

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 December 2017

Public Authority: North Somerset Council
Address: Town Hall
Walliscote Grove Road
Weston-super-Mare
BS23 1UJ

Decision (including any steps ordered)

1. The complainant has requested information about safeguarding referrals, reports and associated actions about three premises within a specified period. North Somerset Council initially withheld the information under section 40(5)(b)(i) of the FOIA on the basis that to confirm or deny it held information would reveal personal data about living individuals. It did however supply food hygiene records held about the establishments. During the course of the Commissioner's investigation, North Somerset Council also relied on sections 31(1) and 31(3) of the FOIA on the basis that disclosure of held information, or acknowledgement that information is held or not held, could prejudice any investigation being run by the Council and other law enforcement agencies into alleged safeguarding concerns, and alert possible perpetrators about current or future safeguarding investigations.
2. The Commissioner's decision is that North Somerset Council has correctly applied sections 40(5)(b)(i), 31(1) and 31(3) of the FOIA.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 23 February 2017 the complainant, a journalist working at the BBC, wrote to North Somerset Council and requested information in the following terms:

'Under the FOIA I would like to request the following please:

The number of safeguarding referrals, reports and/or complaints that North Somerset Council has received/is aware of about the following premises in the last 24 months:

1. *Mumu's: 20 Regent St, Weston-super-Mare BS23 1SQ*
2. *Dragon's Kiss: 18-20 Regent St, Weston-super-Mare BS23 1SQ*
3. *Sass Cafe & Bar, 16-18 South Parade, Weston-super-Mare*

Please break this down by month, by type of incident and action taken by North Somerset Council.'

5. The Council responded on 23 March 2017. It refused to confirm or deny that it held safeguarding information falling within the scope of the request, citing section 40(5)(b)(i) of the FOIA. It did however supply food hygiene records it held for two of the named establishments.
6. Following an internal review the Council wrote to the complainant on 28 April 2017. In its review letter, the Council explained in more detail why it refused to confirm or deny, under section 40(5)(b)(i), whether it held safeguarding information that fell within the scope of the request. It said that to do so would contravene the first data protection principle (personal data must be processed fairly and lawfully), as it may reveal third party personal information, in this case that of the establishments' proprietors. The Council made reference to 'recent interest' and 'local knowledge' in the area, which if combined with either confirming/denying information existed, or disclosing such information, would be likely to result in associations with living individuals.

Scope of the case

7. The complainant contacted the Commissioner on 2 May 2017 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of the case to be whether the Council correctly applied the exemptions under section 40(5)(b)(i) to the complainant's request in its initial response and review. During the investigation the Council engaged sections 31(1) and 31(3) of the FOIA (disclosure of information and confirmation or denial that it held information would prejudice law enforcement activities). Therefore the Commissioner has also considered whether it is correct to rely on these exemptions.

Reasons for decision

Section 40(5)(b)(i)

Section 40(5)(b)(i) of the FOIA provides that if a public authority receives a request for information which, if held, would constitute the personal data of someone other than the requester, it does not have to confirm or deny that it holds the information if by doing so it would breach the data protection principles or section 10 of the Data Protection Act (DPA) 1998. When engaging this exemption, a public authority must consider whether any of the conditions in schedule 2 or 3 of the DPA 1998 are met, and whether the disclosure is fair and lawful.

Section 31(1)

Section 31(1) permits public authorities to withhold information falling under a request if disclosure would prejudice law enforcement activities. In this case the Council has engaged 31(1)(a) and (b) – disclosure of requested information would prejudice the prevention or detection of crime, and the apprehension or prosecution of offenders. To effectively engage 31(1), the public authority have to demonstrate that the prejudice test is met and must consider the arguments for and against disclosure to establish that the public interest rests in maintaining the exemption.

Section 31(3)

Section 31(3) exempts a public authority from neither confirming nor denying it holds information falling under the request, if by doing so it would prejudice the law enforcement activities outlined in 31(1). To effectively engage this exemption, a public authority must satisfy the public interest test.

9. The Council relied on section 40(5)(b)(i) in its response to the complainant's request. In his request for a review, the complainant argued that numbers and figures cannot constitute personal data, and asked for precedents as he had previously been supplied with similar information from both the Council and other public authorities. In its review letter, the Council referred to 'recent interest' and 'local knowledge' and argued that confirming or denying it held information could reveal personal data about living individuals, and in particular the proprietors of the named establishments within the request.
10. In her investigation letter to the Council, the Commissioner requested an explanation of:
 - the local circumstances that the Council had referred to;

- why this statistical information, if combined with either the requested information or confirmation / denial of it, would reveal third party personal data;
 - the impact confirming or denying that it held the requested information would have on identifiable individuals;
 - whether any of the information requested would constitute sensitive personal data; and
 - the Council's consideration of disclosure of the information under conditions for processing within the DPA 1998.
11. In its response to the Commissioner, the Council explained that immediately prior to the request, there had been suggestions of institutional failure in addressing issues of child sexual exploitation (CSE) by the Council circulating locally. At the same time, the BBC aired a programme that focused on the activities of 'Butterfly Massage Parlour', located within the area, where it was alleged that the establishment was in fact a brothel and that vulnerable young girls were being sexually exploited.

Engagement of Section 40(5(b)(i))

12. The Commissioner has first considered whether the requested information would be the personal data of a third party.
13. The DPA 1998 defines personal data as data that relates to a living individual from which that individual can be identified.
14. The Council believes that given the very small numbers of cases (if they existed) that would fall within the request, there would be a strong likelihood of the information requested along with the information already within the public domain resulting in the identification of both alleged perpetrators and potential victims of child sexual exploitation. Knowing, for example, that an allegation of CSE had been made in one particular month against one particular establishment could enable the public to associate this information with particular individuals (even though this assumption may not be accurate).
15. In terms of neither confirming nor denying it holds information within the scope of the request, the Council has drawn a parallel with an example in the Commissioner's guidance on refusing requests¹, where a

¹ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/>

request is made for information held linking Mr Joe Bloggs to a murder. To confirm it holds information may be unfair to Mr Bloggs, who by inference is then connected to the murder (possibly as a suspect), even if this is false. Although no individual is named in the complainant's request, the Council considers a likely outcome (if not the intent) of confirming it holds information is for the public to create a link between activities of CSE and proprietors of the named establishments, which may be unfair.

16. The Council receives many reports, complaints and allegations including those related to safeguarding and CSE. Some are genuine and some malicious in nature but all have to be investigated sensitively and thoroughly. Disclosing information that might reveal the identity of an alleged perpetrator of CSE who then transpires to be an innocent party would be wrong and unfair and potentially traumatic and life changing for that individual and their family. Similarly, disclosing to the world at large through a Freedom of Information request the potential identity of victims of CSE would be traumatic and damaging.
17. Based on these arguments, the Commissioner is satisfied that there is a strong likelihood that any information, if held, falling within this request would constitute personal data.
18. For the engagement of section 40(5)(b)(i), the Council has considered the legitimate interest in the potential release of such data and acknowledges the value and role of investigative journalism and the media in highlighting issues of public interest and concern. However, this is balanced against the rights of data subjects and potential harm caused by disclosing any information about both alleged perpetrators and more importantly the victims of CSE.
19. The Council has noted that information held within the scope of the request may well include sensitive personal data if it includes an indication about the commission or alleged commission of an offence and any associated proceedings. It can see no arguments for disclosing this information under Schedule 3 of the DPA 1998 (conditions for the processing of sensitive personal data).
20. Based on its representations, the Commissioner accepts the Council's position that confirming or denying it holds information within the scope of the request would breach the DPA 1998 and therefore it has correctly applied section 40(5)(b)(i).

Engagement of sections 31(1) and 31(3)

21. Section 47 of the Children Act 1989 places a duty on the Council to investigate reports where a child within its area is suffering significant

harm. Information held by the Council in the context of the request would include the nature of the concern, action taken and any outcome, which is not statistical information. This action and outcome information would be likely to include the involvement of organisations such as the police and other law enforcement agencies.

22. In arguing that section 31 is engaged, a public authority must satisfy the 'prejudice test'. This means that there must be a likelihood that disclosure would cause prejudice to the interest that the exemption protects (in this case the prevention or detection of crime, and the apprehension or prosecution of offenders). A public authority must demonstrate that the prejudice claimed is real, actual or of substance, and that there is a causal link between the disclosure and the prejudice claimed. It must also consider the likelihood of the prejudice occurring i.e. 'would' or 'would be likely' to occur. The Council believes that disclosing information within the request would be likely to alert the perpetrators of alleged criminal activity to the fact that investigations are in progress or have been conducted. Conversely, alerting perpetrators to the absence of any report or investigation could encourage further misdemeanours by leading perpetrators to believe they are not under suspicion or investigation, and therefore their behaviour remains undetected. For these reasons the Council believes that it is right to neither confirm nor deny it holds information within the scope of the request. The Commissioner is satisfied that the Council's arguments meet the prejudice test for the engagement of sections 31(a) and (b) and 31(3)
23. The Commissioner accepts that there is a public interest in the wider public having confidence that public authorities are taking appropriate and necessary action to safeguard vulnerable children and young people in their area, which might be satisfied through requests like that submitted by the complainant. There may also be a public interest in knowing about local risks to vulnerable young people (in this case the identification of local establishments). However, the Commissioner accepts the arguments put forward by the Council that disclosing any information within the scope of the request, or confirming or denying it holds information is likely to prejudice the detection and prevention of crime, and bringing perpetrators to justice. Therefore on balance the Commissioner considers the public interest in disclosure of the information is outweighed by the public interest in maintaining the exemptions, and therefore the Council is entitled to rely on sections 31(1) and 31(3) of the FOIA.
24. The complainant contests the Council's assumption that releasing the information to him would mean that no discretion was exercised in how that information might be used. He has argued that as a respectable

journalist he is bound by the same laws of child protection as the Council. However, for the purposes of the FOIA, when information is disclosed it is done so to the world at large and unconditionally. Requests are applicant and motive blind and consideration should not be given by public authorities as to how and why any disclosed information might be used.

25. Although not directly linked to the application of exemptions, the Council has explained that locally it has been criticised for a perceived failure in responding to allegations of CSE. It believes that fully complying with request would in fact be in the Council's interest as refusing to confirm or deny the existence of information fuels suggestions that it is not fulfilling its statutory responsibilities in safeguarding vulnerable children. However it believes that correctly applying exemptions within the FOIA to the requested information is the right thing to do.

Right of appeal

26. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

27. 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.
28. 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
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF