

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

### **Decision notice**

**Date:** 22 November 2021

**Public Authority:** Coventry City Council

**Address:** The Council House  
Earl Street  
Coventry  
CV1 5RR

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

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1. The complainant has requested the call logs for calls made and received by the Chief Executive of Coventry City Council on specified days. The council withheld some information on the basis of section 40(2) (personal information), and denied holding some information.
2. The Commissioner's decision is that Coventry City Council were correct to withhold some information on the basis of section 40 and that, on the balance of probabilities, the council is not holding any further information in scope of the request.
3. The Commissioner does not require any steps.

## Request and response

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4. On 18 August 2020, the complainant wrote to Coventry City Council ("the council") and requested information in the following terms:

*"Please supply a log of calls made / received by the chief executive (either directly to/from his office or to/from his council mobile phone) on the following days:*

*July 23*

*July 24*

*In order to comply with GDPR – we would accept the final five digits of any personal numbers logged. Numbers already in the public domain should not be redacted.*

*For mobile calls made, I'm sure it's obvious, but if they are not on the device still, they will have been recorded on any bills the council receives from the phone company. So please ensure we have a comprehensive list – rather than just what record is present on the electronic device."*

5. The council responded on the 22 October 2020 as follows:
- The council provided a log of calls made from the mobile phone with the dialled numbers redacted. The dialled numbers were redacted on the basis of section 40(2) (personal information).
  - The council denied holding information regarding incoming calls to the mobile phone.
  - The council denied holding information relating to the call history from the office phone stating that this information is only held for one month.
6. The complainant requested an internal review on 2 November 2020 in which they:
- disputed the application of section 40(2) to withhold outgoing call numbers from the mobile phone log.
  - stated that information regarding a log of received calls should be held on the mobile device for several months. Furthermore that call history would be held on "iCloud" for four months if the device is an iPhone model.

- stated that the FOIA request was made just 26 days from the requested call dates therefore the information should have been retained and recorded. The complainant suggested that the council should check with system provider.
7. Following an internal review, the council wrote to the complainant on 30 November 2020 and:
- upheld the position to withhold dialled numbers from the Chief Executive's mobile phone on the basis of section 40(2).
  - upheld the position that no information is held in regard to incoming mobile calls. The council stated "*We can confirm that no information is held on the device or on any back up.*"
  - maintained the position that no information is held relating to the calls made or received on the Chief Executive's office phone. The council clarified, however, that a report had been subsequently obtained from Microsoft confirming that no external calls were made or received on the relevant dates to or from the Chief Executive's office phone.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 1 December 2020 to complain about the way the request for information had been handled. Specifically they dispute the application of section 40 to withhold the dialled call history from the Chief Executive's mobile phone; and to determine whether the council is correct when it says that at the time of the request it did not hold information relating to a log of received calls on the mobile device.
9. The scope of this case and of the following analysis is whether the council was correct to withhold information on the basis of section 40(2), and whether, on the balance of probabilities, it is holding further information within the scope of the request.

### **Reasons for decision**

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#### **Section 40 personal information**

10. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the

requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

11. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

***Is the information personal data?***

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

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
17. 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.
18. The council is withholding outgoing telephone numbers from the mobile phone log.
19. Information provided under the FOIA is effectively released to the world at large. Telephone numbers can be recognised or used to identify individuals when considered in combination with details. Therefore it is

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

possible that providing the call log would allow the public to make connections to identifiable individuals.

20. The Commissioner does not consider that the suggestion to withhold some digits from telephone numbers would protect individuals from identification. Pieced together with other information that others, such as contacts or colleagues, may already have in their possession, or have access to, could make the ability to identify individuals possible. In any case the Commissioner fails to see why the telephone numbers would be useful, should they be well enough disguised that the contacts were unidentifiable, so considers it likely that the complainant expects to be able to glean information about the call recipients even were some of the digits withheld.
21. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied this information both relates to and identifies the data subjects concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
22. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
23. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

24. 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".*

25. 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 if to do so would be lawful, fair and transparent.
26. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the GDPR**

27. 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*" lawful bases for processing listed in the Article applies.
28. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*“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”<sup>2</sup>.*

29. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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 disclosure of the information 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.
30. 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*

31. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the

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<sup>2</sup> 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) 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”.*

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.

32. The complainant's legitimate interest is in the council being open, honest and transparent about the communication activities of the Chief Executive, who they state is the most senior official at the council.

*Is disclosure necessary?*

33. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
34. No alternative measures have been identified to render disclosure of the requested information unnecessary.

