

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

### **Decision notice**

**Date:** 15 June 2020

**Public Authority:** Northamptonshire County Council

**Address:** One Angel Square  
Angel Street  
Northampton  
NN1 1ED

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

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1. The complainant has asked Northampton County Council for all documents which relate to the investigations of the Adult Safeguarding Team following the death of her mother. The Council initially refused to disclose some of the information it holds in reliance on section 40(2) of the FOIA, on the grounds that the withheld information constitutes the personal data of third-party individuals. During the Commissioner's investigation the Council also confirmed its additional reliance on section 41(1)(a) of the FOIA.
2. The Commissioner's decision is that Northamptonshire County Council has properly applied sections 40(2) and 41(1)(a) of the FOIA to the information it is withholding.
3. No further action is required in this matter.

#### **Request and response**

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4. The complainant wrote to Northamptonshire County Council on 14 July 2018. The complainant's letter contained a request for information under the following terms:
5. "As executors of our late mother's estate and under the terms of the Freedom of Information Act, please supply us in hard copy format with copies of all documentation relating to the investigations undertaken by the Adult Safeguarding Team (or others) and their conclusions. Would

you also please state whether the burn described above was itself the subject of a safeguarding investigation, or indeed if any report of the injury was ever made to you.”

6. On 2 November 2018, the Council responded to the complainant’s request by disclosing approximately 200 pages of documents.
7. On 5 February 2019, the complainant wrote to the Council to make clear that she seeks ‘further information’ regarding the Adult Safeguarding Team investigation which took place between May and August 2014. The complainant advised the Council that she wanted to determine whether a separate investigation was raised in connection to a burn her mother had sustained, and that such information is not readily available from the papers which the Council had disclosed. The complainant identified the following redacted pages as potentially containing information which would be useful to her: Pages 123, 134 to 141 inclusive, 151 and 171.
8. The complainant informed the Council that she accepts that third party data should be redacted from the documents but asserted that she requires the redacted material contained in the pages she has identified.
9. On 1 March 2019, the Council confirmed to the complainant that the redacted information cannot legally be released because it would put Northamptonshire County Council in breach of the Data Protection Act 2018. The Council advised the complainant to confirm exactly what information she required if she wanted to obtain further information relating to the Adult Safeguarding Team.
10. On 27 March 2019, the complainant wrote to the Council to ask it to clarify aspects of its decision to apply section 40(2) of the FOIA to the information it is withholding.

### **Scope of the case**

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11. The complainant contacted the Commissioner on 19 September 2019 to complain about the way her request for information had been handled and specifically about the Council’s withholding of information in reliance on section 40(2) of the FOIA.
12. The Commissioner advised the complainant that her investigation would focus on the Council’s application of section 40(2) of the FOIA for refusing to disclose the information it is withholding.
13. The Commissioner also advised the complainant that previous requests of this type had been considered by both the Commissioner and the First-Tier Tribunal (Information Rights) (the Tribunal), where section 41

of the Act had been found to be applicable. Therefore, enquiries would also be made of the Council about the possible engagement of section 41 of the FOIA – where the withheld information was provided to the Council in confidence.

## Reasons for decision

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### Section 40(2) – personal data

14. The Council has provided the Commissioner with the information it is withholding from the complainant in reliance on section 40(2) of the FOIA: The withheld information is contained in pages 123, 134 – 141, 151 and 171 of the redacted documents previously disclosed to the complainant.
15. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
16. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data (“the DP principles”), as set out in Article of the General Data Protection Regulation (“GDPR”).
17. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (“the DPA”). If it is not personal data, then section 40 of the FOIA will not apply.
18. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, the Commissioner must establish whether disclosure of that data would breach any of the DP principles.
19. Section 3(2) of the DPA 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. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

22. 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.
23. Here, the Commissioner accepts that the withheld information meets the definition of personal data provided by section 3(2) of the DPA and that it is the personal data of third-party individuals ("the data subjects") who are or were members of staff at a care home.
24. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA.
25. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
26. The most relevant data protection principle in this case is principle 5(1)(a). which requires that:  
  
"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
27. Where a request for personal data has been made under the FOIA, disclosure of that personal data under that Act can only be made if to do so would be lawful, fair and transparent.
28. To be lawful, disclosure must be generally lawful and must satisfy one of the conditions for processing listed in Article 6(1) of the GDPR. Additionally, if the requested data is special category data one of the conditions for processing contained in Article 9 must also be met.
29. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) – where there is explicit consent from the data subject, or (e) – where the data has been made public by the data subject.
30. The Council had advised the Commissioner that none of the withheld information constitutes special category data nor does it constitute criminal offence data. Additionally, the Council has confirmed that it has

considered the conditions for processing set out in Article 9 of the GDPR<sup>1</sup> and that these conditions are not satisfied.

31. The Council has made clear to the Commissioner that it does not have consent from the data subject(s) and the information has not already been made public by the data subject(s).
32. In the Commissioner's opinion, to determine whether disclosure would be lawful under the FOIA, that disclosure should be necessary for the purposes of the legitimate interests pursued by the data 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.
33. The lawful basis of disclosure under the FOIA is likely to be derived from Article 6(1)(f) of the GDPR which concerns legitimate interests. This requires the withheld information to be considered in the context of the request. This consideration requires the Commissioner to apply the following three-part test:
  - i) Whether a legitimate interest is being pursued in making the request for information;
  - ii) Whether disclosure of the information is necessary to meet the legitimate interest in question; and,
  - iii) Whether the above interests override the interests, fundamental rights and freedoms of the data subject(s).
34. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.
35. In considering whether there are any legitimate interests in the disclosure of the requested information, the Commissioner recognises that such interests can include the broad general principles of accountability and transparency for their own sakes as well as interests which are specific to the case.
36. Here, the Council says it has identified no legitimate interests which would be satisfied by the disclosure of the requested information.

