

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 March 2021

Public Authority: **Caerphilly County Borough Council**
Address: **Penallta House**
Tredomen Park
Ystrad Mynach
Hengoed
Mid Glamorgan
CF82 7PG

Decision (including any steps ordered)

1. The complainant requested details of complaints and responses made about a specified officer of Caerphilly County Borough Council (the 'Council') in relation to a specific issue. The Council refused to confirm or deny whether there had been any complaints, on the basis that to do so would in itself breach data protection principles, citing section 40(5B)(a)(i) (personal information) of FOIA.
2. The Commissioner's decision is that the Council has was entitled to rely on section 40(5B)(a)(i) of FOIA to neither confirm or deny holding any 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 notice.

Request and response

4. On 27 January 2020, the complainant wrote to the Council and requested information in the following terms:

"Following Full Council last Tuesday item 8 21/1/20 with my question to the Leader on Scrutiny Functions would you please provide:

1. *All letters of complaint, e mails and correspondence received from members of the public following the Leaders [sic] answer from members of the public to the Interim Chief Executive and the Leader, and responses returned – please remove their names and addresses please as I believe this would be against procedure and data protection.”*
5. The Council responded on 24 February 2020. It refused to confirm or deny that the requested information was held under section 40(5B)(a)(i) of FOIA, the 'neither confirm nor deny provision' within the exemption for personal information.
6. The complainant requested an internal review on 8 March 2020. The Council responded, late, on 19 May 2020. The Commissioner notes the Council explained to the complainant that this delay was caused by the impact of Covid-19.
7. Following its internal review, the Council maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner on 23 May 2020, by posted letter which was received on 10 June 2020, to complain about the way his request for information had been handled.
9. Within his correspondence he suggested that any complaints, if held, could be redacted to remove names and addresses of those making the complaints.
10. The Commissioner has considered whether the Council has properly relied on section 40(5) of FOIA in relation to this request.

Reasons for decision

Neither confirm nor deny ('NCND')

11. 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.

12. The decision to use an 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.
13. 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.
14. The Council has taken the position of neither confirming nor denying whether it holds complaint related information about the Council's Leader, citing section 40(5) 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.
15. Put simply, in this case the Commissioner must consider whether or not the Council is entitled to NCND whether it holds any complaint-related information about the Council Leader in relation to the issue specified in the request.

Section 40 - personal information

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

¹ <https://ico.org.uk/media/for-organisations/documents/2614719/neither-confirm-nor-deny-in-relation-to-personal-data-section-40-5-and-regulation-13-5-v20.pdf>

17. Therefore, for the Council to be entitled to rely on section 40(5B) 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 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?

18. Section 3(2) of the DPA 2018 defines personal data as:-

"any information relating to an identified or identifiable living individual".

19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

20. 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.

21. As suggested by the complainant, the Commissioner accepts that it is likely that the details of any parties who complained about the Leader of the Council could be successfully redacted to prevent their identification. However, this is not the matter that she is considering here. As a known party, this is not possible for the Leader of the Council who would be the party who was complained about. 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 because the request clearly specifies that the information relates to the Leader of the Council who is an identifiable living individual.

22. If the Council confirmed that it did hold information then that would confirm that the Leader of the Council had been the subject of a complaint or complaints. If the Council denied that it held any information falling within scope, that would mean that the Leader had not been the subject of a complaint. Either response reveals personal biographical details about the Leader and is therefore their personal data.

23. 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.

24. The fact that confirming or denying whether the requested 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.
25. The Commissioner agrees that the most relevant data protection principle is principal (a).

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

26. Article 5(1)(a) UK GDPR states that:

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

27. In the case of an 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) UK GDPR), be fair, and be transparent.

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

28. 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. 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.
29. 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*².

30. 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.

31. 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

32. 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)

² 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) and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019)

provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. 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.

33. The complainant has not submitted any specific legitimate interest arguments.
34. The Council submitted the following:

"We acknowledge that there is a legitimate interest in the Council confirming whether or not the requested information is held as we have a general duty of openness and transparency, however, we also note that the requester has his own interests in pursuing the request as the request relates to complaints received following the response the Leader of the Council gave to a question the applicant raised in his role as an elected member at a Council Meeting.

There is a legitimate interest in maintaining public confidence in the Council's complaints handling procedures particularly in knowing that complaints made against elected members/the Leader of the Council are dealt with adequately and effectively. We aim to foster this confidence by having a robust complaints process."

35. The Commissioner therefore accepts that there is a legitimate interest that could be met by a confirmation or denial in this case.

