

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

### **Decision notice**

**Date:** 08 May 2013

**Public Authority:** Craigavon Borough Council  
**Address:** Craigavon Civic & Conference Centre  
Lakeview Road  
Craigavon, Co. Armagh  
BT64 1AL

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

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The complainant has requested information from Craigavon Borough Council ("the Council") relating to correspondence to and from certain individuals concerning Lough Neagh rescue service. The Council refused to disclose the requested information, citing section 40(2) by virtue of section 40(3)(a)(i) of FOIA as a basis for non-disclosure. The Council also deemed the request to be vexatious and applied section 14(1) of FOIA. The Commissioner's decision is that the Council has correctly applied section 40(2) of FOIA to the requested information. He has therefore not considered the Council's application of section 14(1) of FOIA. The Commissioner orders no steps to be taken.

### **Request and response**

1. On 2 January 2013, the complainant wrote to the Council and requested information in the following terms:

"Please can I have any correspondence you hold concerning Lough Neagh rescue originating from or to the following people:

[names of four individuals redacted]

This information may be held in the following formats or locations;

E-mails

Internal Memos

### Correspondence of any description

2. The Council responded on 9 January 2013. It stated that the requested information was exempt from disclosure under section 40(2) (personal data of third parties) of FOIA. It also stated that it was applying section 14(1) of FOIA to the complainant's request as it deemed the request to be vexatious.
3. Following an internal review the Council wrote to the complainant on 23 January 2013. It stated that the reviewer was upholding the original decision not to disclose the requested information.

### Scope of the case

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4. The complainant contacted the Commissioner on 30 January 2013 to complain about the way his request for information had been handled.
5. The Commissioner has considered whether the Council has correctly applied the above sections of FOIA as a basis for withholding the requested information.

### Reasons for decision

6. Section 40(2) of FOIA provides an exemption for information which is  
the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied.
7. One of the conditions, listed in section 40(3)(a)(i), is where disclosure of the information to any member of the public would contravene any of the data protection principles as set out in schedule 1 to the Data Protection Act 1998 (the DPA.)
8. In its internal review response, the Trust stated that the withheld information was exempt from disclosure under section 40(2) of FOIA. It clarified that the information was personal data from which individuals (other than the complainant) could be identified and that its disclosure would breach the first data protection principle.
9. The first data protection principle requires that the processing of personal data be fair and lawful and,
  - at least one of the conditions in schedule 2 is met, and
  - in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.
10. In order to reach a view on whether this exemption could be applied,

the Commissioner initially considered whether or not the information in question was in fact personal data.

### **Is the withheld information personal data?**

11. Section 1 of the DPA defines personal data as data which relates to a living individual who can be identified:
  - from those data,
  - or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
12. The withheld information consists of information about living individuals. The Commissioner considers that the withheld information is personal data as specific living individuals could be identified from it.
13. The Commissioner had raised with the Council the possibility of disclosing the information in a redacted format, i.e. removing names of individuals and other identifying details. However, the Council has explained to the Commissioner that the request was first raised through the website [www.whatdotheyknow.com](http://www.whatdotheyknow.com) which published the names of the individuals who the correspondence originated from or was sent to. The website removed those names after an express request from the Council, however they had at that stage been on the site, therefore in the public domain, for some time. The Commissioner accepts, therefore, that disclosure of the information when put together with the names which have already been posted on the website, would clearly identify the individuals concerned and that redaction at this stage would be pointless.

### **Would disclosure of this personal data be unfair and in breach of the first data protection principle?**

14. The Council in this case has stated that it believes disclosure of the requested information would breach the first data protection principle as disclosure would be unfair and would be likely to have a detrimental effect on the individuals concerned. The Commissioner has considered this.
15. The personal data in this case would not relate to the individuals in a professional capacity, but instead in their private capacity. This is significant in that the Commissioner has made a clear distinction in previous decisions between requests for information relating solely to professional matters and information relating to individuals outside their professional capacity. The Commissioner's position is that he considers it far less likely that disclosure of personal data relating to professional matters would be unfair than would disclosure of

information relating to individuals in anon-professional capacity.