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<sup>1</sup> <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/special-category-data/>

37. Whilst that might be the case from the Council's point of view, it is somewhat contradicted by the some of the other points made by the Council. In any event, the Commissioner recognises the interests of the complainant which are made clear through the terms of her request and in her subsequent correspondence with the Council.
38. Clearly the complainant has a legitimate interest in the information she has requested. That interest is in knowing the full extent of the Adult Safeguarding Team's investigation into her mother's death and knowing whether that investigation included a burn which her mother sustained.
39. That said, the Council has drawn the Commissioner's attention to the statement following point (f) of Article 6 which states:

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks."
40. In this case the Council asserts that the information requested by the complainant relates to its function or 'task' in the commissioning of Adult Care Services and Adult Safeguarding.
41. The Council also considers that the disclosure of the withheld information, even if it was redacted, would enable the identification of individuals who work, or have worked, in the particular care home. The Council considers that this would be detrimental to the interests, rights and freedoms of the data subjects and be a breach of the Data Protection Act.
42. Additionally, the Council considers that disclosure of the withheld information is not necessary for the purpose of any legitimate interests and that disclosure under the FOIA should not be permitted, as the Council is a public authority performing a public task and therefore caught by the statement in Article 6, referred to in paragraph 39.
43. The Council argues that any legitimate interest in the contents of the withheld information has already been met by the disclosure of the conclusions of the investigation at page 48, which was made on 2 November 2018.
44. Additionally, the Council says that the investigation summary on page 49, which was disclosed to the complainant, paraphrases much of what is said in the redacted documents and therefore the disclosure of the withheld documents is unnecessary.
45. The Council says that it considered, "that such legitimate interests if any would be overridden by 'the interests or fundamental rights of the data subject which require protection of personal data'."

46. This is because the disclosure of the withheld information would identify individuals, even if their names were redacted, and this would be against the data subjects' interests and reasonable expectations which must be considered by virtue of Article 47 of the GDPR.
47. A consequence of disclosing the withheld information is that the Council may be subjected to potential civil proceedings, and the Council says it would not be able to rely on a public interest defence for breaching its duty of confidence owed to the data subjects.
48. The Council considers that the withheld information was provided to the Council in confidence for the purpose of its safeguarding function. It says, "To disclose those documents would seriously undermine that trust and so there would not be sufficient public interest in disclosing the information...".
49. In the Commissioner's opinion, the legitimate interests of the general public have been met to a large extent by the disclosure of information which has already been made. That said, the Commissioner recognises that the complainant's legitimate interests exceed those of the public. The Commissioner accepts the complainant's legitimate interests have not been fully met by the Council's disclosure.
50. However, considering that any disclosure of information which is made under the FOIA is to the world, and is not limited to the requester, the Commissioner has decided that there is only a very limited necessity which would warrant disclosure of the withheld information.
51. The Commissioner must strike a balance between the rights and freedoms of the data subjects against the limited legitimate interests which may require the disclosure of their personal information. In this case she is of the view that the wider public interest in transparency has already been served. The limited necessity for the withheld information to be disclosed to the complainant is insufficient to require the Commissioner to carry out a balancing test which is unlikely to require the disclosure of the withheld information.
52. The Commissioner' has therefore decided is that the Council has properly applied section 40(2) of the FOIA to the information it is withholding from the complainant. The Commissioner is satisfied that disclosure of the withheld information would not meet the requirements of data protection principle (a) and would therefore be unlawful.

*Section 41(1) – information provided in confidence*

53. Notwithstanding the foregoing decision, the Commissioner has decided to outline her decision in respect of the Council's confirmed additional application of section 41(1)(a) of the FOIA.



54. The Council has informed the Commissioner that the withheld information was provided to the Council by staff working at a particular care home. The information is considered to possess the necessary quality of confidence on the grounds that it is not otherwise accessible to the public and is not trivial in nature.
55. The information was clearly provided to the Council in confidence for the purpose of its safeguarding function and, in the Commissioner's opinion, disclosure of the withheld information would likely undermine the trust required of care home staff who might be engaged in similar safeguarding functions in the future.
56. Although section 41 is an absolute exemption, the law of confidence contains its own in-built public interest test which relates to a possible defence of a civil action, that is, where disclosure is in the public interest.
57. The Commissioner considers that there would be insufficient public interest to warrant the disclosure of the withheld information as a defence to an actionable breach of confidence. The withheld information was provided to the Council for the purpose of its safeguarding function and the loss of trust which would follow a disclosure of that information under the FOIA would be counter to the public interest.
58. The Commissioner's decision that the Council is also able to rely on section 41(1)(a) of the FOIA. This decision is consistent with other decisions for similar or related information<sup>2</sup>.

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<sup>2</sup> ICO case [FS50864285](#)



## Right of appeal

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59. 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@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)

60. 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.

61. 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**