

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

### **Decision notice**

**Date:** 7 May 2024

**Public Authority:** City of Wolverhampton Council

**Address:** Civic Centre  
St. Peter's Square  
Wolverhampton  
WV1 1SH

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

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1. The complainant requested information about an individual's registration as a foster carer. City of Wolverhampton Council (the "Council") refused to confirm or deny whether the information was held, relying on the exemption for personal information in section 40(5B) of the FOIA.
2. The Commissioner's decision is that the Council's refusal notice did not comply with section 17(1) but that is entitled to rely on section 40(5) to refuse to confirm or deny that it holds the requested information.
3. The Commissioner does not require further steps.

## Request and response

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4. On 2 January 2024, the complainant wrote to City of Wolverhampton Council (the "Council") and requested the following information:

"On the platform, TikTok in a public live stream [redacted] told viewers that in the past [redacted] was a foster carer for Wolverhampton City Council. Weblink to article evidencing overriding public interest in disclosure of the requested information containing s40 'personal data' [redacted].

From your records, please can you confirm or deny that [redacted] was a registered foster carer for Wolverhampton City Council and if applicable, the time period for which [redacted] was approved."

5. The Council responded on 23 January 2024 and stated that it was refusing to confirm or deny whether the requested information was held, citing section 40(2) of the FOIA.
6. Following an internal review Council wrote to the complainant on 23 February 2024. It stated that it was maintaining its position.

## Scope of the case

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7. On 23 February 2024 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to determine whether the Council was entitled to refuse to confirm or deny whether the requested information was held.

## Reasons for decision

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### Neither confirm nor deny ("NCND")

9. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. This is commonly known as "the duty to confirm or deny". However, there are exemptions to this duty, whereby a public authority may NCND whether it holds the requested information.

10. The decision to use a NCND response will not be affected by whether a public authority does, or does not, in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
11. In this case the Council has taken the position of neither confirming nor denying whether it holds the requested information. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not the Council is entitled to NCND whether it holds any information of the type requested by the complainant.

### **Section 40 - Personal information**

12. 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 UK General Data Protection Regulation ('UK 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 whether 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 was held, would constitute disclosure of a third party's

personal data and therefore contravene one of the data protection principles.

18. The Commissioner is satisfied that if the council confirmed that information was held, that information would constitute personal data relating to the individual in question; primarily, whether they had applied to the Council for registration as a foster carer.
19. The fact that confirmation or denial constitutes the disclosure of personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether confirmation or denial would contravene any of the DP principles. The most relevant DP principle in this case is principle (a).

### **Would principle (a) be contravened?**

20. 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".
21. 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 if to do so would be lawful, fair and transparent.
22. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether a legitimate interest is being pursued, whether confirming or denying that the requested information is held is necessary to meet that legitimate interest, and whether these interests override the rights and freedoms of the individuals whose personal information it is.
23. In this case, the Commissioner accepts that there is a legitimate interest in the transparency of the Council's obligations in respect of registrations for foster carers.
24. However, the Commissioner considers that if the Council were confirm that it held the requested information it would cause distress to the individual named in the request as that individual would have a reasonable expectation that the Council would not disclose whether or not they had applied for a role. They would expect this information to remain confidential to them and the Council given that the information is their personal data.
25. In respect of the legitimate interest in disclosure, the complainant has referred to a newspaper article which relates to the individual identified in the request. Having viewed this the Commissioner considers that this simply confirms that the individual in question, due to their appearance

in broadcast media, is of interest to the general public. He does not consider that it demonstrates that there is a specific public interest in the Council confirming or denying whether the information is held.

26. Public interest in this context refers to the interest in transparency and accountability around, for example, public authority spending and/or decision making. The Commissioner does not consider that the requested information has any relevance to these factors and he has not been directed to any other public interest matters.
27. He also does not consider that anyone contacting a public authority to register for a fostering role would expect this information to be made public as it relates to a personal decision about their private life. That reference may have been made to it in broadcast media does not, in the Commissioner's view, negate this expectation. Confirming that the information is or is not held would represent unwarranted intrusion into the individual's private life and would be likely to expose the Council to allegations of mishandling personal information.
28. Therefore, the Commissioner's decision is that the Council is entitled to rely on section 40(5) of FOIA to refuse to confirm or deny whether the information requested is held.

## **Procedural matters**

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### **Section 17 – refusal notice**

29. Section 17(1) of the FOIA states:

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

30. In this case the Council's refusal notice confirmed that it was relying on the neither confirm nor deny provision of the exemption in section 40 of the FOIA. In doing so it wrongly cited section 40(2) as the relevant section whereas it should have cited section 40(5B).

31. Whilst the Commissioner has concluded in this notice that section 40(5B) applies to this request he also finds that in citing the wrong subsection in its refusal notice the Council breached section 17(1). He does not require the Council to take any steps.
32. In reaching his decision in this matter the Commissioner has referred to a number of previous decision notices which relate to comparable requests for information which reached the same conclusions<sup>1</sup>. He considers that the reasoning and conclusions in those notices are transposable here and reflect that he has taken a proportionate and consistent approach.

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<sup>1</sup> See, for example: <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4027152/ic-251148-n2k9.pdf>, <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4028390/ic-262708-g1l2.pdf>, <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4028933/ic-266181-l2v1.pdf>

## **Right of appeal**

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33. 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)

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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