

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 August 2018

Public Authority: Swindon Parish Council
Address: Community Centre
High Street
Swindon
South Staffordshire
DY3 4NP

Decision (including any steps ordered)

1. The complainant has requested a specific communication which Swindon Parish Council has withheld under sections 14, 36(2), 40(2), 41 and 42 of the FOIA.
2. The Commissioner is satisfied that Swindon Parish Council was entitled to apply section 40(2) (personal data) of the FOIA to the requested information.
3. The Commissioner does not requires Swindon Parish Council to take any steps to ensure compliance with the legislation.

Request and response

4. On 16 October 2017 the complainant wrote to the clerk at Swindon Parish Council (SPC) and requested information in the following terms:
'Please forward a copy of [name redacted]'s complaint/letter to [the Council Chairman] and all other SPC members and put a copy of the complaint/letter on the village notice board and Web site'.
5. SPC's clerk responded on 23 October 2017 and stated that she did not hold a copy of the communication sent to the Chairman.

Chronology

6. The Commissioner contacted SPC on 26 February 2018 and 2 March 2018 and invited it to issue a formal response to the complainant's request under section 1 (General right of access) of the FOIA. This is

because the original response did not specify whether SPC, as a public authority, held the requested information under Section 1(1)(a) of the FOIA.

7. SPC's clerk responded on 1 and 7 March 2018 stating that although she did not hold a copy of the requested information she would forward the Commissioner's correspondence to the Chairman to see whether he had retained a copy. The clerk also provided the Commissioner with a copy of SPC's minutes for a meeting on 14 December 2016 when the content of the requested information was displayed, discussed and minuted under paragraph 9, headed 'correspondence'¹.
8. On 18 March 2018 SPC's Chairman sent the Commissioner a copy of the requested information.
9. The Commissioner contacted SPC's clerk again on 26 March 2018 stating that she was satisfied the requested information was held at the time of the request. Accordingly, she invited SPC to either disclose the requested information to the complainant or issue a refusal notice under Section 17 of the FOIA.
10. On 5 April 2018 SPC contacted the complainant stating it was refusing his request under sections 14, 36, 40(2), 41 and 42 of the FOIA and gave its reasons.

Scope of the case

11. The complainant contacted the Commissioner 1 December 2017, 30 January 2018 and 23 February 2018 to complain about the way his request for information had been handled. In particular, he said he was unhappy with the decision made by SPC not to send him a copy of the information he had requested.
12. The scope of the Commissioner's investigation has been to assess whether SPC was entitled to withhold the requested information under the FOIA.

Reasons for decision

¹ See paragraph 9b

13. SPC withheld the requested information under sections 14, 36, 40(2), 41 and 42 of the FOIA. The Commissioner has considered whether SPC was entitled to withhold the requested information under the FOIA and started by looking at section 40(2).

Section 40(2) of the FOIA – Third party personal data

14. SPC stated that the requested information contains third party personal data which the third party has not given permission to be disclosed. Also, it stated that any disclosure would amount to a breach of confidence.

Personal data

15. Section 40(2) of the FOIA provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in Section 40(3)(a)(ii) is satisfied.
16. One of the conditions, listed in Section 40(3)(a)(ii), is where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 ("the DPA", which was the access regime for personal data at the time the request was dealt with).
17. The Commissioner has first considered whether the withheld information would 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'.

18. The Commissioner has reviewed the requested information in this case which comprises a communication addressed to the Chairman of SPC and is satisfied that it is the personal data of its author. The Commissioner is also satisfied that the information contains the personal data of two other third parties who are expressly named as per paragraphs 2 to 11 of the Confidential Annex.
19. SPC has suggested that disclosure of the author's personal data would breach the first data protection principle, which states:

'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.'

20. The relevant conditions in the context of a FOIA request are the first and sixth. These can be summarised as follows;

- The data subject has given consent to the processing (condition 1)
- The processing is necessary for the purpose of the legitimate interests of the data controller or a third party (unless the processing is unwarranted because it would prejudice the rights and freedoms or legitimate interests of the data subject (condition 6)).

Fairness

21. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
 - the nature or content of the information itself;
 - whether the individuals concerned are senior employees with public facing roles or junior staff in non-public facing roles
 - the circumstances in which the personal data was obtained;
 - any particular circumstances of the case, eg established custom or practice within the public authority; and

- whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so, the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
22. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.
23. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.

