

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 7 January 2020

**Public Authority:** London Borough of Ealing  
**Address:** Perceval House  
14-16 Uxbridge Road  
Ealing W5 2HL

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to financial arrangements concerning social care for one of the councillor's in-laws. The London Borough of Ealing (the "Council") refused to confirm or deny whether it held this information citing section 40 (personal data exemption) as its basis for doing so.
2. The Commissioner's decision is that the Council is entitled to refuse to confirm or deny whether it holds the requested information.
3. No steps are required.

#### Request and response

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4. On 8 February 2019, the complainant requested information of the following description:  
  
"In respect of the money [named councillor] owes to Ealing Council for social care his mother in law received for which he was liable, but failed, to pay;  
Please advise:
  1. What steps the council has taken to recover the money?
  2. How long the debt has been outstanding?
  3. The total sum of the debt involved and how much has been repaid?
  4. What steps the council is taking to recover the monies under the conditions of the charge on the councillor's property?
  - 5 in view of the fact that the councillor's mother in law, who was the recipient of the social care, passed away in July 2018, and the conditions of the charge state that the debt must be repaid in full at this

time, what steps has the council taken to retrieve the full amount of this money since July 2018?

6. In the event of the councillor defaulting on the conditions of the charge on his property regarding his debt for social care what action is the council going to take against him?"
5. On 15 February 2019, the Council responded. It refused to confirm or deny that it held the requested information and cited section 40 (personal data) as its basis for doing so.
6. The complainant requested an internal review on 17 March 2019. The Council sent him the outcome of its internal review on 5 April 2019. It upheld its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 9 July 2019 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the Council is entitled to rely on section 40 as its basis for refusing to confirm or deny whether it holds the requested information.

### **Reasons for decision**

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#### *Section 40(5B)(a)(i)*

9. As the public authority's refusal of the request was after 25 May 2018, the date the new Data Protection Act 2018 (DPA 2018) and the General Data Protection Regulation EU2016/679 (GDPR) legislation came into force, the Commissioner considers that the DPA 2018/GDPR applies.
10. Under section 1(1)(a) FOIA, any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request.<sup>1</sup> This requirement to inform an applicant whether information matching their request is held by the public authority is commonly referred to as the "duty to confirm or deny."

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<sup>1</sup> Subject to other provisions in the FOIA.

11. Section 40(2) FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester (ie a third party) and where one of the conditions listed in section 40(3A), 40(3B) and 40(4A) is satisfied.
12. Section 40(5B)(a)(i) 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 GDPR to provide that confirmation or denial.
13. Therefore, for the public authority to be entitled to rely on section 40(5B) 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) 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 public authority has argued that confirming or denying whether the information is held would, in itself, would constitute disclosing personal data relating to the named councillor and their spouse. It would make public whether or not the property of the named councillor and their spouse had been made liable by the Council for social care provided by the Council to the mother of the named councillor's spouse and that there was some sort of financial debt involving the spending of public money related to this. The Commissioner is satisfied that the requested information, if held, would be the personal data of those two individuals. The request is about any charges incurred on their property in respect of social care for the spouse's parents. This information, if held, would clearly be of biographical significance to both the councillor and their spouse.

18. The Commissioner therefore finds that confirming or denying whether the requested information is held would result in the disclosure of the personal data of the councillor and their spouse. The first criterion above is therefore met.
19. The fact that confirming or denying whether the requested information is held would reveal the personal data of the councillor and their spouse does not automatically prevent the public authority 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.
20. Before addressing this, the Commissioner would note that she Commissioner asked the Council whether, if held, the information would be special category data (additional data protection rules apply to such data). The Council argued that because the information, if held, would relate to social care it would inevitably be special category data. This is because social care is connected to adjustments arising from a person's health. While the Commissioner accepts that social care has this connection, unless the requested information is about living individual who has received or is receiving this care, it will not be special category data unless it satisfies the definition of special category data for another reason.<sup>2</sup> The wording of the request indicates that the councillor's mother-in-law (the recipient of the social care in question) is now deceased, having passed away before the request was made. On a strict reading of the law, this means that any information relating to her, including sensitive information such as health data cannot be personal data subject to GDPR/DPA 2018, although other confidentiality obligations may apply.
21. Returning to the detail of this request, the Commissioner agrees that the most relevant data protection principle is principle (a).

*Would confirming whether or not the requested information is held contravene principle (a)?*

22. Article 5(1)(a) GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”

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<sup>2</sup> The Commissioner has published information about special category data: <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/special-category-data/>

*Public authority's submissions*

23. The public authority argued that confirming or denying whether it holds the requested information would contravene principle (a). This is because the matter relates to the named councillor's and their spouse's private life. The Council noted that matters relating to social care of a close family member (now deceased) are private and that there is high and entirely reasonable expectation of confidentiality relating to those matters. It would be distressing, particularly for the named councillor's spouse, if confirmation or denial about such private family matters were to be provided under FOIA. It emphasised that the named councillor's spouse was not an elected member of the Council, neither were their parents. It further argued that providing confirmation or denial in this case would be contrary to the individuals' right to privacy as set out in Article 8 of the Human Rights Act as follows:

"1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."<sup>3</sup>

*Complainant's submissions*

24. The complainant set out what he alleged was a financial controversy related to the use of public money and how his request related to this. He stressed the alleged connection of this matter to the named councillor and argued that there was a particularly compelling public interest in disclosure to expose detail of it given that public funds were involved.

25. He also provided link to news coverage of this matter. While the Commissioner notes that this publicly available coverage, she does not propose to reproduce the link here. She did put the link to the Council and asked it to comment. It observed that although the article states that the mother of the named member's spouse needed social care, it did not say whether this was provided by the Council. It provided no financial details which would assist in understanding the level of care

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<sup>3</sup> <http://www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/I/chapter/7>

that the person received nor did it provide any other information about the arrangements. This is what has been requested in this case and the Council asserted that it is not obliged to provide confirmation or denial as to whether it holds such information.

### *The Commissioner's considerations*

26. The Commissioner has found that confirming or denying whether the requested information is held would result in the disclosure of the personal data of the named councillor and their spouse.
27. 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 (ie it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), fair, and transparent.

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

28. Article 6(1) of the 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. One of the conditions in Article 6(1) must therefore be met before issuing a confirmation or denial that the requested information is held would be considered lawful.
29. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) 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’<sup>4</sup>.*

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<sup>4</sup> Article 6(1) goes on to state that:-

*“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) provides that:-

*“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph*

30. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under the 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 disclosure of the information 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.

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

#### *Legitimate interests*

32. In considering any legitimate interest(s) in confirming or denying whether a request for information under the FOIA is held, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.

33. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

34. There is a legitimate interest in maintaining public confidence in the Council's handling of the public purse where there has been allegations about its misuse. Further to that legitimate interest, the Commissioner considers that if the allegations relate to a councillor's misuse of public funds greater weight may be given to that legitimate interest.

*Is confirming whether or not the requested information is held necessary?*

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*(dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

35. '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. Confirmation or denial under the FOIA as to whether the requested information is held must therefore be the least restrictive means of achieving the legitimate aim in question.
36. In the circumstances of this case, the Commissioner recognises a legitimate interest in knowing more about how public money is spent and whether an elected official has conducted their family finances appropriately – especially where it is alleged that their conduct has had a detrimental effect on the public purse. However, the appropriate route for addressing this is via the Council's own complaints handling process and, if, for whatever reason, a complainant has no confidence in the outcome of that process, they should apply to the Local Government Ombudsman. The Commissioner is unclear whether that course of action has been followed in this case.
37. The Commissioner does not think that confirmation or denial is necessary in this case in order to serve the legitimate interest in knowing more about how public money has been spent and whether an elected official has acted in a way that is detrimental to the public purse. There are other routes for addressing this. The Commissioner thinks that the negative impact on their spouse's reasonable expectation of privacy regarding the care of their parent carries greater weight here. Confirmation or denial would, in this case, be extremely intrusive. It would, of itself, disclose that there is or is not a matter which is being considered by the Council in respect of funding of social care of the parent of the named councillor's spouse. The Commissioner is satisfied that this is ostensibly about the private family life of the individuals in question and that, where there are any concerns which relate to the use of public money, these can be considered by a formal complaints process.
38. The Commissioner considers that confirming or denying whether the requested information is held does not meet the three part legitimate interests test outlined above. The Commissioner does not consider that disclosure is necessary to meet the legitimate interest in understanding more about how allegations of improper use of public money are handled at the Council.
39. The Commissioner has therefore concluded that the requirements of Article 6(1)(f) of the GDPR have not been met and so confirming or denying whether the requested information is held would not be lawful.



40. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that she does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and transparent. 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(5)(B) of FOIA.

*Conclusion*

41. 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**

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42. 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)

43. 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.

44. 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 .....**

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