

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 June 2015

Public Authority: Bramham Parish Council
Address: 1 Fossards Close
Bramham
Wetherby
LS23 6WD

Decision (including any steps ordered)

1. The complainants have requested information held by the council on their company and on themselves. The council responded by applying section 36(2) of the FOI Act (prejudice to the effective conduct of public affairs), section 40(2) (personal data) and section 41 (information provided in confidence).
2. The Commissioner's decision is that the council has incorrectly applied all three exemptions.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the withheld information to the complainants.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 24 September 2014 the complainants wrote to the council and requested information in the following terms:

"We are making a request under the Freedom of Information Act from Bramham Parish Council for ALL emails, letters or correspondence for anything relating to our company [name of limited company redacted] or [names of individuals redacted] who are also the Directors of [name of company redacted]."

6. The council responded on 17 October 2014 and refused the request on the grounds that section 36(2)(b) (prejudice to effective conduct of public affairs), 40 (personal data) and 41 (information supplied in confidence) applied.
7. The council provided an internal review on 14 November 2014 in which it upheld its initial decision.

Scope of the case

8. The complainants contacted the Commissioner 12 December 2015 to complain about the way their request for information had been handled. They consider that the information which is held should have been disclosed to them.

Reasons for decision

Background to the complaint

9. The information in question relates to correspondence as regards building work which was carried by the complainants' company previously. The work was on a pavilion in the village. The majority of the work to complete the pavilion had been carried out but in 2012 the pavilions owners, the Bramham Sports and Leisure Association (the BSLA) exhausted their funds and the work ceased, leaving the pavilion only partially completed.
10. The council took over the project and sought to complete the pavilion on behalf of the village. It hired a consultant surveyor to advise on the work which would be necessary to complete the pavilion.
11. When discussing the pavilion in an open council meeting comments were made which the complainant's consider damaged the reputation of their company. The complainant's have taken issue with these comments and blame the consultant. Whilst the council subsequently sought to clarify the reality of the situation in the next minutes, the complainants do not consider that this has cleared their company name. They are therefore

seeking further information held about them and their company with a view to protecting their company's reputation.

Is the information environmental information

12. The Commissioner has considered whether the information which is held by the council is environmental information for the purposes of the Environmental Information Regulations 2002.
13. Whilst the information surrounds the councils plans to complete a pavilion the request relates more to information held about the complainant's company rather than about any actual building work which would affect the environment.
14. The Commissioner considers that the discussions do not have any effect on the elements of the environment defined within Regulation 2(a) of the EIR. These are defined as:

"the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;"

15. The Commissioner's decision is therefore that the information is not environmental information and that the council was correct to consider the information under the terms of the FOI Act.

Section 40(1)

16. The Commissioner notes that the request is for details of the complainants themselves as well as their company. This is a request for personal data under the Data Protection Act 1998 (the DPA). The exemption in section 40(1) of the FOI Act applies to requests for the personal data of the applicant. The council should however consider the request under the terms of section 7 of the DPA.
17. However the requestors are directors of a limited company. Information held about limited companies is not caught within the definition of personal data under the DPA as the company has its own legal identity.
18. Information relating to the actions taken by the owners on behalf of the company may not fall within the definition of personal data for the purposes of the DPA. It may simply be information about the company. In this case the withheld information inevitably discusses the complainant's by name, however the information relates to the actions of the company rather than them as individuals. The information might

therefore be personal data about the individuals in addition to being information about the company.

19. However the Commissioner has not found the need to identify and separate any part of the information as the personal data of the applicants in this case. The council has chosen not to distinguish between information which might be personal data under the DPA in addition to being information relating to the company. It has not therefore sought to apply section 40(1) to any of the information it holds.

Section 40(2)

20. Section 40(2) provides (amongst other things), that the personal data of third parties can be exempt from disclosure where disclosing the information would breach one of the data protection principles of The Data Protection Act 1998.
21. The council has applied section 40(2) to correspondence it has had with the consultant which it hired to consider the work necessary to complete the pavilion. The correspondence relates in part to work carried out by the complainants company, and other subcontractors who worked with the company on the pavilion previously.
22. Section 40(2) states:

"Any information to which a request for information relates is also exempt information if -

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied."

Section 40(3) provides that -

"The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene

(i) any of the data protection principles, or..."

23. The relevant data protection principle to consider for this complaint is the first data protection principle. This states that:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

- (a) at least one of the conditions in Schedule 2 is met, and*
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."*

24. When considering whether a disclosure of information would breach the first data protection principle the Commissioner firstly considers whether a disclosure of the information would be fair.
25. The first question which the Commissioner must consider is whether the individual would have any expectation that their information would be disclosed in response to an FOI request. If they would not have any expectation, or if it would not have been obvious at the time that they provided the information then this is a very strong indication that a disclosure would be not be fair.
26. However in circumstances where there is a pressing social need for the information to be disclosed it may still be fair in spite of the expectations of the individual. The pressing social need outweighs the expectations of the individual to make a disclosure of the information fair for the purposes of the first data protection principle.

Third parties

The Commissioner notes that some data refers to sole traders and businesses that provided services to the BSLA in the initial stages of the development. The Commissioner is satisfied that the information contained within the correspondence relates only to the business dealings of these individuals, however as some of these may be sole traders the information may also be their personal data for the purposes of the DPA.

27. The Commissioner considers that these individuals would not have had any expectations that information about them would be disclosed by a public authority that they had had no direct contract with. He also notes that the work which they carried out was finished in 2012. It would not therefore fall within their expectations that details of them or their business matters might subsequently be disclosed by a public authority a number of years after the work had been completed.
28. Nevertheless the community would know who carried out the work at the time, and a disclosure of the very limited information which is held which refers to them would not disclose anything particularly new about

them or their actions. Their involvement with the project would already be known at that time, and the Commissioner understands that more recent developments relating to how or whether those individuals had been paid for the work they carried out was discussed in the open council meeting.

29. In this light there is a strong argument for this being made public so the community understand the work being carried out by the council to finish the project.
30. The Commissioner also considers that it would be fair to third parties for this information to be disclosed in order that the public are aware that the issues which have arisen do not relate to the quality of the work carried out by these third parties.

The consultant

31. The council said that the consultant would not have considered that the emails would be disclosed in response to an FOI request. It also said that this would not have been obvious to him at the time. It pointed out that the consultant actually made clear in one of his emails that he considers the correspondence to be private and between him and the council only.
32. As the complainants' are already aware of the consultant's identity the council is not able to redact the documents in order to anonymise the information. The consultant was asked by the council whether he consented to the disclosure of the information. He refused consent to do so. The council therefore said that if it disclosed the information this would be likely to damage the professional relationship between the council and the consultant.
33. The council said that it is aware that the complainants were in a dispute with the consultant over comments he had made about the pavilion and on their company. It considers that the request is related to that dispute. The council considers that a disclosure of the information may be professionally damaging to the consultant if the information was disclosed.
34. In terms of the application of section 40(2), it argues that a disclosure of the information would be against the consultants wishes and that its disclosure would be detrimental to him.

35. The Commissioner has considered this argument. The consultant was hired by the council in a professional capacity to provide advice on the state of the pavilion. The role was to analyse and provide advice on the work required on a public asset. The consultant would therefore have had an expectation that the results of the analysis would need to be disclosed, and that any report he gave might subsequently be questioned by the authority. Although the requested information is not a report per se, it does discuss details about the state of the pavilion and addresses the actions which the council needed to take to complete the pavilion.
36. The Commissioner is satisfied that there would have been less of an expectation that such correspondence might be disclosed under the Act. Nevertheless the consultant is carrying out work in a professional capacity, and the correspondence relates to that work. There must therefore have been a degree of expectation that in such circumstances there might be a potential for a request to be made and that that correspondence might then need to be disclosed. The Commissioner notes however that the consultant believed that the correspondence was in private and expressed this view to the council regarding the content of one email. The Commissioner therefore considers that the expectation of the consultant would be that some of the information/opinion he was expressing within the emails would not be disclosed.
37. However the Commissioner must also consider whether there is a pressing social need which might make a disclosure of the information fair for the purposes of the first data protection principle.
38. Statements made in a public council meeting have led to opinions being expressed in respect of the complainants' business which it appears were incorrect. The complainants' consider that the consultant was partly responsible for giving a misconceived view that there were issues with the work carried out previously, and part of the withheld information does relate to whether this was the case or not. Although the council took steps to clarify the situation after the meeting the complainants remain unhappy that the overall reputation of their business may have been tarnished by the comments. A disclosure of the information would aid in clarifying the situation in this respect.
39. The Commissioner considers that where actions in a public council meeting inadvertently lead to unwarranted reputational damage to a private company (and the individuals who run that company) then there is a strong impetus for the authority to seek to rectify the situation. Although the council sought to do this by clarifying matters in subsequent meeting minutes, a disclosure of the information in this case would further aid the company in doing this. There is therefore a

pressing social need for the information to be disclosed where the actions of the council have inadvertently led to a company's reputation being damaged, and where a disclosure of the information would help to clarify the situation.

40. In spite of any expectations by third parties and by the consultant himself therefore, having considered the nature of the information the Commissioner is satisfied that it would be fair for the information to be disclosed.
41. The Commissioner therefore considers that, taking all of the circumstances into account, a disclosure of the information would be fair for the purposes of the first data protection principle.
42. The Commissioner is therefore satisfied that a disclosure of the information would be fair for the purposes for the first data protection principle.

Schedule 2 conditions

43. Where a disclosure of the information would be fair and lawful then the next question is whether there is a criterion within schedule 2 of the Act for that information to be disclosed. The Commissioner is satisfied that in this case the 6 criterion is applicable. This states that:

6(1)The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

44. The Commissioner is satisfied that although the council has sought to clarify the statements which were made in the open public meeting the complainant's have a right to obtain correspondence which will help aid them in completely clarifying the situation. It would also be fair to the other third parties in order to demonstrate that the issues involved were not issues with the quality of the work which they carried out on the pavilion previously.
45. The Commissioner therefore considers that a disclosure of the information is warranted for the purposes of the schedule 2 condition 6 in this situation.
46. The Commissioner has therefore decided that in respect of the personal data the council was not correct to apply section 40(2).

Section 41

47. The council applied section 41 to the same information which it applied section 40(2).

48. Section 41 provides that:

"Information is exempt information if-

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

49. Section 41(1) provides that –

"Information is exempt information if-

(c) it was obtained by the public authority from any other person (including another public authority), and

(d) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

50. In order for the exemption to be engaged the Commissioner considers that the appropriate test in this case is that it must be shown that the information meets the common law test for confidence. Primarily this requires that the information:

- That the information was provided to the authority by another person, and
- that a disclosure of the information would give rise to an actionable breach of confidence - which in turn the Commissioner considers in this case requires that:
 - The information has the necessary 'quality of confidence' – it need not be highly sensitive, but it must not be trivial;
 - the circumstances in which the information was provided gave rise to an obligation of confidence, in that a 'confider' provided information to a 'confidant' in the expectation, whether

explicit or implied, that the information would only be disclosed in accordance with the wishes of the confider;

- disclosure of the information would be unauthorised and to the detriment of the person(s) to whom the duty of confidence is owed, or cause a relevant loss of privacy;
- the action would not fail on grounds which provide a legal defence to a breach of a duty of confidence, for instance that disclosure would be protected by a public interest defence.

