

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 July 2022

Public Authority: Newcastle City Council
Address: Civic Centre
Newcastle upon Tyne
NE1 8QH

Decision (including any steps ordered)

1. The complainant requested information from Newcastle City Council ("the Council") relating to an investigation into a complaint made to the Council by the complainant. The Council refused to provide some of the requested information citing section 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that the Council is entitled to rely on section 40(2) to withhold the requested information.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 16 December 2021, the complainant wrote to the Council and requested information in the following terms:

"On 3rd of November, I entered a complaint to the Council, case number above. This case was given to [name redacted] to investigate. It is my understand [name redacted] conducted a number of interviews in relation to my complaint, at least 4.

Under The Freedom of Information Act, I would request a copy of all the documentation gathered from the investigation, to include

the statements provided in relation to the interviews conducted by [name redacted].”

5. The Council responded on 18 January 2022 and refused to provide the requested information citing section 40(2) (personal information) of the FOIA as its basis for doing so.
6. On 19 January 2022 the complainant requested an internal review.
7. Following an internal review the Council wrote to the complainant on 16 February 2022. The Council provided the complainant with a copy of their own statement which they made as part of the Council’s investigation into the complaint they made.
8. However, the Council withheld the statements made by several individuals as part of the Council’s investigation into the complaint made by the complainant. It cited section 40(2) (personal information) as its basis for refusing to provide the withheld information.

Scope of the case

9. The complainant contacted the Commissioner on 17 February 2022 to complain about the way their request for information had been handled.
10. The scope of this case and the following analysis is to determine whether the Council has correctly cited section 40(2) of the FOIA to refuse to provide the withheld information.

Reasons for decision

Section 40 - personal information

11. 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.
12. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the

¹ As amended by Schedule 19 Paragraph 58(3) DPA

processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').

13. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

15. Section 3(2) of the DPA defines personal data as:

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

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.
18. 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.
19. In this case, the complainant has requested the statements made by several individuals as part of the Council's investigation into a complaint the complainant made to the Council. The Commissioner is satisfied that the withheld information is personal data as the information relates to specific individuals and is likely to identify those individuals and therefore, falls within the definition of 'personal data' in section 3(2) of the DPA.
20. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
21. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

23. 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 if to do so would be lawful, fair and transparent.

24. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

25. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“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.

26. In considering the application of Article 6(1)(f) of the 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;

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

iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

27. 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

28. 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.

29. In this case the Commissioner accepts that there is a legitimate interest in knowing what the individuals who provided statements have said during the Council's investigation into the complaint made by the complainant. There is also a legitimate interest in ensuring that the Council has conducted a full investigation into the complaint.

Is disclosure necessary?

30. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

31. The Commissioner is satisfied that disclosure of the requested information would be necessary to achieve the legitimate aims identified and that there are no less intrusive means of achieving these aims.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

32. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

33. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause
 - whether the information is already in the public domain
 - whether the information is already known to some individuals
 - whether the individual expressed concern to the disclosure
 - the reasonable expectations of the individual.
34. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
35. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
36. The Commissioner considers that the individuals who provided statements as part of the Council's investigation into the complainant's complaint have a strong and reasonable expectation that the statements they provided will remain confidential.
37. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the fundamental rights and freedoms of the individuals who provided statements. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
38. The Commissioner's decision is that the Council is entitled to rely on section 40(2) of the FOIA to refuse to provide the withheld information. The Commissioner requires no further action to be taken by the Council in relation to this request.

Right of appeal

39. 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

40. 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.
41. 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

Ben Tomes
Group Manager
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Water Lane
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