

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

### **Decision notice**

**Date:** 7 January 2022

**Public Authority:** North Norfolk District Council  
**Address:** Council Offices  
Holt Road  
Cromer  
NR27 9EN

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

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1. The complainant requested information held by North Norfolk District Council (the council) about its Employment and Appeals Committee (EAC).
2. The council provided the complainant with some information in response to her request. Following the intervention of the Commissioner, the council then agreed that some additional information about the EAC members could be released. However, it advised that it could neither confirm nor deny whether it held any information relevant to that part of the complainant's request that had asked for details about an EAC meeting of December 2019.
3. The Commissioner's decision is that the council correctly relied on section 40(5B)(a)(i) of the FOI to refuse to confirm or deny whether it held any information about a specific EAC meeting.
4. However, as a result of the late disclosure of information, the Commissioner has found there to be a breach of section 1 and 10 of the FOIA.
5. The Commissioner requires the council to take the following steps to ensure compliance with the legislation:
  - Provide the complainant with details of the members of the EAC in December 2019, as described within paragraph 14 of this decision notice, if it has not already done so.

6. The council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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7. On 29 October 2020, the complainant wrote to the council and requested information in the following terms:

*'Can I say that I am concerned about the absence of any reference to the EAC on the Council website, although this Committee has been referenced by the Council in public statements.*

*Could I please ask you to send me copies of all material that relates to the setting up of this Committee, to its population for the purposes of its December 2019 investigation, its agenda for that meeting and any other material relating to the EAC Committee that is disclosable under FOI legislation.'*

8. On 23 November 2020, the council responded, providing the complainant with some information about the EAC. However, it stated that it could neither confirm, nor deny, whether it held information about a December 2019 EAC meeting. It stated that it cited section 40(5B)(a) of the FOIA, as to confirm or deny holding the information requested may contravene the data protection principles.
9. On 23 November 2020, the complainant requested an internal review. She argued that the information requested would not fall under data protection legislation as suggested by the council.
10. On 3 December 2020, the council contacted the complainant to advise that it was usual practice for the council's lawyer to carry out the internal review. However, on this occasion, it stated that it considered there to be no officer who was independent of the original decision, and had sufficient seniority and expertise to carry out the internal review.

## **Scope of the case**

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11. The complainant contacted the Commissioner on 6 December 2020, to complain about the way her request for information had been handled.
12. She states that she is not seeking personal data, but rather requires information about the EAC. She therefore believes that the council was not correct when it said that it could neither confirm nor deny whether any further information was held that was relevant to her request.

13. During the course of the Commissioner's investigation, the council agreed to release details of those individuals who were EAC members in December 2019. It went on to say that it now routinely publishes such information on its website.
14. The complainant has also asked whether the Commissioner could consider certain information held by the council about a particular exemption certificate. However, as this information does not fall within the scope of her original request, it will not be considered within this decision notice.
15. The Commissioner will decide whether the council was correct to advise that it could neither confirm nor deny whether it held information about a December 2019 meeting of the EAC.

## **Reasons for decision**

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### **Section 40 – Personal data**

16. Section 40(5B)(a)(i) of the FOIA provides that the duty to confirm or deny whether information is held does not arise if to do so would involve a disclosure of personal data relating to any individual other than the requester and that disclosure would contravene any of the data protection principles.
17. Therefore, for the council to be entitled to rely on section 40(5B) of the FOIA to refuse to confirm or deny whether they hold 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 involve a disclosure of a third party's personal data; and
  - Providing this confirmation or denial would contravene one of the data protection principles.

### **Would confirmation or denial that the requested information is held involve the disclosure of a third party's personal data?**

18. Section 3(2) of the Data Protection Act 2018 (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. The Commissioner understands that the EAC deals solely with matters that relate to the appointment, discipline and grievances of the Chief Officers within the council. There are only four Chief Officers currently in post, each of which hold separate and very senior positions within the council.
22. The Commissioner has taken into account all the information which has been made available to him during the investigation, including that which is already in the public domain about matters to which the request relates. Having considered the council's representations, and the fact that there are only four Chief Officers (who carry out very specific roles), the Commissioner is persuaded that, in this instance, to confirm or deny whether the requested information is held would allow individual Chief Officers to be identified, and is therefore personal data.
23. Therefore, it is the Commissioner's opinion that if the council were to confirm that it did hold the information that has been requested by the complainant about a December 2019 meeting or, alternatively, if it were to confirm that it did not hold this information, either response would reveal information that identified and related to the Chief Officers within the council.
24. 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.
25. However, the fact that confirming or denying whether the requested information is held would reveal personal data does not automatically prevent the council from refusing to confirm whether or not it holds the information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.

