

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 11 January 2018

Public Authority: Holt Town Council
Address: Council Office
Community Centre
Kerridge Way
Holt
Norfolk
NR25 6DN

Decision (including any steps ordered)

1. The complainant has requested a copy of an audio recording of the Holt Town Council meeting held on 10 April 2017. The Commissioner's decision is that Holt Town Council has incorrectly cited the exemption for personal data at section 40(2) of the FOIA and the exemption for commercial interests at section 43(2) of the FOIA.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Disclose the audio recording with the item on 'Personnel Matters' redacted.
3. The public authority must take this step 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

4. On 29 April 2017, the complainant wrote to Holt Town Council ('the council') and requested information in the following terms:

- "I have inspected the Holt Town Council website and read the Minutes of the meeting held on Monday 10th April 2017. I find myself at variance with the way in which item 3 has been minuted and request a copy of the recording that took place at the meeting."
5. The council responded on 2 May 2017 and said that if the complainant contacts the council an appointment could be made to listen to the recording.
 6. On 4 May 2017, the complainant said that he is making the request under the Freedom of Information Act 2000 and the Data Protection Act 1998.
 7. The request for the audio recording was reiterated on 8 and 9 May 2017.
 8. On 14 May 2017, the council informed the complainant that it is attempting to get the recording onto some sort of media and that it will be with the complainant within the allotted timescale of 20 days. It also said that if the complainant wishes to listen to the recording sooner that can be arranged straight away.
 9. On 21 May 2017, the council informed the complainant that it now has a copy of the recording and if he could let it know when he is coming to pick it up the paperwork can be ready.
 10. The complainant replied on 22 May 2017. He asked to be informed of the cost of the full tape recording and whether the paperwork could be emailed.
 11. On 22 May 2017, the council replied as follows:

"There is no cost as the recording is only available on a 7 day loan. The paperwork is purely for you to sign when you pick it up stating that you will not share, distribute or copy this recording. As I am sure you will understand there is confidential information on this recording that only you can hear as a member."
 12. On 28 May 2017, the complainant said that he believes it is within his rights, under the Freedom of Information Act 2000 and the Data Protection Act 1998 to have a copy of the recording, which he will pay for if any costs are incurred, and for him to keep it for his own reference, not just on a 7 day loan. He pointed out that council meetings are held with the public in attendance, up to Part 2, and are recorded by different people at the meetings. He said he failed to see why any paperwork is necessary but said he will agree not to disclose Part 2 of the audio recording.

13. The council replied on 30 May 2017. It clarified that it was treating the request under access of information otherwise known as a 'member need to know basis'. It said that if the complainant insists that the request is made under the FOIA it would be unable to release the tape as release would be classed as detrimental to Holt Town Council.
14. On 5 July 2017, the Commissioner asked the council to undertake an internal review of how the request was handled.
15. On 9 July 2017, the complainant requested that the council reconsider its response and handling of the matter which has resulted in the failure to release a copy of the audio recording.
16. The council then wrote to the complainant on 2 August 2017. It said that the complainant's conflict of interest is the primary issue and overrides the request under the FOIA. It said that the council should not provide a copy of the oral record of the meeting 'as stated by Sections 17 and 40 in the Freedom of Information Act 2000.'
17. The council also wrote to the complainant on 17 August 2017. Part of that correspondence said that the council '...conclusions fit comfortably under S14(2), S17, S40(1) and S43(2) under the Act, and on appeal would suggest S40 would apply.'
18. The Commissioner is aware that there has been additional correspondence between the complainant and the council. However, for clarity, only the correspondence which appears to be most relevant to the request for information is detailed above.

Scope of the case

19. The complainant contacted the Commissioner on 1 June 2017 to complain about the way his request for information had been handled.
20. The Commissioner has considered whether the council has correctly applied the exemption for third party personal data at section 40(2) of the FOIA and the exemption for commercial interests at section 43(2) of the FOIA to a copy of the recording of the council meeting dated 10 April 2017.
21. The complainant has agreed that the item on 'Personnel Matters' can be excluded from this decision. The Commissioner understands that this is what is referred to as Part 2 of the meeting.
22. In its response to the Commissioner, the council said that 'Commercial Documents are the Contract for the Cley Car Park, the Lease and a

contract for a contractor to build the site, belong to HTC'. For the avoidance of doubt, such documents do not fall within the scope of the request in this case and are not considered in this decision notice.

23. The Commissioner informed the council, and the complainant, that section 17 of the FOIA is not relevant to whether the requested information should be disclosed as it is concerned with how a request for information should be refused.
24. She also informed that council, and the complainant, that section 14(2) does not appear to be relevant in this case as it only applies where a public authority has previously complied with a substantially similar request.
25. The Commissioner asked the council if it has considered whether any part of the withheld information constitutes environmental information under the Environmental Information Regulations 2004 ('the EIR') and the outcome of that. The council said the following:

"Since August we have considered this, but did not think in terms of the Act.

We assumed this request for information must relate to Item 13 and no other items, ie the Cley Road Car Park project.

Under S21 Yes, as [name redacted] he was sent the Minutes of the meeting so that he has the Council conclusions on Item 13. Now as [name redacted] he may access these and any other Council Minutes."

However from the comments in your letter, as I understand his request, he does not agree with the Minutes.

So this must relate to Item 3 - namely the DPI ?

As he voluntarily left the whole of the meeting after Item3, he cannot disagree with anything else in the Minutes as he was not there.

If the ICO requests a copy of the recording for Item 3, that can be forwarded to [name redacted] (?) that can be arranged, or if directed to do so, can be done directly by ourselves."

26. The Commissioner is unclear how this response relates to whether the council considers the information to be environmental. It appears to suggest that the council is willing to disclose the recording of the meeting in relation to Item 3. For the avoidance of doubt, the Commissioner considers the request to be for the entire recording of the meeting with the exception of the item on 'Personnel Matters'.

27. The Commissioner also asked the council whether the request has been considered as a subject access request under the Data Protection Act 1998 ('the DPA') and the outcome of that. The council's response said that it assumes that this is to enquire whether any council records, comments or notes are kept about the complainant. It said that the definition is noted of Personal Data as follows:

"A living, identifiable individual, where the recording might have an expression of an opinion about the individual or an event that relates to, that can lead to the identity of that individual.."

It explained that the conflict of interest discussion at Item 3 was direct, and related to the conflict of interest and the complainant's car park project, not to his character, personality or attributes in any way. It said that no personal opinions were expressed at the meeting regarding the 'living individual' other than to confirm the decision it was felt right to exclude the complainant for that item, and one person did say he had previously left a meeting, but did not elaborate. The council summarised that 'apart from contact details, there are no records that could be identified as an item covered by the 8 Principles'.

28. The Commissioner has interpreted this response to mean that the council has not considered the request as a subject access request under the DPA as it does not consider the requested information to constitute the complainant's personal data. For the avoidance of doubt, this decision notice does not consider any of the complainant's personal data.
29. The complainant asked the Commissioner to explain why the council are referring to his case as a conflict of interest instead of a non pecuniary interest. The Commissioner informed the complainant that this is not something she can look into as her remit is limited to whether the council have complied with information access legislation.

Reasons for decision

Section 40(2)

30. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the FOIA would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').
31. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as

defined by the DPA. Section 1 of the DPA defines personal data as follows:

“personal data” means 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 intentions of the data controller or any other person in respect of the individual.”
32. 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 data protection principles under the DPA.
33. As explained above, the first consideration is whether the withheld information is personal data.
34. The Commissioner asked the council to explain whose personal data the council considers the requested information to be, to confirm which of the data protection principles it believes would be breached if the withheld information was disclosed, and to explain why it believes that disclosure would be unfair and/or unlawful. She requested that the council give specific consideration to the fact that part 1 of the meeting was held in public.
35. The council did not address the Commissioner’s questions. Instead, it said that it has ‘no additional personal data’ on the complainant other than publicly available information for planning consent on his car park project.
36. The Commissioner considers that the council has been given sufficient opportunity to provide evidence and arguments in support of its position. When making her enquiries in this case, the Commissioner informed the council that her general approach is to allow one further opportunity for a public authority to justify its position, before issuing a decision notice. In cases where a public authority has failed to provide sufficient arguments to demonstrate that exemptions are engaged, the Commissioner is not obliged to generate arguments on a public authority’s behalf.
37. In this instance, the Commissioner has decided that the council has failed to demonstrate that the exemption at section 40(2) is engaged.

She has taken into consideration that because she is also responsible for the ensuring compliance with the DPA, it would not be appropriate to order disclosure of information under the FOIA which could breach the DPA. However, the meeting was open to, and attended by, members of the public and therefore the Commissioner cannot see how, in this instance, disclosure of a recording of a public meeting would breach the DPA.

Section 43(2) – Commercial interests

38. Section 43(2) of the FOIA provides an exemption from disclosure of information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.
39. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered her awareness guidance on the application of section 43¹. This comments that:

"A commercial interest relates to a person's ability to participate competitively in a commercial activity."
40. In this instance, it appears that the council has applied section 43(2) to Item 13 of the meeting. Item 13 is entitled 'To discuss contracts for the Cley Road Car Park'. The Commissioner considers that information relating to the awarding of a contract falls within the remit of section 43(2) FOIA.
41. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
42. In this case the council said that it 'would plump for the 'would be likely' to have a prejudicial effect'.

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.ashx

43. The council did not directly respond to the Commissioner's request for it to identify the party or parties whose commercial interests would be prejudiced. However, it said the following:

"If you insist on our giving [complainant's name redacted] the whole recording, it could be damaging for us, as one of the Lessor signatories for the Cley Road Car park has not yet signed. [Complainant's name redacted] could make it even more difficult to close the deal. You will hear how the Council is in the dark about [complainant's name redacted] project."
44. The Commissioner has interpreted the above to mean that the council considers that it is its own commercial interests that would be prejudiced by disclosure.
45. The Commissioner needs to consider how any prejudice to commercial interests would be likely to be caused by the disclosure of the withheld information. This includes consideration of whether the prejudice claimed is "real, actual or of substance" and whether there is a causal link between disclosure and the prejudice occurring.
46. The council said that by listening to the recording, the complainant might be able to assure himself that no adverse comments were made about him when the item was discussed. It said that all other details are in the public domain and referred to these as the minutes of the meeting and 'an article about the Cley Car Park with a picture of our Mayor on site replete with chain of office!'. It said that it is very reluctant to have any further adverse comments in the press about this Cley Road Car Park.
47. The council also said that the clear link between disclosure and the prejudice occurring is that the complainant has a disclosable pecuniary interest and that, at the time of the request, he was the only council member with a car park project that awaits financing. It questioned why the complainant should want so much extra information other than to try and compromise its project. It said that evidence is included in his complaint to a local weekly magazine, and copied in the local paper, which forced a reply from its Mayor. Having viewed the articles, the Commissioner does not consider them to constitute evidence that disclosure would prejudice the council's commercial interests.
48. The council's arguments as to why the requested information should not be disclosed focus on a conflict of interest. It explained to the Commissioner that the complainant has approval from North Norfolk District Council for a car park, but that there has been no progress for years, and that this represents a conflict of interest with the Cley Road Car Park project. It said that during the meeting there was a 'protracted

and heated discussion' as to whether the complainant should be present for the Cley Road Car Park item and that the council agreed that he should leave the room for that item.

49. The council acknowledged that the Commissioner's role is to ensure that it complies with the FOIA, DPA and EIR. However, it suggested that as a council it has to start from the basic Guidelines for Councillors, and that the overriding concern is for councillors to declare where they have a conflict of interest, and the council can then decide whether the disclosable pecuniary interest is such that the councillor should withdraw for that agenda item. The council suggested that 'COI trumps FOI'. The council also said that its Standing Orders are followed by the council and each councillor and that under the Standards, and one of the seven Nolan Principles – Selflessness, a disclosable pecuniary interest is set out very clearly.
50. The Commissioner's guidance on 'The Prejudice Test'² states that;
- "If an authority claims that prejudice would be likely to occur they need to establish that
- there is a plausible causal link between the disclosure of the information in question and the argued prejudice; and
 - there is a real possibility that the circumstances giving rise to prejudice would occur, ie the causal link must not be purely hypothetical; and
 - the opportunity for prejudice to arise is not so limited that the chance of prejudice is in fact remote."
51. The Commissioner does not consider that the explanation given by the council sufficiently demonstrates a causal link between the disclosure of the withheld information and the stated prejudice to commercial interests. The explanation is couched in very general terms and focuses on a conflict of interest rather than a link between disclosure of the withheld information and a prejudice to commercial interests. As stated above in relation to the application of section 40(2) of the FOIA, the council was informed by the Commissioner that it must justify its position and was provided with the Commissioner's guidance on how she deals with complaints which clearly states that it is the public

² https://ico.org.uk/media/for-organisations/documents/1214/the_prejudice_test.pdf

authorities' responsibility to satisfy the Commissioner that information should not be disclosed and that it has complied with the law.

52. It is not for the Commissioner to speculate as to how the prejudice would be likely to occur. It does not necessarily follow that because the complainant has a disclosable pecuniary interest, disclosure of a recording of a public meeting would result in prejudice to commercial interests.
53. The lack of sufficient arguments from the council has led the Commissioner to the conclusion that section 43(2) of the FOIA is not correctly engaged in this case.

Other matters

54. The council informed the Commissioner that if she insists that the council provides the complainant with the requested information that it has the right to demand copies of all items mentioned in the FOIA that are in the Commissioner's Office, regarding this or any other complaint and referred to 'All your internal communications etc'.
55. The Commissioner would like to point out that the council is entitled to make such a request for information and if it chooses to do so it should submit its request the Information Access Team at:
accessicoinformation@ico.org.uk
56. The council said that if the Commissioner agrees that the conflict of interest principle is logical, namely that the complainant should have withdrawn for the Cley Road Car Park discussion, it follows that it is not appropriate for him to have a recording of the same. It is not for the Commissioner to judge whether the complainant should have been in attendance for the Cley Road Car Park discussion. Moreover, whether he should have attended or not is not relevant to whether the requested information should be disclosed under the FOIA. The council has also asked the Commissioner how the FOIA can override the Standards adopted by councillors all over the country. The Commissioner would like to emphasise that information can only be withheld if an exemption under the FOIA applies to the requested information. The FOIA gives the public the right to access recorded information held by a public authority unless it can be demonstrated that an exemption under the legislation applies.
57. In relation to the public interest test, the council said that it 'is best served by not going any further with this investigation. We have had enough grief already.' The council should ensure that in future its public interest arguments relate specifically to the exemption being claimed.

The council should be aware that, in relation to qualified exemptions, a public authority can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner considers that the council would benefit from reviewing her guidance on the public interest test:

https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

58. The council also expressed its opinion that because the complainant is no longer a councillor, it can see no reason to provide him with a copy of the recording. Again, the council needs to appreciate that the public has a right to be provided with recorded information held by a public authority and should use that as its starting point upon receiving a request. The question it should ask itself is not 'why should we provide this information?' The question should be 'is there any reason, under the terms of the FOIA, why we shouldn't provide the information'. The council should also be aware that even if an exemption applies, it can choose to provide requested information rather than apply the exemption.
59. Given the council's apparent lack of knowledge of the FOIA, it may be beneficial for it to watch the Commissioner's training film, 'Tick tock' designed to help make public authorities aware of their responsibilities under the Freedom of Information Act and the Environmental Information Regulations:

<https://vimeo.com/65572280>

Right of appeal

60. 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

61. 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.
62. 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

Deborah Clark
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