

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 September 2016

Public Authority: Kirklees Metropolitan Council
Address: Civic Centre
High Street
Huddersfield
West Yorkshire
HD1 2TG

Decision (including any steps ordered)

1. The complainant has requested information from Kirklees Metropolitan Council ("the Council") about communications between the Council and the Crown Prosecution Service ("the CPS") in relation to given building addresses. The Council applied the exemption provided by section 40(5) of the Freedom of Information Act ("the FOIA"). The complainant subsequently contested the Council's application of this exemption.
2. The Commissioner's decision is that the Council has correctly applied the exemption provided by section 40(5).
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 13 January 2016 the complainant requested:

I would like Kirklees council to send me information in connection to anyone at the council contacting the Crown Prosecution Service (CPS), in context of issues on [redacted street address] between dates 01/01/2010 and 13/01/2016. I will need-

1. *Dates on which any contacts were made between Kirklees council and the CPS*
2. *The names of people from Kirklees council who made contact with the CPS.*

3. *The names of people spoken to at the CPS.*
4. *Details of matters discussed between Kirklees council and the CPS.*
5. *Copies of any emails or letters between the Kirklees council and the CPS.*
6. *Copies of email addresses or postal addresses from Kirklees council used in contact with the CPS.*
7. *Copies of email addresses or postal addresses at the CPS to which Kirklees council communicated with.*
8. *Records of any phone calls between Kirklees council and the CPS.*
9. *The phone numbers from which Kirklees council contacted the CPS.*
10. *The phone numbers of the CPS to which Kirklees council made contact.*

A general question to Kirklees council as part of the request - if they have been in contact with the CPS in connection to anything on [redacted street address], between dates 01/01/2010 and 13/01/2016 generally.

*Also specifically relating to dwelling No.[redacted building address].
Also specifically in connection to dwelling No.[redacted building address].*

Or, if Kirklees council can thoroughly deny any contact between the CPS and themselves, with regard to matters on [redacted street address], specifically No.[redacted building address], in the years 2014, 2015 and 2016, that would suffice instead of all the above. If Kirklees council can truthfully deny contact between themselves and the CPS regarding No.[redacted building address], and if that denial is true, that will be fine.

I think this option is a generous alternative to the information requested.

5. On 4 February 2016 the Council responded. It refused to confirm or deny that it held relevant information under the exemption provided by section 40(5).
6. The complainant requested an internal review on 4 February 2016.
7. The Council sent the outcome of its internal review on 4 April 2016. It maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner on 4 April 2016 to complain about the Council's application of section 40(5).
9. The Commissioner considers the scope of this case to be the determination of whether the Council has correctly applied the exemption provided by section 40(5).

Reasons for decision

Section 40(5) – exemption from the duty to confirm or deny

10. Section 40(5) provides 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 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).

11. In order for the Commissioner to determine whether the Council has correctly applied section 40(5), the Commissioner will need to decide whether the act of confirming or denying that information is held would disclose the personal data of identifiable individuals.

Section 40(5)(a) – the personal data of the applicant

12. Section 40(5)(a) provides that the duty to confirm or deny does not arise in relation to information that would fall within the scope of section 40(1). Section 40(1) provides an absolute exemption for information which is the personal data of the applicant, and no consideration of whether disclosure is in the public interest is required. 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 ("the DPA").

Is the requested information the applicant's personal data?

13. Personal data is defined by section 1 of 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 data controller or any person in respect of the individual..

14. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, or has them as its main focus or else impacts on them in any way.

15. Having identified that the request partly seeks information about the complainant's address, the Commissioner is satisfied that such information would represent the complainant's personal data. On this basis the Commissioner therefore upholds the Council's application of section 40(5)(a).

Section 40(5)(b) – the personal data of third parties

Section 40(5)(b) provides that the duty to confirm or deny does not arise in situations where the act of confirming or denying that information is held would disclose the personal data of third parties. This is subject to consideration of the data protection principles, and whether disclosure would breach any one of them.

Is the requested information the personal data of third parties?

16. In the circumstances of this case the request is composed of two distinct parts.

17. The first part seeks information about multiple building addresses sited on one street. Although a confirmation that information is held may not easily be related to an identifiable individual, the act of denying that information is held would disclose personal data about every individual who resides on the street (namely that no communications between the Council and the CPS had taken place in relation to them).

18. The second part, which is worded in a manner that suggests it provides an 'alternative' request to the first part, seeks information about a specific building address. In this context it is evident that the act of confirming or denying if information is held would immediately disclose personal data about identifiable individuals residing at the address (namely whether or not the Council had communicated with the CPS in relation to them).