51. The Commissioner accepts that the above does not constitute the only test of confidence however he considers it appropriate to use this test in this case.
52. The Commissioner has firstly considered whether the information was provided to the council by another person. The information is emails between the council and the consultant. The Commissioner is satisfied that some information is provided by the consultant, and is therefore information provided to the council by a third party.
53. However other emails have been sent by the clerk to the council and do not discuss information provided specifically by the consultant. The Commissioner therefore considers that section 41 cannot apply to this information.
54. For the remaining information the Commissioner has firstly considered whether information has the necessary obligation of confidence.
55. The information was provided as part of the ongoing actions taken by the consultant when carrying out his review of the current state of the pavilion. The work is being carried out on a public asset, and the discussions relate mostly to the state of that asset and the work required to finish the project.
56. The council has provided no direct evidence that the information was provided to it in confidence. It argues that the exemption applies because if it did not the consultant might suffer loss, and as a consequence rescind his contract with the council. The council did not provide arguments as to how a disclosure of the information might lead the consultant to suffer loss, and the Commissioner cannot speculate on this.
57. The Commissioner was however provided with an email from the consultant to the council. This clarifies that he expected that one email between them was private and confidential. This does indicate that the consultant believed that this piece of correspondence was to be held in

confidence, and this can potentially be extrapolated across all of the correspondence over the issue.

58. The Commissioner therefore considers that the information is likely to have the necessary obligation of confidence.
59. However the Commissioner has next considered whether the information has the necessary quality of confidence. This relates to the nature of the information which is held (i.e. whether it is trivial), and whether the information is already in the public domain.
60. The information is correspondence between the consultant and the council regarding issues surrounding the pavilion. The issues have been discussed within an open council meeting, and as a result led to a complaint being made by the complainants about the nature of what was said that the meeting and about the accuracy of the information which was discussed. The council also sought to clarify the issues in later minutes. The central issues discussed in the correspondence are therefore already publicly known.
61. The issue for the council and the complainant would be the nature of the conversations and discussions surrounding the work which had been carried out previously, as well as conversations about parties involved with the pavilion previously.
62. As the essence of the information has already been disclosed the within the meeting and in subsequent council minutes the information is within the public domain. The Commissioner is therefore satisfied that the information does not have the necessary quality of confidence.
63. The Commissioner's decision is therefore that the council was not correct to apply section 41(1) in this instance.

Section 36

64. Section 36(2)(b) of FOIA states that:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(b) would, or would be likely to, inhibit-

- (i) the free and frank provision of advice, or...*
- (ii) the free and frank exchange of views for the purposes of deliberation, or*

65. The exemption was applied to emails which were sent between members of the Parish Council discussing how to deal with, and respond to correspondence and representations received from the complainants. It also includes correspondence on what to do with the pavilion more generally.
66. The council said that it has relied upon section 36(2)(b)(i) in withholding elements of the information from the complainant. However the council further argued that a disclosure of the information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. The Commissioner therefore understands that the council intended to apply section 36(b)(ii) rather than 36(b)(i), and that this is a typing error on its behalf. As such he has considered the application of the exemption accordingly.

Was the exemption applied by the 'qualified person'?

67. Section 36 may only be applied by a 'qualified person'. A qualified person is defined under section 36(5)(o) as any officer/employee of a public authority authorised by a Minister of the Crown. For a Parish Council, the qualified person is the clerk and/or the chair. In this case the exemption was applied by the clerk to the council. The Commissioner is therefore satisfied that the decision was taken by a qualified person as defined by the Act.

Was the qualified person's opinion reasonable?

