

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 August 2021

Public Authority: Huntingdonshire District Council

Address: St Mary's Street
Huntingdon
PE29 3TN

Decision (including any steps ordered)

1. The complainant requested from Huntingdonshire District Council ("the Council") information relating to any formal complaints made by the previous owners of their property, regarding a neighbours bonfires. The Council withheld the requested information under section 40(2) of the FOIA.
2. The Commissioner's decision is that any information the Council did hold would be that of third parties. However, she considers that the Council should have relied on section 40(5) of the FOIA and should not have confirmed or denied holding information.
3. The Commissioner does not require the Council to take any further steps.

Request and response

4. On 11 December 2020 the complainant wrote to the Council to request information in the following terms:

"In short, we require verification of whether any formal complaints have been received by the council from the previous owners of our home (address redacted) about bonfires at (address redacted).

Within 2 weeks of living here (moved in date redacted) we witnessed huge, black smoking, smelly bonfires by the neighbour who's garden backs onto ours. We were also swiftly approached by other neighbours telling us these bonfires are regular and are a nuisance.

We are told many people have complained to Environmental Health and The Fire Brigade (who have attended many times), AND we are told this is why the previous owners of our home sold up.

This is very concerning to us, as during the sales process we relied upon the facts given, being there were NO ongoing neighbour disputes.

I have sought advice from our Solicitor who has suggested we seek confirmation of whether the previous owners of our home, (address redacted), (redacted previous owners names) made any formal complaint to the council/Environmental Health etc about fires at (address redacted)."

5. The Council responded on 8 January 2021 and refused to provide the information, citing section 40(2) of the FOIA – personal information, as the basis for doing so.
6. The complainant sought an internal review on 12 January 2021.
7. Following an internal review, the Council wrote to the complainant on 9 February 2021. It maintained the application of section 40(2). However, it did disclose the number of complaints received from (address redacted) in 2020.

Scope of the case

8. The complainant contacted the Commissioner on 16 February 2021 to complain about the way their request for information had been handled, and specifically that the Council was not entitled to withhold information under section 40(2).
9. The Commissioner has considered the request for information and the responses by the Council and she considers that the Council should never have confirmed holding information in the first place.
10. Responses provided under the FOIA are considered to be provided to the world at large. The Council has, in confirming it held information, confirmed the fact that at least one complaint had been received. This should not have been disclosed under the FOIA.
11. Given her dual role as the regulator of data protection legislation, the Commissioner considers that she has sufficient experience and expertise to reach a decision in this case based on the request and responses. The Commissioner has therefore not sought further submissions from the Council as to why it handled the request in the way that it did.
12. The Commissioner considers that the matter to be decided is whether the Council is entitled to rely on section 40(5) to refuse to either confirm or deny it holds the requested information.

Reasons for decision

13. Section 1(1)(a) of FOIA provides that where a public authority receives a request for information, it is obliged to tell the applicant whether it holds that information. This is commonly known as the duty to confirm or deny.
14. There are however exemptions from the duty to confirm or deny. It should be noted that when applying an exemption from the duty to confirm or deny, a public authority is not restricted to only considering the consequences of the actual response that it would be required to provide under s1(1)(a). For example, if it does not hold the information, the public authority is not limited to only considering what would be revealed by denying the information was held, it can also consider the consequences if it had to confirm it did hold the information and vice versa.
15. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny 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 General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.

16. Therefore, for the Council to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny 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?

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

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

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

19. 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.

20. The Commissioner is satisfied, from reviewing the request, that if the Council were to either confirm or deny it held the information, it would involve the disclosure of personal data. The first criterion set out is therefore met.

21. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party (or parties) does not automatically prevent the Council from refusing to confirm whether 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.

22. The Commissioner considers 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?

23. 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”.

24. 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 (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair and be transparent.

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

25. 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 disclosure of the information in response to the request would be considered lawful.

26. 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”¹.

27. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part-test:

¹ 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 (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

- (i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- (ii) **Necessity test:** Whether confirming or denying that the requested information is held 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(s).

28. 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

- 29. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOIA request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sake as well as case specific interests.
- 30. 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.
- 31. In this case, it is clear that the complainant is seeking information relating to complaints made by a third party, the previous owners of (*address redacted*) relating to (*address redacted*). The complainant has stated they have a personal interest in the information.
- 32. There may also be legitimate interests in the information to other residents in the local area.

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

- 33. '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 that the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.

34. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

35. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if a data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOIA request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
36. Disclosing whether the requested information was held would reveal whether or not a complaint had been made by the former owners of (*address redacted*). As this information relates to the former owners of (*address redacted*), it is considered personal data and the former owners of (*address redacted*) would expect this information to be treated as confidential, should any complaints exist.
37. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.
38. The Commissioner has therefore decided that the Council should have refused to confirm whether or not it held the requested information on the basis of section 40(5B)(a)(i) of the FOIA.

Other matters

39. When responding to FOIA requests, the Council should consider whether to provide a confirmation or denial response.

Right of appeal

40. 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

41. 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.
42. 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

Phillip Angell
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