

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 August 2014

Public Authority: Sheffield City Council
Address: Town Hall
Pinstone Street
Sheffield
S1 2HH

Decision (including any steps ordered)

1. The complainant submitted a request to Sheffield City Council (the Council) concerning a complaint he had previously submitted to the Council about the conduct of particular members of staff. The Council refused to confirm or deny whether it held the requested information citing sections 40, 41 and 38 of FOIA.
2. The Commissioner's decision is that under FOIA the Council was not obliged to confirm whether or not it held the requested information on the basis of section 40(5)(a). However, the Council breached section 17(1) of FOIA by failing to issue the complainant with a refusal notice within 20 working days.

Request and response

3. On 8 December 2014 the complainant wrote to the Council and requested information in the following terms:

'Re: Your letter dated 6 December 2013 and referenced JSh/GW/JS463.

You ended your letter with information as to where I might go for the the next stage, if I wish.

As I have noted several irreconcilable inconsistencies when comparing your statements with currently held documents.

It would therefore be appropriate, if I were to make an informed opinion, if you would please send all the contributory documents, in whatever format, that had a part of your 'investigation' [into a complaint submitted by the complainant about the behaviour of two members of staff], and upon which basis you have made your conclusions.

I look forward to the receipt of the material indicated above.'

4. The Council responded on 14 January 2014 and explained that it did not intend to respond to this request under FOIA as this would simply result in it having to issue a 'neither confirm nor deny' response. Instead it provided the complainant with a response outside of FOIA.
5. The complainant subsequently contacted the Council in order to explain that he wished a formal response to be provided in line with the requirements of FOIA.
6. The Council provided this response on 3 February 2014 and explained that it was refusing to confirm or deny whether it held any information falling within the scope of the request on the basis of the exemptions contained at the following sections of FOIA: 38 (health and safety), 40 (personal data) and 41 (information provided in confidence).
7. The complainant contacted the Council on 13 February 2014 and asked for an internal review of this refusal to be undertaken.
8. The Council informed him of the outcome of the review on 6 March 2014; the review upheld the application of the exemptions cited in the refusal notice.

Scope of the case

9. The complainant initially contacted the Commissioner on 4 February 2014 to complain about the Council's initial failure to provide him with a response to his request under FOIA. He also explained that he rejected the Council's suggestion in its response of 3 February 2014 that he would need it to conduct an internal review of that response as '*yet more obfuscation and delay*'.
10. The Commissioner contacted the complainant on 13 February 2014 and explained that it expected requestors to ask a public authority to conduct an internal review before he would accept a complaint.
11. The complainant subsequently contacted the Commissioner on 6 March 2014 once he had received the outcome of the internal review. The

complainant remained dissatisfied with the Council's failure to provide him with the information he requested under FOIA.

12. With regard to the second aspect of this complaint, it is important for the Commissioner to clarify that the right of access to information provided by FOIA as set out in section 1(1) of the legislation is in two parts.
13. Firstly, section 1(1)(a) provides requesters with the right to be told whether the information that they have requested is held. Secondly, section 1(1)(b) provides requesters with the right to be provided with that information (assuming of course that the requested information is held).
14. Both rights of access are subject to the application of exemptions. That is to say a public authority can choose to confirm that it holds information, ie it can comply with the right of access contained at section 1(1)(a), but then refuse to disclose that information, ie refuse to comply with right of access contained at section 1(1)(b).
15. Alternatively, as in this case, a public authority may decide to rely on an exemption to refuse to comply with the right of access contained at section 1(1)(a) of FOIA, ie they may refuse to even confirm or deny whether the requested information is in fact held.
16. Therefore, the Commissioner has simply determined whether the Council is entitled to refuse to confirm or deny whether it holds the requested information – ie whether it is absolved from the duty contained at section 1(1)(a) of FOIA – rather than whether the Council should disclose the requested information (if held).

Reasons for decision

Section 40(5) – personal data

17. Section 40 of the FOIA provides a number of exemptions relating to the withholding of 'personal data' with personal data being defined by the Data Protection Act 1998 (DPA).

18. Section 40(5) specifically states that:

'The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).'

19. The Council argued that confirming whether or not it held the requested information would breach the data protection rights of the two staff members as it would reveal under FOIA whether they had been the subject of a complaint about their conduct. Such an argument is relevant to the exemption contained at section 40(5)(b)(i).
20. The Council also argued that confirming whether or not it held the requested information would breach the data protection rights of the complainant himself. Section 40(5)(a) states that the duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority) the requestor's personal data and thus exempt from disclosure on the basis of section 40(1) of FOIA.
21. The consequence of these sections 40(1) and 40(5)(a) is that if a public authority receives a request for information which, if it were held, would be the requester's personal data then it can rely on section 40(5)(a) to refuse to confirm or deny whether or not it holds the requested information.
22. It is important to note that the Council's implication that the duty contained at section 1(1)(a) of FOIA does not apply because by confirming whether or not information is held would breach the complainant's own rights under the DPA is somewhat of a misnomer. This is because sections 40(1) and 40(5)(a) - unlike other parts of section 40 - are class based exemptions. Therefore for these exemptions to be engaged there is no need to demonstrate that disclosure (or confirmation) under FOIA would breach an individual's rights under the DPA. Rather, as explained above if the requested

information (if held) is a requestor's own personal data then these two exemptions can apply, regardless as to whether disclosing, or confirming whether information is held, would in fact constitute a breach of the requestor's rights under the DPA.

23. Personal data is defined by the DPA as:

'...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'

24. In the circumstances of this case the Commissioner is satisfied that at least some of the requested information, if held by the Council, would be the complainant's personal data. This is because the complainant would be identifiable from some of the information that has been requested given that it would most likely contain his name and possibly his contact details. Furthermore the information would obviously relate to the complainant given that it relates to concerns the complainant raised with the Council.

25. Therefore, the Commissioner accepts that the parts of the requested information, if held, which would be the complainant's own personal data would be exempt from disclosure on the basis of section 40(1) of FOIA. Furthermore, as section 40(1) of FOIA applies to such information, the Council is not required to confirm or deny whether it holds any of the requested information under FOIA by virtue of section 40(5)(a).

26. In reaching this conclusion the Commissioner recognises that some parts of the requested information (if held) may not constitute the complainant's own personal data. However, if the Council were to respond to this FOI request by providing the complainant with information falling within the scope of his request that is not his personal data (if indeed any such information was held) then it would, under FOIA, also be confirming that it holds personal data of which he is the data subject, ie it would be confirming that he had made a complaint about the conduct of two staff members. In other words, in cases such as this, to confirm or deny whether non-personal information is held is to confirm or deny whether the requestor's personal data is held. For the reasons set out above, the Commissioner is satisfied that under section

40(5)(a) the Council has no duty to confirm whether any such personal data is in fact held.

Section 17 – refusal notice

27. If a public authority wishes to rely on an exemption to refuse to comply with a request then within 20 working days of the request it must, under section 17(1) of FOIA, provide the complainant with a refusal notice which states the exemptions it is seeking to rely on.
28. In this case the complainant submitted his request on 8 December 2013 but the Council did not issue its formal refusal notice until 3 February 2014.
29. In submissions to the Commissioner, the Council emphasised that when it initially responded to this request on 14 January 2014 it deliberately chose not to provide a formal response under FOIA – but to respond outside of the legislation – in order to benefit the complaint. That was because any response under FOIA would simply have resulted in a neither confirm nor deny response, whereas outside of the legislation the Council was able to provide the complainant with a more helpful response. The Council explained that it took this approach in light of its duty under section 16 of FOIA to assist requestors.
30. The Council also noted that the complainant did not state that his email of 8 December 2013 was a FOI request. The Council acknowledged that requestors were not under any obligation to do so. However, it suggested that it was worth noting that in light of the nature and frequency of the complainant's previous correspondence with the Council, he had been given the contact details of a particular member of staff to whom such requests should be submitted in order to help manage his requests more efficiently. In submitting his request of 8 December the complainant had not used this contact point.
31. Given the circumstances of this case, the Commissioner welcomes the approach taken by the Council; ie providing the complainant with a response outside of FOIA was clearly to his benefit. However, the Commissioner is also conscious that his Guide to Freedom of Information explains that:

'It will often be most sensible and provide better customer service to deal with it as a normal customer enquiry under your usual customer service procedures, for example, if a member of the public wants to know what date their rubbish will be collected, or whether a school has a space for their child. The provisions of the Act need to come into force only if:

- *you cannot provide the requested information straight away;*
or
- *the requester makes it clear they expect a response under the Act.*¹

32. Given that the Council's response outside of the legislation did not provide the complainant with all of the information he requested, there are some grounds for arguing that the provisions of FOIA were relevant and thus the Council should have issued the complainant with a formal refusal notice in response to his request within 20 working days of his request.

33. Therefore, in not issuing its formal refusal notice until 3 February 2014 – having been specifically asked by the complainant for a response under FOIA – the Commissioner is forced to find that the Council breached section 17(1) of FOIA albeit that there was no material benefit to the complainant in the request being dealt with under FOIA.

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/guide_to_freedom_of_information.pdf - page 18

Right of appeal

34. 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: GRC@hmcts.gsi.gov.uk

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

35. 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.
36. 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

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