

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 July 2015

Public Authority: Suffolk County Council
Address: Endeavour House
8 Russell Road
Ipswich
IP1 2BX

Decision (including any steps ordered)

1. The complainant has requested information about a complaint he submitted to the Council concerning an incident he says he witnessed which raised health and safety in the workplace issues. Suffolk County Council ("the Council") would neither confirm nor deny holding the requested information by virtue of sections 40(5) (personal information).
2. The Commissioner's decision is that the section 40(5)(a) exemption is engaged.
3. The Commissioner does not require the Council to take any steps as a result of this decision.

Background

4. The complainant claimed to have witnessed an incident in a dental surgery in which the safety of a child was compromised. He referred his concerns to the Council, in the belief that it had a duty to investigate breaches of health and safety regulations in the workplace. He subsequently asked to know what was done as a result of his complaint. The Council acknowledged receipt of his complaint but refused to discuss what action it had taken as a result, citing confidentiality issues.

Request and response

5. On 2 December 2014, the complainant wrote to the County and submitted the following request for information under the FOIA:

"I do not find it acceptable that I cannot be made aware of any action taken as a result of my concerns, and therefore I do not know if any action was taken at all or my complaint has been ignored. Accordingly under the terms of the Freedom of Information Act I make a formal request that you email me copies of all the paperwork, emails and all communications to and from all parties involved in this matter. In line with the Data Protection Act you may delete all names of third parties and any reference that may identify such third parties."

6. The Council responded on 9 February 2015. It stated that the requested information was exempt from disclosure under section 40(2) (personal information about third parties).
7. Following an internal review the Council wrote to the complainant on 11 March 2015. It acknowledged that it had exceeded the statutory 20 working day timescale for responding to the request. However, it upheld its application of section 40(2).

Scope of the case

8. The complainant contacted the Commissioner on 10 March 2015 to complain about the way his request for information had been handled. He felt that with the appropriate redactions for personal data, the information he had requested could be disclosed to him.
9. At the outset of the Commissioner's investigation, the Council considered that the requested information related to third parties' personal data. However, during the course of the investigation it amended its position, stating that the requested information, if held, would also constitute the complainant's personal data and that therefore, because of the circumstances of the case, section 40(5)(a) applied.
10. Following the combined cases of the *Home Office v Information Commissioner* (GIA/2098/2010) and *DEFRA v Information Commissioner* (GIA/1694/2010) in the Upper Tribunal, a public authority is able to apply a new exemption or exception either before

the Commissioner or the First-tier Tribunal and both must consider any such new claims.

11. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA. In considering such matters, the Commissioner is mindful that whilst an individual may be aware that information does or does not exist because of their involvement in events, it does not follow that the general public is also aware of the existence of that information. Disclosure under the FOIA is a disclosure to the world at large.
12. In this case the Commissioner must decide whether confirmation or denial that the requested information is held should be in the public domain. The Commissioner recognises that the complainant has personal reasons for making his request. However, neither the identity of the applicant nor any personal reasons or private interests for wanting the requested information are relevant to the consideration of an FOIA request.

Reasons for decision

13. Under section 1(1)(a) of the FOIA, a public authority is obliged to advise an applicant whether or not it holds the requested information. This is known as the "duty to confirm or deny". However, the duty to confirm or deny does not always apply and authorities may refuse to confirm or deny through reliance on certain exemptions under the FOIA.

Section 40(5)

14. The exemption at section 40(5) of the FOIA provides that a public authority does not have to confirm or deny whether requested information is held if to do so would constitute a disclosure of personal data.
15. Section 40(5)(a) provides that the duty to confirm or deny does not arise in relation to information that falls, or would fall if it were held, within the scope of section 40(1) of the FOIA. Section 40(1) provides that information which is the personal data of the applicant is exempt from disclosure under the FOIA. This is because individuals may request their personal data under a separate legislative access regime, namely the right of subject access under section 7 of the Data Protection Act 1998 (DPA).

16. Section 40(1) is an absolute exemption, meaning that if it applies there is no requirement to go on to consider whether disclosure would nevertheless be in the public interest.

Would confirming or denying that the requested information is held constitute a disclosure of personal data?

17. Section 1(1) of the DPA defines personal information 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 likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual".

18. In his guidance on section 40¹ of the FOIA, the Commissioner expanded on what constitutes personal data:

"For data to constitute personal data, it must relate to a living individual, and that individual must be identifiable. In considering whether information requested under FOIA is personal data, the public authority must decide whether the information satisfies both parts of the definition."

19. The complainant's request is for information about a complaint he made to the Council, about an incident he says he witnessed. The Commissioner considers that this is an approach for information which can be linked to a named, living individual - the complainant himself. It is therefore his personal data, and falls within the scope of section 40(1).
20. It follows from this that to comply with section 1(1)(a) of FOIA (that is, to either confirm or deny holding the requested information) would put into the public domain information about the existence or

¹ <https://ico.org.uk/media/for-organisations/documents/1206/never confirm nor deny in relation to personal data and regulation foi eir.pdf>

otherwise of an investigation linked to the complainant; this would constitute a disclosure of personal data that would relate to the complainant.

21. In considering whether the Council should have applied section 40(5)(a), the Commissioner has taken into account that the FOIA is applicant blind and that any disclosure would be to the world at large. If the information were to be disclosed, it would be available to any member of the public, not just the complainant. Confirmation or denial in the circumstances of this case would reveal to the general public information about the complainant which is not already in the public domain and which is not reasonably accessible to it. The Commissioner therefore considers that the exemption was correctly relied upon by the Council in this case.
22. The Commissioner would remind applicants that any individual wishing to access their own personal data should pursue this right under the DPA.

Other matters

23. The Commissioner notes that the complainant submitted his request to a valid customer service email address used by the Council on 2 December 2014. He received a reply telling him that he should redirect his request to the department with responsibility for dealing with FOIA requests. He did so on 3 December 2014, but made an error when transcribing the email address. As a consequence, the Council did not receive the forwarded request and took no action in respect of it.
24. The complainant contacted the Commissioner on 7 February 2015 about the Council's failure to respond, and copied the Council in on his correspondence. It was only then that the Council received the forwarded request, and it provided a refusal notice on 9 February 2015.
25. The Commissioner is concerned that the Council failed to deal with the request at the point it was first received (at the customer service email address) and that it required the complainant to forward the

request to a different address, rather than arranging to do this for him. His guidance to organisations on the FOIA² states:

"For a request to be valid under the Freedom of Information Act it must be in writing, but requesters do not have to mention the Act or direct their request to a designated member of staff. It is good practice to provide the contact details of your freedom of information officer or team, if you have one, but you cannot ignore or refuse a request simply because it is addressed to a different member of staff. Any letter or email to a public authority asking for information is a request for recorded information under the Act."

26. However, as a result of this complaint the Council has confirmed that it has amended its procedures to ensure that FOIA requests are recognised and referred to the appropriate department.

² <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/receiving-a-request/>

Right of appeal

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

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

Jon Manners
Group Manager
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Wycliffe House
Water Lane
Wilmslow
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SK9 5AF