Reasonable expectations

24. In the Commissioner's view, a key issue to consider in assessing fairness is whether the individual concerned has 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 and also the purpose for which they provided their personal data.
25. The Commissioner has seen the requested information, which comprises an email addressed to the Chairman of SPC, and is satisfied its author would have a reasonable expectation that it would not be disclosed to the world at large under the FOIA.
26. Although the requested information was shown to a limited audience and discussed and selectively minuted at an open meeting of SPC on 14 December 2016, the Commissioner does not believe the author would have had a reasonable expectation that the entirety of the information would subsequently be placed in the public domain.

27. As stated in paragraphs 13 and 14 of the Confidential Annex, the Commissioner also considers that the two named individuals would have a reasonable expectation that the entirety of the information would not be disclosed.
28. In its internal review response dated 5 April 2018, SPC stated that the withheld information was provided in confidence and disclosure to the world at large would constitute a breach of that confidence.

Consent

29. In its internal review response SPC stated that the author of the information had not given permission for its complete disclosure into the public domain.
30. SPC has not provided any evidence that the two named individuals have provided their consent for disclosure. However, the Commissioner acknowledges that in view of the content of the information, the two individuals would have a reasonable expectation of privacy.

Consequences of disclosure

31. When considering the consequences of disclosure in this case, the Commissioner has taken into account the nature of the withheld information. She has also considered that disclosure under the FOIA is to the world at large and not just to the complainant.
32. In its submission to the Commissioner, SPC stated that its Chairman believed the complainant's request was likely to cause an unjustified level of distress to the author of the requested information as they would have little confidence in the use to which it would be put and where it would be published.
33. Given the nature of the information and the reasonable expectations of the individuals concerned, the Commissioner is satisfied that disclosure of the withheld information could cause unnecessary and unjustified distress to the two other individuals.

Legitimate interests in disclosure

34. Despite the reasonable expectations of the individuals and the fact that damage or distress may result from disclosure, it may be fair to disclose the information if there is an overriding legitimate interest in disclosure to the public.
35. The Commissioner recognises there is a legitimate and wider public interest in transparency and accountability regarding matters discussed and decisions made at parish council meetings. However, the Commissioner notes that this interest has been met in that reference to

the requested information is made in the minutes of SPC's meeting on 14 December 2016.

36. The complainant referenced his request under the Department for Communities and Local Government (DCLG) 'open and accountable local government 2014 rules'² but his request was refused. He pointed out to SPC that under these rules it is criminal offence, attracting a fine up to £200 for any person found guilty, if without reasonable excuse a person with custody of a document (which is required by the national rules to be made available to the public) refuses to supply the whole or part of the document, or intentionally obstructs any other person/s from disclosing such a document.
37. The Commissioner recognises there may be other routes through which the complainant can personally request and obtain the requested information but consideration of these are outside the jurisdiction of the Commissioner's investigation and the scope of this Decision Notice.
38. In the circumstances of this case, the Commissioner does not consider that the legitimate interests in the public accessing the withheld personal information would outweigh the potential damage and distress which could be caused to the data subjects by disclosure of the information.
39. Therefore, the Commissioner does not consider that disclosure of the withheld information is necessary to meet a legitimate public rather than a personal interest.

Conclusion on the analysis of fairness

40. The Commissioner has concluded that it would be unfair to disclose the entirety of the withheld information in view of the reasonable expectations of the data subjects and the likely distress caused as a result of disclosure. As the Commissioner has concluded that disclosure would be unfair and constitute a breach of the first data protection principle. Although it is not necessary, she has not gone on to consider whether there is a Schedule 2 condition for processing the information.

2

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/343182/140812_Openness_Guide.pdf

41. As the Commissioner is satisfied that Section 40(2) of the FOIA is engaged she has not gone onto consider any of the other exemptions cited by SPC.

Other matters

42. The Commissioner did consider whether to order disclosure of the withheld information with redactions but concluded that it would not reveal any more information than that which has already been recorded in the minutes of SPC's meeting on 14 December 2016.

Right of appeal

43. 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

44. 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.
45. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**