*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 disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
36. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
37. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

38. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
39. The council advised that it does not have the consent of any of the individuals to disclose their personal data.
40. The council advised that individuals would have no expectation that their personal data would be disclosed to the wider world and it would be unreasonable to ask each individual to give their consent.
41. The council stated that if it made its own judgement on whether to release certain numbers from the log then this would not meet the test of personal data being processed fairly.
42. The complainant argues that if any individuals were identified, the fact that they had been in contact with the Chief Executive would not necessarily be detrimental to them. They state that it is hard to understand why this would be the case, especially if individuals have high profile and well publicised working relationships.
43. The complainant states that if the council has previously disclosed information relating to the fact that individuals have had communications and worked together with the Chief Executive then this information is already in the public domain.

### **The Commissioner's view**

44. The Commissioner has considered the arguments made by the complainant. However it is her view that disclosure without consent would be unfair to those individuals whose telephone numbers would be released. The held data does not record the purpose of the calls, which could have been regarding any matters to a range of individuals, not just to those with high profile and well publicised working relationships.
45. The Commissioner considers it highly unlikely that any of the individuals would expect their information to be released.
46. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
47. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.



48. The Commissioner has therefore decided that the council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).
49. Since the end of the transition period following the UK's departure from the EU, the GDPR were replaced by the UK GDPR. As this request was received before the end of that transition period, the application of section 40(2) has been decided by reference to the GDPR. However the Commissioner is also satisfied that the disclosure of the personal data to which that exception was applied would not contravene the UK GDPR for exactly the same reasons.

### **Section 1 – General right of access to information**

50. Section 1(1) of the FOIA states that: *Any person making a request for information to a public authority is entitled—*
- (a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
  - (b) *if that is the case, to have that information communicated to him.*
51. Section 1(1) requires that any person making a request for information to a public authority must be informed in writing by the public authority whether it holds information relevant to the request, and if so, to have that information communicated to them. This is subject to any exclusions or exemptions that may apply.
52. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
53. In other words, in order to determine such complaints, the ICO must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).

#### The complainant's position

54. The complainant stated that a log of received calls should be stored on the mobile device for several months. Call data is also likely to be stored on "*the cloud*". The complainant argued that this is something which happens automatically with "*Apple devices*", therefore it should have been available had the council searched for it in time.

55. The request was made on 18 August 2020, being just 26 days after the requested call dates. The council, having received and acknowledged this request, should have maintained any records of the data at that point.

#### The council's position

56. The council checked its records on 14 September 2020, and found at that time that the recorded data did not include calls received.

57. In response to the internal review request, on 20 November 2020 the council established that in relation to the mobile call log, the data would be stored on the handset.

58. An officer from the ICT department met with the Chief Executive on 20 November to look at his phone. The device was checked and only had up to 3 weeks of recent calls stored. The ICT officer spoke to the phone provider who confirmed that the call data is not captured in any cloud storage facility.

59. The council states that it accepts that its initial search was inadequate in response to the request. The subsequent search of the mobile phone confirmed that no information was held on incoming calls and there is nothing to suggest that it was held at the time of the original request, but it is not possible to confirm this.

60. The council confirmed that it holds no further records of information that would fall within the scope of the request. It advised that there are neither business nor statutory reasons to hold this information and that the council's retention and disposal schedule does not set standards for the retention of such records.

#### The Commissioner's conclusion

61. Whilst not forming part of this decision notice, the Commissioner undertook a review of whether the council committed a section 77 offence (deliberate concealment or destruction of records to avoid disclosure) in relation to the request. The review found that there was no evidence to substantiate any allegation of a criminal offence.

62. The Commissioner has considered the case made by the complainant, and the council's position in conjunction with the request.

63. The council confirmed with the phone provider that the requested information would not have been stored in any cloud storage facility.

64. Section 1(4) of FOIA states that: *The information—*

(a) *in respect of which the applicant is to be under subsection (1)(a), or*

(b) *which is to be communicated under subsection (1)(b),*

*is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.*

65. The Commissioner can not know whether any information in scope of the request would have been stored on the Chief Executive's phone at the time of the request response.
66. As a matter of good practice, a public authority should delay the destruction of information if it is known to be the subject of a request. However the Commissioner accepts that it is unknown whether or not any information in scope of the request would have been held on the Chief Executive's phone at the time of the request. She also accepts that information may have been deleted due to normal working processes, and this is acceptable under section 1(4).
67. There is no contradictory evidence available to the Commissioner that indicates the council's position is wrong.
68. On this basis the Commissioner has concluded that, on the balance of probabilities, the requested information is not held.

## Right of appeal

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69. 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)

70. 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.

71. 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 .....**

**Janet Wyles**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**