthermore, it applied section 30(1)(b) in respect of the information held as part of an investigation.
2. The Commissioner's decision is that the council was correct to apply the exceptions cited.
3. The Commissioner does not require the council to take any steps.

## Request and response

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4. On 12 June 2022 the complainant wrote to the council and requested information in the following terms:

“Accordingly, and pursuant to the Freedom of Information Act we require the following information:

- i. All information and correspondence held by the council on [name of individual redacted by the ICO] and [name of individual redacted by the ICO].
  - ii. All information held on [name of company redacted by the ICO], including and notwithstanding the complaints investigated by the council following any complaint or correspondence from [name of individuals redacted by the ICO], this includes inquiries made by the council to substantiate these complaints.
  - iii. Correspondence from [name of company redacted by the ICO], Sainsbury’s and/or Waitrose regarding the complaints brought to the attention of the council, including the responses from [name of company redacted by the ICO].”
5. The council responded on 28 June 2022. It cited the following exemptions of FOIA:
- i. Section 40(5A) in respect of part 1 of the request to neither confirm nor denied whether relevant information was held in respect of the two individuals named by the complainant.
  - ii. Section 12 (appropriate limit) in respect of part 2 of the request.
  - iii. Section 30(3)(investigations conducted by public authorities). It neither confirmed or denied whether relevant information is held relating to any investigation it may or may not have carried out in respect of the matters raised in the request. It also said that if relevant information is held, it would also apply section 41 (information provided in confidence), and section 43 (commercial interests) to withhold that information.
6. Following an internal review, the council wrote to the complainant on 15 July 2022. It maintained its earlier position.

## Reasons for decision

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### Section 40(2) – personal data of third parties

7. The following analysis explains why the Commissioner is satisfied that the public authority was entitled to apply section 40(5A) of FOIA part one of the complainant's request.
8. Section 40(5A) of FOIA allows a public authority to confirm or deny whether relevant information is held. It is in place to protect situations where confirming or denying that personal data is held in response to an FOI request would disclose personal data about those individuals in circumstances which would fail to comply the requirements of the UK GDPR.
9. The Commissioner is satisfied that the requested information, if held, would be personal data for the purposes of the UK GDPR. It would relate to the correspondence submitted to the council by named third parties, and would provide biographical details about those parties i.e., that they had written to the council.
10. The Commissioner is also satisfied that the condition at section 40(3A)(a) is satisfied as confirming or denying whether any relevant information is held would contravene data protection principle (a).
11. The Commissioner has ascertained this by assessing whether there is a lawful basis for processing the requested information under Article 6(1)(f) of the UK GDPR.
12. The complainant has not provided any background or justification for requesting the personal data. Nevertheless, the public has a general legitimate interest in local authorities being transparent about their actions and about the information they do, or do not hold.
13. The Commissioner has determined that, whilst the public has a legitimate interest in disclosure, and disclosure would be necessary to satisfy that interest, there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms.
14. The Commissioner has determined this by balancing the legitimate interests he has identified against the fact that, if any information were held, the individuals concerned would have a reasonable expectation that their information would not be disclosed to the public.
  - The council clarified that neither of the two individuals work for the council. It said that, as far it is aware, the individuals are members of the public.

- The Commissioner considers that if members of the public have had correspondence with the council, they would not reasonably expect that the council would disclose that fact without a legitimate basis for doing so.
  - It would not be fair to the individuals to confirm whether the council has had any correspondence with them without the council identifying reasons for doing so which would outweigh their fundamental rights and freedoms under the UK GDPR.
  - Beyond the general legitimate interest noted above, no further legitimate interests in the council confirming whether information is held or not has been identified. Therefore, the legitimate interests in confirming or denying whether information is held does not outweigh the rights and freedoms provided to the individuals under the UK GDPR in this case.
15. As the Commissioner has concluded that disclosure would not be lawful under Article 6(1)(f) of the UK GDPR, he has not gone on to separately consider whether disclosure would be fair or transparent.

## **Section 12 – appropriate limit**

16. Section 12(1) of the FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the “appropriate limit” as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Fees Regulations”).
17. The council noted that part 2 of the request was for “All information held on [name of company redacted by the ICO]...” The council confirmed to the Commissioner that it would hold information falling within the scope of the request.
18. The council said that it delivers over 500 different services, including but not restricted to its activities as a Food Authority, Planning, Business Rates, Smarter Energy, Feedback, Freedom of Information, Waste Management, Noise, and other pollution issues relevant to the Environmental Protection Act.
19. The council clarified that in order to provide a full response to the request, it would firstly need to determine which of its services hold any information in relation to the company concerned.

20. The council calculated that in order to undertake these checks within each of these services, it would on take an average of 15 minutes per service, a total of a minimum of 125 hours or £3,125. This would significantly exceed the appropriate limit, just to determine which services hold any information falling within the scope of 'all information held about [name of company redacted by the ICO]'. Subsequent requirements in order to respond to the request would therefore greatly exceed this estimate.
21. The council confirmed that, in order to provide advice and assistance, it asked the complainant to refine or clarify the scope of their request, but it had not received a response to this.