**Would confirmation or denial contravene one of the data protection principles?**

26. 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'.*

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 they hold the requested information – if to do so would be lawful (i.e., it would meet one of the conditions of lawful processing listed in Article 6(1) of the 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.'*

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.

Is a legitimate interest being pursued?

32. In considering any legitimate interest(s) in confirming or denying under the FOIA that the information 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 interest.

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 may be more easily overridden in the balancing test. 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.
34. The council has said that, generally speaking, it has a duty to be open and transparent. In the Commissioner's opinion, there is a legitimate interest in maintaining public awareness and confidence about the processes which are followed by the council, and the decisions that are reached. It is important that the public has trust that where questions may have been raised about the conduct of an officer at a senior level, that the matter is dealt with appropriately and robustly, and in accordance with the council's policies and procedures.
35. Given the above, the Commissioner accepts that there is a legitimate interest that could be met by a confirmation or denial in this case.

Is disclosure necessary to meet the legitimate interests?

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 the 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 council has advised that there is no alternative measure that could be implemented which would achieve the legitimate aim in question, that is to provide for more openness and transparency with regard to the EAC.
38. Whilst the Commissioner is aware from the complainant's representations that there is already information within the public domain that appears to be linked to the content of her request, it is his decision that this does not provide the detail which she is seeking, and does not provide for full openness and transparency with regard to the EAC, and its meetings.
39. The Commissioner is therefore satisfied that disclosure would be necessary in this case in order to meet the legitimate interest in confirmation or denial of whether the requested information is held.

Do the above interests override the legitimate interest (s) or fundamental rights and freedoms of the data subject ?

40. In considering the above question, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to an FOIA request, or if such a confirmation or denial would cause unjustified distress. The data subject's interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
41. The council has advised that the EAC is distinguished from most other committees in that it is not a public committee, as this allows for matters to be discussed in private session. It goes on to explain that the EAC deals with matters that are sensitive, and may involve discipline and grievance cases; they may therefore contain information about allegations of wrongdoing, matters to do with capability, breakdown of trust or health issues (and can therefore include special category data).
42. The Commissioner has given consideration to that information described by the complainant which is already known to the public. He accepts that the existence of certain information in the public domain is a relevant factor to his consideration in this case. However, it is his opinion that all the Chief Officers would have a reasonable expectation that details about whether they were the subject of an EAC meeting in December 2019 (or any other time) would not be disclosed in response to an FOIA request.
43. The personal data that would be released through confirmation or denial concerns that individual in their professional capacity (as Chief Officer(s) of the council). Nonetheless, the Commissioner considers it is likely to cause that individual(s) a considerable degree of distress, if their personal data was released through the council confirming or denying when asked for information about EAC meetings. The Commissioner has therefore weighed this against the legitimate interest in disclosure in this case.
44. The Commissioner accepts that confirmation as to whether the requested information is held may further inform the public about how the council dealt with a matter which was the subject of some public controversy. He also considers that there is some legitimate interest in the public being able to scrutinise what action the council has taken in a particular case.
45. However, the Commissioner is not persuaded that revealing under the FOIA whether the council holds the information that has been requested in this case is necessary in order to maintain public confidence, nor would it inform the debate as to whether the council has adequate



procedures in place to deal with any concerns that may arise about the conduct of its Chief Officers.

46. Based on the circumstances of this case, the Commissioner has determined that there is not sufficient legitimate interest to outweigh the fundamental rights and freedoms of the relevant individuals in this instance. He has therefore determined that confirming whether or not the requested information is held would not be lawful.

#### Fairness/ Transparency

47. Given the conclusion the Commissioner has reached on lawfulness, which included consideration of fairness, he considers that he does not need to go on to separately decide whether confirming or denying whether the information is held would be fair and/or transparent.
48. As such, in this case the Commissioner has decided that the council can rely on section 40(5B)(a)(i) to neither confirm nor deny it holds any further information that is relevant to the complainant's request.

#### **Procedural matters**

49. Section 10 of the FOIA requires a public authority to disclose non-exempt information within 20 working days of receiving a request.
50. In this case, during the Commissioner's investigation, the council agreed to release information relating to the membership of the EAC. As this is information which should have been communicated to the complainant under section 1 of FOIA within 20 working days of her request (by the timeframe specified in section 10 of the FOIA), the Commissioner has recorded a breach of section 1 and 10 of the FOIA.



## Right of appeal

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51. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

52. 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.

53. 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**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**Cheshire**  
**SK9 5AF**