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

36. '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 FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
37. The complainant has not submitted any reasons as to why he considers it 'necessary' for the Council to confirm or deny whether it holds the requested information.
38. The Council made the following arguments:

"We then looked at whether or not confirming that the information is held is necessary to meet the legitimate interest, and "necessary" means more than desirable but less than indispensable or absolute necessity. 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 intrusive.

The Council considered whether there were any less intrusive way [sic] of answering the request, and we are satisfied that in this case there are no less intrusive means of achieving the legitimate interests identified without disclosing 3rd party personal information as the named person would still be identifiable if a redacted copy of the information was provided as there is only 1 Leader of the Council.

We acknowledge that there is a legitimate interest in maintaining confidence in the procedures for handling complaints, however, in the circumstances of this case, there is no compelling legitimate interest in confirming or denying whether complaints have been made about the Leader's conduct at the Council meeting in order to maintain public confidence in the complaint handling procedures. Elected members are required to sign an acceptance of office which says that they will agree to adhere to the Code of Conduct for Members and a copy of this code is available for the public to view on the Council's website, providing openness and transparency in the way that the Council deals with such matters and reassures the public that such matters are dealt with appropriately.

It is the Council's view that revealing whether complaints have been made about the Leader is unlikely to be particularly informative as to whether adequate procedures are in place for handling complaints made about elected members. It is likely that the public will have greater trust and confidence in a process if it knows that details of complaints made to the Council will not be disclosed under FOIA. This will build confidence that if they feel it necessary to raise any concerns about an elected member, they can do so in the knowledge that it will not be put into the public domain. It is likely that information about how complaints are handled will better inform the view of the public on the adequacy of the complaints handling procedures rather than by putting details of individual complaints into the public domain."

39. In addition, the Council explained:

"It could be argued that there is a legitimate public interest in knowing that the Leader of the Council carries out their role effectively, but that public interest could be adequately met by

the fact that the Council has a Code of Conduct for Members which is published on the Council's website along with details of how to make a complaint about an elected member. Formal complaints about elected members who may have breached the code of conduct should be addressed to the Public Services Ombudsman for Wales who determine whether or not the complaint meets the criteria for investigating. The findings of any investigations carried out by the Ombudsman refer to cases by reference numbers and do not name individuals, so the identity of the individuals who have been investigated are not put into the public domain. The only time a complaint would be made public would be if the Ombudsman found a breach and it was reported to the Standards Committee or Adjudication Panel for Wales. On the basis that there are policies and procedures in place to deal with complaints made about the conduct of elected members, the public interest is met and there is no legitimate interest in confirming or denying whether any complaints against the individual have been received.

It is normal procedure for complaints to be investigated to see if there is any merit in the allegations being made, and we have to acknowledge, that any allegations made could be unfounded or malicious. Confirming whether the information requested is held could have a detrimental affect [sic] on the reputation of the individual named and on the public's confidence in their ability to carry out the role as Leader of the Council. It is important that the Council and the public have confidence in the Leader of the Council and confirming that a complaint had been received could have an adverse affect [sic] on that trust."

40. The Commissioner agrees with the Council's assessment that there is no less intrusive means of responding to the request. She notes that a Code of Conduct for Members procedure is in place, which elected members are required to sign up to, and which is publicly available. She also notes that the findings from any resulting investigations by the Ombudsman are only made public in the circumstances outlined above.
41. The Commissioner does not consider that confirmation or denial of whether the Council holds any complaints relating to its Leader as per the request informs the debate as to whether it has adequate procedures in place to deal with complaints about its elected members.
42. If the complainant does personally have an issue with how he was dealt with by the Leader then presumably he is able to take this up as a personal complaint for consideration. Furthermore, if any other member of the public has made a relevant complaint then, presumably, this will be considered via the appropriate channels rather than publicly under the FOIA. The relevant codes referred to above will ensure that, where

necessary, effective action is taken. Conversely, just disclosing whether or not any complaints were received in respect of this particular matter would not be informative as it would not indicate whether or not any such complaint was upheld or if there was any breach of the codes of conduct. As there is another avenue for seeking personal redress in this matter, in the Commissioner's view it is not 'necessary' for the Council to comply with section 1(1)(a) of FOIA in order to meet the legitimate interests identified above.

The Commissioner's view

43. 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.

Other matters

44. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA.
45. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
46. The Commissioner notes that in this case it took 50 working days for an internal review to be completed. However, she also notes that on 8 April 2020, in response to an email from complainant, the Council advised the complainant as follows:

"Please accept our apologies for the delay in answering your request [for internal review].

Currently, due to the Covid-19 pandemic, many staff are being assigned to critical services causing disruption to normal services."

47. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft "Openness by Design strategy"³ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"⁴. In this case, the Commissioner has also made a record of the reason for the delay in the internal review.

³ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁴ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

48. 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

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

49. 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.
50. 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

Carolyn Howes
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