

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

### **Decision notice**

**Date:** 23 September 2013

**Public Authority:** North Lincolnshire Council  
**Address:** Civic Centre  
Ashby Road  
Scunthorpe  
DN16 1AB

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

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1. The complainant has requested information relating to a complaint they made to North Lincolnshire Council (the "council") about a Councillor. The council refused the request citing the exemption for investigations and proceedings conducted by public authorities (section 30(2) of the FOIA).
2. The Commissioner's decision is that North Lincolnshire Council has failed to demonstrate that the withheld information engages the exemption at section 30(2) of the FOIA but that the information is exempt under the exemption for third party personal data, namely section 40(2) of the FOIA.
3. The Commissioner does not require the public authority to take any steps.

## Request and response

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4. On 4 December 2012, the complainant wrote to the council and requested information in the following terms:

*"...copies of all correspondence and other paperwork or notes regarding the above complaint ref no 2011/12/17, including **name redacted** representation to the council."*

5. The council responded on 18 January 2013. It stated that it was refusing to provide the requested information citing the exemption for investigations and proceedings conducted by public authorities (section 30(2) of the FOIA).
6. Following an internal review the council wrote to the complainant on 18 March 2013. It stated that it was upholding its original decision to refuse the request.

## Scope of the case

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7. On 25 March 2013 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would consider whether the council was entitled to rely on the exemption in section 30(2) of the FOIA as a basis for refusing to provide the withheld information.

## Reasons for decision

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### **Section 30(2) – investigations and proceedings conducted by public authorities**

9. The exemption provided by section 30 of the FOIA is known as a "class based" exemption. This means that, in order for the exemption to be engaged it needs to be shown that information falls into the categories defined by the exemption.
10. The council has stated that it considers that the withheld information is subject to the exemptions provided by section 30(2)(a)(iii) and section 30(2)(b) of the FOIA.

11. Section 30(2)(a)(iii) states:

*"Information held by a public authority is exempt information if-*

*(a) It was obtained or recorded by the authority for the purposes of its functions relating to-*

*(iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment...."*

12. Section 30(2)(b) states:

*"(Information held by a public authority is exempt information if-)*

*(b) It relates to the obtaining of information from confidential sources.*

13. In order for the exemption to be engaged, a public authority will need to demonstrate that the criteria set out under section 30(2)(a)(iii) and section 30(2)(b) have been met.

14. Firstly, information needs to have been obtained for the purposes of a public authority's functions in relation to investigations for the purposes specified in section 31(2) of the FOIA.

15. The council has confirmed that it considers that the withheld information falls into the category defined by section 31(2)(b), namely, that the information is held by the council for:

*"... the purpose of ascertaining whether any person is responsible for any conduct which is improper."*

16. The council has stated that the relevant enactment here is the Localism Act 2011 (the "Act"), section 28 of which requires authorities to have arrangements in place under which allegations relating to a code of conduct can be investigated<sup>1</sup>. The Commissioner notes that section 27(2) of the Act requires authorities to adopt a code which sets out the conduct which is expected by members of the authority.

17. The council provided the Commissioner with a copy of its code of conduct and its arrangements for dealing with associated standards

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<sup>1</sup> <http://www.legislation.gov.uk/ukpga/2011/20/section/28/enacted>

complaints under the Act. Where such complaints are received, the council explained, an Assessment Panel is convened to consider the complaint and issue a decision.

18. It explained that the withheld information relates to a complaint which was submitted to the council regarding a Councillor's alleged breach of the council's code of conduct. The council confirmed that the complaint was handled in accordance with its arrangements for investigating complaints which identify potential breaches of the code of its code of conduct.
19. Having viewed the withheld information and considered the submissions provided by the council the Commissioner is satisfied that that the information satisfies the criteria specified under section 30(2)(a)(iii), namely:
  - the information was obtained or recorded by the council for the purposes of its functions relating to an investigation carried out for the purpose of ascertaining whether a person is responsible for a breach of the council's code of conduct and,
  - the council is empowered to conduct this investigation under section 28 of the Localism Act 2011.
20. For the exemption to be engaged, however, it needs to be shown, as provided by section 30(2)(b), that the withheld information relates to the obtaining of information from confidential sources.
21. The council has argued that the withheld information was obtained from a confidential source and that the third party who provided the information did so on the basis that they would not be identified as the source of this information.
22. The council directed the Commissioner to the context within which code of conduct complaints are considered. It explained that it is made clear that any submissions made in this regard are treated in confidence and are only made available to the Assessment Panel charged with considering the complaint. The council also confirmed that the Assessment Panel is a private session.
23. The Commissioner's guidance defines a confidential source as someone who contributes information which is often vital to the investigations of public authorities. In short, a confidential source is a person who

provides information on the basis that they will not be identified as the source of the information<sup>2</sup>.

24. The Commissioner's guidance also clarifies the distinction between confidential sources and confidential information. Public authorities will often receive confidential information during the course of their investigations but this does not mean that the provider of the information is a confidential source.
25. To illustrate the distinction, the Commissioner's guidance uses the hypothetical analogy of Her Majesty's Revenue and Customs (HMRC) receiving information from a company as part of an investigation into the company's tax affairs. In such a scenario, whilst the information itself might be confidential, the company providing it would not be considered a confidential source for the purposes of section 30(2)(b).
26. The Commissioner notes that, in this case, the request relates to a complaint which was submitted to the council about the conduct of a specific councillor. The council's procedure for investigating complaints of this nature confirms that, on receipt of a complaint, the individual against whom the allegation will be given an opportunity to provide written comments.
27. The request for information identifies this individual and asks for their representations to the council regarding the complaint. Given that the complainant in this case is also the person who submitted the original complaint to the council it is clear that the identity of the councillor making any representations to the council would be known to them and would not, therefore, be anonymous.
28. Having considered the council's submissions, the withheld information and his guidance, the Commissioner has concluded that the withheld information does not satisfy the criteria for a confidential source as defined by section 30(2)(b). He has, therefore, decided that the exemption at 30(2) of the FOIA is not engaged in this case and he has not gone on to consider the public interest arguments.

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[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/investigations-and-proceedings-foi-section-30.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/investigations-and-proceedings-foi-section-30.ashx)

## **Section 40 – personal data**

29. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the FOIA would breach any of the data protection principles or section 10 of the DPA.

30. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

*"...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."*

31. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

32. The Commissioner is under no positive duty to pro-actively consider exemptions which have not been referred to by a public authority and he is not obliged to generate associated arguments on behalf of public authorities. However, he may do so if it seems appropriate to him in any particular case and after carefully taking into account his obligations under the Human Rights Act 1998 and his jurisdiction for data protection in assessing the risks associated with disclosure.

33. In this instance, in view of his obligations under the DPA, the Commissioner has considered whether it would be fair to disclose the withheld information.

*Is it personal data?*

34. The Commissioner has viewed the withheld information and notes that it all relates to a complaint which has been brought against a third party, in this case a Councillor at the council. The Commissioner is satisfied that the focus of the information is the Councillor (the "data subject"), that the information relates to them and that they are identifiable by reference to the information.

35. As the Commissioner finds that the withheld information in its entirety constitutes the personal data of the data subject he has concluded that the information falls within the scope of the exemption. He has gone on to consider whether disclosure would breach the first data protection principle.

36. 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."*

37. The Commissioner has first considered whether disclosure of the information would be fair.

*Would disclosure be fair?*

38. In assessing fairness, he has considered:

- the nature of the information itself;
- the reasonableness of the expectations of the individual(s) about what would happen to their information; and
- the possible consequences of disclosure - whether disclosure would cause any unnecessary or unjustified damage or distress to the individual(s) concerned.

39. He has then balanced against these the general principles of accountability and transparency, as well as any legitimate interests which arise from the specific circumstances of the case.

*The nature of the information*

40. The withheld information consists of a small quantity of administrative correspondence relating to the complaint and the data subject's letter of representation to the council.

*Reasonable expectations of the data subject*

41. Disclosure of information under FOIA is disclosure to the public at large and not just to the complainant.

42. The Information Commissioner recognises that people have an instinctive expectation that a public authority, in its role as a responsible data controller, will not disclose certain information and that they will

respect its confidentiality. For example, he considers that information relating to an internal investigation, a grievance or disciplinary hearing will carry a strong general expectation of privacy.

43. In this case, the Information Commissioner is satisfied that the data subject would have had a reasonable expectation that their personal information would be kept confidential and not passed on to third parties without their consent.
44. In its submissions to the Commissioner, the council confirmed that the data subject had stated that they did not want their submission to be released. They had not, therefore, given their consent to the information being disclosed.

*The consequences of disclosure*

45. In light of the nature of the information and the reasonable expectations of the data subject, as noted above, the Commissioner is satisfied that release of the withheld information would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the individual in this case.

*The legitimate public interest in disclosure*

46. Notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, depending on the circumstances of the case it may still be fair to disclose requested information if there is a more compelling public interest in disclosure.
47. In considering 'legitimate interests', the Information Commissioner's view is that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
48. In this instance, the complainant has raised the possibility that the data subject's representations made to the council might have been misleading or might have otherwise misrepresented the relevant facts. Without having access to the information and being able to challenge its veracity, the complainant has argued that the council's investigation and decision might have been flawed.
49. The Commissioner accepts the general principle that openness in local government is desirable and sees that it is clearly in the public interest for individuals to see how a council applies its policies and procedures and to be reassured that investigations are conducted fairly.
50. The council has argued that the public will not benefit from the disclosure of the information. The procedures in place for



investigating complaints relating to the code of conduct exist to ensure that councillors are investigated in a fair and proper manner.

51. In this case the council has confirmed that, had they thought that their representations would be disclosed, the data subject may not have participated in the investigation and may not have made full and frank representations. The council has stated that, without the engagement of the data subject, its investigation would have been prejudiced and the Assessment Panel would not have had all the relevant information required to make a fair, balanced decision.

### *Conclusions*

52. Having considered the facts of this case, the Commissioner has concluded that it would be unfair to the data subject to release the requested information as he considers that their right to privacy in relation to personnel matters outweighs the interests of the public in understanding the details of these matters.
53. The Commissioner notes that, as previously identified in this decision notice, the relevant investigatory process, including submissions which relate to it, is conducted with an explicit expectation of confidentiality. Whilst he is mindful that the complainant has a valid interest in accessing the information, the Commissioner does not see that there is a broader public interest in disclosing the information. The council's investigatory process exists to provide public reassurance that complaints about misconduct can be properly explored and that councillors' conduct that be held to account.
54. The Commissioner has not been provided with any evidence that the council has not properly followed its own procedures in this case and he considers that, in addition to disrupting the integrity of the procedure, disclosure of the information would be likely to cause unwarranted intrusion and distress to the data subject.
55. The Commissioner has therefore decided that the disclosure of the requested information would be unfair and a breach of the first data protection principle. It has therefore not been necessary to go on to consider any of the conditions in Schedule 2 of the DPA.
56. In conclusion, the Commissioner finds that all the withheld information is exempt under section 40(2) of the FOIA

## Right of appeal

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57. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

58. 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.
59. 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 .....**

**Andrew White**  
**Group Manager – Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**