The Commissioner's analysis

22. The Commissioner has considered the complainant's and the council's arguments.
23. The Commissioner considers that the council's arguments, both to the Commissioner, and to the complainant in its response and review response, are persuasive in this instance. The Commissioner recognises that the number of different service areas which the council argues it has could potentially be narrowed down by considering where information is most likely to be held by it relevant to the request. For instance, service areas such as social services, education, housing Human Resources and IT would be less likely to hold information on a third-party food producer. Nevertheless, the request was for 'all' information held by the council in respect of the company, and without carrying out checks it could not be sure that no other information is held within any particular service area.
24. The complainant's failure to either clarify the scope of their request, or to narrow the scope to specific issues, leaves the council in a position where it could only respond to the request by instructing each of its service areas to carry out searches to ensure that all relevant information was located.
25. The Commissioner's decision is therefore that the council was correct to apply section 12 of FOIA in this instance.

**Section 30(1)(b) - Investigations and proceedings conducted by public authorities.**

26. The following section explains why the Commissioner has decided that the council was correct to apply section 30(1)(b) to withhold the information falling within part iii of the complainant's request for information.

27. During the course of the Commissioner's investigation, the council withdrew its reliance on neither confirming or denying whether relevant information is held. It confirmed that it holds relevant information, however it applied section 30(1)(b) to withhold it.
28. Section 30(1)(b) states information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct.
29. Section 30(1)(b) therefore applies to investigations where the public authority has the power to conduct those investigations. Importantly, the public authority must also have the power to institute and conduct any criminal proceedings that result from its investigation.
30. The Commissioner considers that the phrase 'at any time' means that information can be exempt under section 30(1)(b) if it relates to a specific ongoing, abandoned, or even a closed investigation.
31. Section 30(1)(b) is a class-based exemption. There is no requirement to demonstrate that a disclosure of the information might be harmful in order for section 30(1)(b) to be engaged.
32. The council clarified that it is a Food Authority as defined by Section 5(1)(a) of the Food Safety Act 1990. Section 6(2) of that Act states that every Food Authority shall enforce and execute the provisions of the Act, and Section 6(5) states that an enforcement authority may institute proceedings under provisions of the Act, or any regulations or orders made under it. It argues, therefore, that as a Food Authority it is duty bound to undertake investigations to identify instances of non-compliance with food law, and take appropriate action to ensure compliance, including criminal prosecutions.
33. The Commissioner accepts the council's argument that, as a Food Authority, it has a power under section 6(5) of the Food Safety Act 1990 to investigate potential criminal breaches of food safety legislation and to institute proceedings. He has reviewed the withheld information and accepts that it is held as a result of the council using those powers to investigate complaints made to it.
34. The Commissioner is therefore satisfied that the withheld information falls within the class described in section 30(1)(b), and therefore, the exemption is engaged.
35. Though the exemption is engaged, it can only be maintained if the public interest in doing so outweighs the public interest in disclosure.

### **Public interest test**

#### The public interest in the information being disclosed

36. The Commissioner recognises that the central public interest in the information being disclosed is in creating greater transparency in the work which the council does to support public health and food law compliance by investigating complaints made to it.
37. A disclosure of the information would also provide clarity as to the nature and depth of complaints against the company, and provide reassurance to the public as to the standards to which its food is prepared.

#### The public interest in the exemption being maintained

38. Whether or not the council finds issued during the course of its investigation, it may be detrimental to the commercial interests of a company for information relating to the council's investigations to be disclosed.
39. Disclosure may be unfair in cases where those under investigation were not deemed to have breached any health and safety laws. Conversely, a disclosure of information where issues were found may circumvent the council's processes where actions were required of a company following its investigation.
40. Companies would be less likely to be forthcoming, and act more defensively in respect of council investigations, if they believed that their correspondence with the council may subsequently be disclosed to the whole world. Disclosure would therefore prejudice the voluntary disclosure of information to the council during future such investigations, and make council investigations harder to carry out efficiently.
41. There is a strong public interest in allowing authorities to have sensitive discussions with companies, in a full and frank way, and on an informal basis where possible. This allows for the free flow of information which can shorten the length of time such investigations take, and leads to a more thorough understanding of the circumstances surrounding complaints.

## **The balance of the public interest arguments**

42. The Commissioner accepts that there is a public interest in understanding how the council carries out its investigative work, and how it makes decisions as to whether companies should be prosecuted for failing to adhere to the relevant legal requirements.
43. However, the key to the consideration of any section 30 case is to determine whether disclosure could in some way compromise a public authority's ability to carry out its investigative work effectively. Clearly, it is not in the public interest to jeopardise the ability of the council to regulate and enforce compliance with the Food Standards Act.
44. The Commissioner accepts that organisations which are required to investigate and prosecute criminal offences often rely on the voluntary co-operation of victims and witnesses, as well as those under investigation. Whilst those bodies usually have enforcement powers to require information to be provided, these are most effective when used sparingly, and it is important not to obstruct the voluntary flow of information.
45. Having considered the circumstances of the case, the Commissioner has decided that the public interest lies in maintaining the exemption in this case.



## Right of appeal

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

**Signed .....**

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