68. The next criteria which the Commissioner must consider is whether the decision was taken by the qualified person because in his or her reasonable opinion a disclosure of the information would inhibit the free and frank exchange of views for the purposes of deliberation.
69. The Commissioner was provided with the withheld information by the council as evidence of the information which the qualified person had before her when making her decision on the application of the exemption. He is also aware that the council has referred directly to ICO guidance when seeking to apply the exemption. The qualified person therefore had all of the necessary information to reach a reasoned decision on the application of the exemption to the information.
70. The qualified person said that the pavilion, the condition report, and its completion have been a sensitive issue for the parish council and the village. It argued that it is therefore important that the parish council maintains a collective approach in dealing with this and any related issues. In deliberating on those decisions, it said that it is inevitable that differing views/opinions are expressed. To disclose differences in opinion/ individual viewpoints may inhibit discussion between members

of the council and also encourage exploitation of these differences for political or personal purposes.

71. The Commissioner considers that the arguments are reasonable and accepts that on this basis the exception is engaged.
72. The Commissioner has therefore gone on to consider the public interest test as required by section 2 of the Act. The test is whether the public interest in maintaining the exemption outweighs that in the information being disclosed.

The public interest

The public interest in the exemption being maintained

73. The council argues that the decisions of the parish council are collective decisions, and disclosing individual correspondence between councillors may undermine collective decision making, together with public confidence in the councils eventual decisions. It argued that disclosing this information could lead to political issues.
74. The Commissioner accepts that this could be the case in many instances. He also accepts that in some situations there is a public interest in allowing an authority to present a collective decision which does not divulge details of any diverse opinions of its members. In this way cabinet members can be full and frank when arguing their point, and are free to 'think the unthinkable' in order to reach a solution to a problem. A disclosure of information which shows the discussions which went on behind closed doors can stifle robust, full and frank discussion, and hinder decision making in the future.
75. However a decision issued by the council regarding an issue does not however necessarily need to be a unanimous one, and the public will accept, and to a degree, expect, that decisions will sometimes be challenged and thoroughly questioned before an eventual vote on the decision is taken. It is not always the case therefore that collective decision making is required to be maintained.
76. The Commissioner considers that the collective decision argument in this case does not accord with the nature of the information which has been withheld. Whilst the information does involve decision making, it is essentially deliberation as what is needed for the work on the pavilion to be completed. There is little actual deliberation, and few areas where alternative opinions are expressed. Only a very small number of individuals are involved in the discussion and it would not be particularly harmful to any of these parties for their contributions to be disclosed.

77. Where opinions do differ, any embarrassment which might occur due to a disclosure of the information is not a reason for withholding information under the Act. The question is whether the disclosure might be detrimental to future full and frank discussions.

The public interest in the information being disclosed

78. The public interest in the information being disclosed relates to general issues of transparency and accountability for the completion of a project which was begun by the BSLA. There is a strong public interest in the project being completed so that the pavilion can be used by the public. There is also a public interest in allowing the community to know the issues which the council faced when looking to complete the project.
79. The Commissioner is satisfied that the arguments expressed by the council in support of withholding the information are generally not strong when compared to the competing arguments. The community had been left with a part finished pavilion for a number of years, and the actions of the council in seeking to complete the project are clearly in the public interest. There is however also a public interest in disclosing how the council has gone about completing the project and the issues this has inadvertently raised, due primarily to the changeover in ownership and the time which has passed since the project was begun.
80. The Commissioner also considers that where a public authority's actions inadvertently raise misconceptions about an organisation within a public meeting there is a public interest in allowing that to be clarified and the organisation to seek to clarify the situation by direct reference to the authority's actions. The public may then better understand what occurred, and correct any incorrect conclusions which might have been drawn as a result of that.
81. Whilst the council are wary of disclosing the information due to the ongoing dispute between the complainant's and themselves the actual information which has been withheld is, for the most part already known.
82. Whilst the Commissioner accepts that the arguments are reasonable in general he does not consider that the public interest arguments expressed by the council hold a great deal of weight when considered against the nature of the information which has actually been withheld under this exemption.
83. The Commissioner's decision is therefore that the public interest in the information being disclosed outweighs that in the exemption being maintained in this instance.

Right of appeal

84. 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

85. 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.
86. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF