

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 February 2023

Public Authority: Barnsley Metropolitan Borough Council

Address: PO Box 634,
Barnsley
S70 9GG.

Decision (including any steps ordered)

1. The complainant has requested that Barnsley Metropolitan Borough Council (the Council) provide information in relation to one of its employees.
2. The Commissioner's decision is that the Council correctly relied on Section 40(5B)(a)(i) of FOIA to refuse to confirm or deny whether it held information falling within the scope of the request.
3. The Commissioner does not require the Council to take any steps as a result of this decision notice.

Request and response

4. On 14 November 2022, the complainant wrote to the Council and requested information in the following terms:

'Under [Freedom of Information Act/Environmental Information Regulations], I would like to request the following information:

How long did (name redacted) work for your Council?

How many complaints did (name redacted) have against (redacted) while working for your Council?

What was (name redacted) position within your Council?

Did (name redacted) receive any disciplinary action against (redacted) while working for your Council and what was the outcome?

Was (name redacted) dismissed from working for your Council?

Why would (name redacted) still be registered as working for your Council with social work England?

I would like you to provide this information in the following format: Email PDF and hard copy letter'.

5. The Council responded 14 November 2022 and stated it was not obliged to disclose the requested information as it was covered by Section 40(2) of FOIA.
6. The complainant was unhappy with the Council's response and requested an internal review on 14 November 2022.
7. The Council responded on 15 November 2022 stating it was standing by its original response.

Scope of the case

8. The complainant contacted the Commissioner on 15 November 2022, to complain about the way his request for information had been handled.
9. On 29 November 2022 the Commissioner contacted the Council to request any further arguments and information it may wish to provide in relation to the complainant's request.
10. The Council responded on 6 December 2022 providing its final reasoning in which it confirmed that it was refusing to confirm or deny whether it held information in respect of the complainant's request under Section 40(5)(b) of FOIA.
11. The scope of the Commissioner's investigation will be to consider whether the Council is entitled to rely on Section 40(5) of FOIA in relation to the complainant's request.

Reasons for decision

12. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in a request. This is commonly known as 'the duty to confirm or deny'. However, there may be occasions when complying with the duty to confirm or deny under Section 1(1)(a) would itself disclose sensitive or potentially exempt information. In these circumstances, Section 2(1) of FOIA allows a

public authority to respond by refusing to confirm or deny whether it holds the requested information.

13. The decision to use a neither confirm nor deny (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. The Commissioner's guidance¹ explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds information about an individual can itself reveal something about that individual. For example, where a request is made for information about staff disciplinary records in respect of a particular individual, to confirm or deny that that information is held would be likely to indicate that the person was, or was not, the subject of a disciplinary process. This is, of itself, a disclosure of information about that person.
14. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
15. In its response to the Commissioner, the Council has taken the position of neither confirming nor denying whether it holds the requested details of the person named in the request, citing Section 40(5B)(i) of FOIA. 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 the information requested by the complainant.
16. Put simply, the Commissioner must consider whether or not, in this particular case, the Council is entitled to NCND whether it holds any information in relation to the person that the complainant's information request refers to.

Section 40 - personal information

17. 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

¹ [Neither confirm nor deny in relation to personal data \(Section 40\(5\) and regulation 13\(5\)\) \(ico.org.uk\)](https://ico.org.uk/for-organisations/guide-to-the-data-protection-legislation/section-40-foia-requirements/section-40-5b-requirements/section-40-5b-a-requirements/)

Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.

18. Therefore, for the Council to be entitled to rely on Section 40(5B)(a)(i) 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 any 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?

19. Section 3(2) of the Data Protection Act 2018 (the DPA 2018) defines personal data as 'any information relating to an identified or identifiable living individual'.
20. The two main elements of personal data are that the information must relate to a living person, and that the person must be identifiable.
21. 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.
22. The Commissioner is satisfied that confirming or denying whether the information is held would result in the disclosure of a third party's personal data. This is because the request clearly specifies that the information relates to a particular person, who is an identifiable living individual.
23. If the Council confirmed it did hold information, that would verify the person named in the complainant's request was or had been employed by the Council. If the Council denied that it held any information falling within scope of the request, that would mean the named person was not or had not been employed by the Council.
24. Either response would reveal information that relates to and identifies the person named in the request, and is therefore their personal data in accordance with the definition in Section 3(2) of the DPA 2018.
25. For the reasons set out above the Commissioner is satisfied that, if the Council confirmed whether or not it held the requested information, this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.

26. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent the Council from refusing to confirm whether or not 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.

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

27. In this case, the Commissioner considers the most relevant data protection principle to be principle (a).
28. Article 5(1)(a) of the UK GDPR, which concerns this principle, states the following:

‘Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.’

29. 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 (meaning it would meet one of the conditions of lawful processing listed in Article 6(1) UK GDPR), be fair, and be transparent.

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

30. Article 6(1) of the UK 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.
31. 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.
32. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) UK 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’

33. In considering the application of Article 6(1)(f) UK 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 confirmation as to whether the requested information is held (or not) 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.

34. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) Legitimate interests

35. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

36. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

37. The complainant has not provided the Commissioner with any public interest reasons as to why the requested information should be disclosed.

(ii) Is confirming whether or not the requested information is held necessary?

38. '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.

39. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
40. The Commissioner is satisfied that confirmation or denial of whether the requested information is held is the least intrusive means of achieving the legitimate aim in question.

(iii) Balance between legitimate interest and the data subject's interests or fundamental rights and freedoms

41. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject's interests, fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the 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.
42. The Council has stated the person named in the request would have a reasonable and legitimate expectation that the information requested would not be disclosed under FOIA and furthermore disclosure could result in potential harm or distress to the data subject.
43. The Commissioner is satisfied that the person named in the request would have no reasonable expectation that the Council would confirm or deny whether it held the information that has been requested in this case. He is also satisfied that confirming or denying whether or not the information is held may potentially cause damage and distress to named person.
44. The Commissioner has therefore weighed this against any potential legitimate interests in disclosure in this case.
45. Based on the circumstances of this case, the Commissioner has determined that there is not sufficient legitimate interest to outweigh the named individual's fundamental rights and freedoms in this instance.
46. He has therefore determined that confirming whether or not the requested information is held would not be lawful.

Fairness/Transparency

47. Given the conclusion the Commissioner has reached on lawfulness, which included consideration of fairness, he considers that he does not

need to go on to separately to decide whether confirming or denying whether the information is held would be fair and/or transparent.

48. 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 FOIA.

Right of appeal

49. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

50. 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.
51. 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

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