Would this disclosure represent sensitive personal data?

19. Section 2 of the DPA defines sensitive personal data as personal data that consists of information about the following:
- an individual's mental or physical health,
 - their political opinions,
 - their sex life,
 - their racial or ethnic origin,
 - their religious beliefs,
 - whether they are a member of a trade union,
 - the commission or alleged commission of an offence by them, or any proceedings for any offence they have committed or are alleged to have committed.
20. The Council considers that in the context of the request, and act of either confirming or denying that information is held would reveal sensitive personal data by indicating whether or not the Council had communicated with the CPS about individuals who reside on the street. As such the Commissioner is satisfied that this disclosure would fall within the definition of "*the commission or alleged commission of an offence by them, or any proceedings for any offence they have committed or are alleged to have committed.*"

Would disclosure breach the data protection principles?

21. The data protection principles are set out in schedule 1 of the DPA. The Commissioner considers that the first data protection principle is most relevant in this case. The first principle states that personal data should only be disclosed in fair and lawful circumstances, the conditions of which are set out in schedule 2 of the DPA, and schedule 3 of the DPA for sensitive personal data.
22. The Commissioner's considerations below have focused on the issues of fairness in relation to the first principle. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of

the data subject and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

The reasonable expectations of the data subject

23. When considering whether the disclosure of personal information is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the data subject. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.
24. In this case the Council considers that such disclosure would not be reasonably expected by individuals, as they have not given explicit consent for their personal data to be disclosed, and would not reasonably expect the Council to publically confirm or deny whether it had been in communication with the CPS in respect of them.

The consequences of disclosure

25. The Council considers that the request has been made in relation to a private dispute involving the complainant's neighbours, which is understood to have resulted in court proceedings. Several Subject Access Requests have already been submitted by the complainant, with this information request under the FOIA having been made to seek any further held information.
26. The complainant has also informed the Commissioner that this information request has been made in order to pursue information that he believes that Council has not provided in response to his Subject Access Request.
27. The Council has informed the Commissioner that it acknowledges the wider public interest in openness and transparency in relation to the information it holds. However in the circumstances of this case the Council does not consider there to be a pressing social need or compelling public interest that would justify the intrusion into the individuals' right and expectation of privacy.

Balancing the rights and freedoms of the data subject with the legitimate interest in disclosure

28. Whilst the Commissioner has considered the complainant's reason for requesting the information, it is recognised that this reason relates to an ongoing private matter rather than one of wider public interest.
29. In the circumstances of this case the Commissioner considers that disclosure of the information sought would intrude on the rights and

expectation of privacy held by individuals, and may also place individuals at risk of harm by indicating whether or not they had committed an offence, or are alleged to have done so. This is particularly so in relation to the second part of the request, in which the complainant seeks such a confirmation about a neighbouring address.

30. There is no evidence available to the Commissioner that suggests a wider public interest in the request that outweighs the consequences. The Commissioner further notes that in situations where individuals dispute the completeness of a Subject Access Request, they have a separate right under section 42 of the DPA to seek an assessment from the Commissioner. This represents an appropriate mechanism by which such concerns can be addresses.
31. Having considered the above factors, the Commissioner recognises that disclosure would represent a significant infringement on the rights and freedoms of the relevant individuals, and considers that there is no legitimate interest to warrant this.

The Commissioner's conclusion

32. Having considered the above factors the Commissioner is satisfied that disclosure, through the act of either confirming or denying whether information is held, would not be fair under the first principle of the DPA.
33. Whilst the Council has also proposed that the second principle (which specifies that personal data will not be processed for reasons incompatible for why it is held) is relevant in this case, the Commissioner is satisfied that disclosure would already be a breach of the DPA under the first principle.
34. On this basis the Commissioner upholds the Council's application of section 40(5)(b).

Other matters

35. The Commissioner has identified that the Council provided the outcome of its internal review outside of forty working days following it being requested.
36. Under the FOIA there is no obligation for a public authority to provide a complaints process. However, it is good practice (under the section 45

Code of Practice¹) to do so, and the Commissioner recommends that an internal review outcome be provided within twenty working days, or forty working days in exceptional circumstances. In circumstances where a public authority is found to consistently fail to follow good practice, the Commissioner may issue a practice recommendation.

¹ <https://www.gov.uk/government/publications/code-of-practice-on-the-discharge-of-public-authorities-functions-under-part-1-of-the-freedom-of-information-act-2000>

Right of appeal

37. 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

38. 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.
39. 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

Andrew White
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