

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 September 2019

Public Authority: Atherstone Town Council
Address: Atherstone
Warwickshire
CV9 1YN

Decision (including any steps ordered)

1. The complainants have requested a copy of a report read out in a meeting of Atherstone Town Council ("the Council") on 18 April 2018.
2. The Commissioner's decision is that the Council has correctly withheld the report under section 40(2) of FOIA – third party personal data. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

3. On 1 July 2018, the complainants wrote to the Council and requested information in the following terms:

"With reference to the minutes of Atherstone Town Council meeting 18 April 2018, point 24 E47, please can we request a copy of report which was written by [named councillor] and read out at the meeting."
4. The Council responded on 26 July 2018. It denied holding the information, as it considered that the report was held by an individual councillor.
5. Following an internal review the Council wrote to the complainant on 20 August 2018. It upheld its original position.

6. Following the complainants contacting the Commissioner, a decision notice¹ was issued to the Council which found that the Council held the report. The Council was ordered to provide a fresh response to the complainants which did not rely on the report not being held.
7. The Council issued a new response on 31 May 2019, advising that the report was held, but that it was applying exemption 41(1) of the FOIA – information provided in confidence. The Council also stated that the report was exempt from disclosure because of the provisions of the Local Government Act of 1972, which the Commissioner takes to be a reference to the exemption at section 44(1) of the FOIA – prohibitions on disclosure.
8. The complainants requested an internal review, which the Council responded to on 19 June 2019, maintaining its position.

Scope of the case

9. The complainants contacted the Commissioner on 21 June 2019, to complain about the way their request for information had been handled.
10. In the Commissioner's view, the Council has demonstrated a lack of understanding of its obligations under the FOIA, initially evidenced by the earlier decision notice, case reference FS50784881, regarding whether the Council itself held the report.
11. During the investigation of that case, the Council at times suggested to the Commissioner that it considered that the report may contain personal data. However, its response to the complainants, which the Commissioner has been asked to investigate in this case, was based, by implication – although not explicitly stated – on the exemption at section 44(1)(a) of the FOIA – prohibition on disclosure due to the provisions of an enactment, and on section 41(1) – information provided in confidence.
12. The Commissioner, as is her normal procedure, asked the Council for a detailed explanation of its position. The Council stated that it was unable to answer and then outsourced the responsibility for responding to a solicitor. However, this only magnified the Council's

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614895/fs50784881.pdf>

issues, since the solicitor's response to the Commissioner made only a vague assertion about the burden on the Council, and failed to provide a detailed explanation of the Council's application of any exemptions.

13. In light of the Council's lack of understanding of both their obligations under the Act and the exemptions contained therein, the Commissioner has used her discretion to consider whether the report is exempt from disclosure under section 40(2) of the FOIA – third party personal data – and, if necessary, will consider the other exemptions applied by the Council. The withheld information is clearly comprised of third party personal data and thus must be given due consideration by the Commissioner in her capacity as the regulator.

Reasons for decision

Section 40 Personal information

14. 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.
15. In this case the relevant condition is contained in section 40(3A)(a)². 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').
16. 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.
17. 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.

² As amended by Schedule 19 Paragraph 58(3) DPA.

Is the information personal data?

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

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

19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. The Commissioner's guidance on what is personal data³ states that if information 'relates to' an 'identifiable individual' it is 'personal data' regulated by the DPA.

20. 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.

21. 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.

22. It must also be noted that the Council has not provided a detailed argument regarding whose personal data it is. However, in the circumstances of this case, having considered the withheld information, the Commissioner notes that the report contains details of a private family dispute, in which a number of individuals are named. She is satisfied that the information therefore relates to several data subjects who are living. She is satisfied that 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.

23. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the data protection principles.

³ <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf> & https://ico.org.uk/media/fororganisations/documents/1549/determining_what_is_personal_data_quick_reference_guide.pdf

24. The most relevant data protection principle in this case is principle (a).

Would disclosure contravene principle (a)?

25. 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".

26. In the case of a 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 (i.e. it would meet one of the bases of lawful processing listed in Article 6(1) GDPR as well as being generally lawful), be fair, and be transparent.
27. 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

28. 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.
29. 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"⁴.

⁴ 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".

30. 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.

31. 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

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

33. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

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".

34. The Commissioner understands that the complainants are concerned that ownership of their late parent's grave has not been correctly transferred by the Council to other family members, and considers that they have a legitimate interest in investigating the procedure followed by the Council. The Commissioner also recognises there are legitimate interests in the Council's transparency and accountability.

Is disclosure necessary?

35. '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.
36. The Commissioner is aware that the report has been read out at a Council meeting. However, the Commissioner has no evidence that its contents in recorded form are currently available to the complainants nor to the wider world. Disclosure of the withheld information in response to the request would therefore be therefore 'necessary' to meet the legitimate interests already identified.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms.

37. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects 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.
38. 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 individuals expressed concern to the disclosure; and
 - the reasonable expectations of the individuals.
39. 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.

40. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
41. Disclosure under FOIA is tantamount to publication to the world at large. The Commissioner must therefore balance the legitimate interests with the data subject's interests when determining whether the information can be disclosed into the public domain and not just to the complainants.
42. The Council has not provided detail of the individuals' expectations in this case. However, the Commissioner considers that they would have a reasonable expectation that the report would not be made public, since the report concerns a private family matter. The Commissioner accepts that it is the general expectation of the data subjects concerned that their personal data will remain private and confidential and will not be disclosed to the world at large. Disclosure under the FOIA would confirm to the world at large information of a personal or private nature and the Commissioner considers this would be an unwarranted intrusion into the lives of the data subjects.
43. The Commissioner considers that disclosure of the report would reveal information regarding the data subjects' private family affairs. The Commissioner accepts that the data subjects in this case are unlikely to expect that this information would be disclosed into the public domain. She notes that the report had been read out during the private and confidential section of the meeting dated 18 April 2018, from which members of the public had been asked to withdraw. While a summary of what was discussed in this section of the meeting has been published, the level of detail about the private family dispute which is contained within the report, is not within the public domain.
44. The Commissioner accepts that the complainants have a private legitimate interest in the withheld information; however, she does not consider that this private interest outweighs the rights and freedoms of the third parties identified in the report. Whilst there is also a general public interest in transparency with regard to the Council's operations, she again does not consider that this justifies the disclosure of the report.

45. 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.
46. 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.
47. The Commissioner has therefore decided that the Council was entitled to withhold the report under section 40(2), by way of section 40(3A)(a). It has not been necessary for her to consider the application of any other exemptions.

Other matters

48. The Commissioner trusts that in responding to requests for information in future, the Council will comply promptly with its responsibilities under the FOIA, or under the Environmental Information Regulations 2004, and will engage fully with her office when required to provide detailed explanations of its position.

Right of appeal

49. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

50. 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.
51. 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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