16. When considering whether a disclosure under FOIA would be fair the Commissioner's approach is to reach a balanced view after considering the following factors:
  - Does the information relate to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life)?
  - Has the individual named been asked whether they are willing to consent to the disclosure of their personal data?
  - The possible consequences of disclosure.
  - The reasonable expectations of the individual(s) about what will happen to their personal data.
17. The Council has clearly stated that the individuals have explicitly refused their consent to the information being disclosed. Whilst the expression of a refusal to consent is not absolutely determinative in the decision as to whether the data subject's personal data will be disclosed, the data subject's views and wishes will be taken into account when deciding whether disclosure of personal information would be unfair.
18. The Commissioner's view is that where a data subject refuses consent this will be based on how they already feel about the information even though they may not have actively considered their views on a potential disclosure and thus the act of seeking consent simply prompts the data subject to consciously form a view on the issue of disclosure and to articulate that view to the public authority. Therefore although the refusal of consent can be seen as a reflection of the expectations of the data subject, it should not be seen as something that affects or informs those expectations.
19. It also remains important to still consider whether it is reasonable for the data subject to object to the disclosure. In some cases, it may also be possible for the data subject to provide details of the reasons why their individual circumstances may affect fairness, or shed light onto the circumstances which may lead the public authority to conclude that the data subject had a reasonable expectation that the information would remain confidential.
20. The Council has explained to the Commissioner the background to the request and has outlined a number of reasons why the individuals would be greatly distressed at the disclosure of the requested information. Indeed, the individuals have already been greatly distressed by the publication of their names on the aforementioned website and have sought assurances from senior members of the

Council that their personal information, i.e. any correspondence relating to Lough Neagh rescue involving them, will not be further disclosed. The Commissioner accepts, therefore, that the individuals would have had a reasonable expectation that the requested information would not be disclosed.

21. The Commissioner considers that disclosure would be likely to be distressing to the individuals concerned. The Commissioner has taken into account the fact that the individuals would have a reasonable expectation that such information would be kept confidential, especially following their meeting with senior members of the Council. Therefore, the Commissioner considers that the emotional wellbeing of the individuals may be affected by disclosure even though the distress or damage caused may be difficult to clearly evidence.
22. The Commissioner considers that there is a real risk that release of the information would cause damage and intrusion to the individuals concerned in this case, particularly due to the fact that it is outside their reasonable expectations for information of this nature to be made available to the world at large.
23. However, the Commissioner's approach to cases like this is that, notwithstanding the data subjects' reasonable expectations or any damage or distress caused to him or her by disclosure, it may still be fair to disclose requested information if it can be argued that there is a more compelling public interest in releasing the information. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in disclosure.
24. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure; that is to say any public interest in disclosure must outweigh the public interest in protecting the rights and freedoms of the data subject.
25. Whilst there is a general public interest in public bodies being open and transparent, the Commissioner does not consider that disclosure of the requested information in this case would inform the public in any way as to the activities of that public body. The information relates to the individuals acting in their private capacity, not their professional one. The Commissioner's view is that given the strong expectations of privacy and the likely alarm and distress that disclosure would cause,

the disclosure of the requested information would be disproportionate, and that there is no compelling interest in disclosure which would outweigh the public interest in protecting the rights and freedoms of the individual data subjects concerned. Consequently, the Commissioner is satisfied that the section 40(2) exemption is engaged in this instance.

26. The Council has also sought to apply section 14(1) of FOIA to this request, as it deems it to be vexatious. The Commissioner has not considered in any detail the application of this section, as he is satisfied that section 40(2) has been applied correctly and is an appropriate basis for non-disclosure of the requested information.

## Right of appeal

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27. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

28. 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.
29. 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 .....**

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**