

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 December 2021

Public Authority: Bath and North East Somerset Council

Address: The Guildhall

High Street

Bath

BA1 5AW

Decision (including any steps ordered)

1. The complainant has requested from Bath and North East Somerset Council ("the Council") information relating to communications between the Standards Committee and the Monitoring Officer. The Council disclosed some information, but withheld the remainder under section 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that the Council was entitled to withhold the information under section 40(2).
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 16 December 2020, the complainant wrote to the Council and requested information in the following terms:

"Requested information:

Par.15 on page 1 of the minutes of the Standards Committee meeting on the 20th September 2018 read,

'The Monitoring Officer explained that as requested by the Standards Committee, the criteria for considering complaints had been amended

to state: If appropriate, the Monitoring Officer will then go on to apply the following criteria in deciding whether a complaint should be investigated, dealt with informally or rejected:

Whether the complaint is about something that happened over 6 months ago as those involved are not likely to remember it clearly enough to provide credible evidence, or where the lapse of time means there would be little benefit or point in taking action now.

Resolved all to note'

I would like all information and communications regarding the request from the Standards Committee to the Monitoring Officer, from when it was first raised as an issue, why it was considered an issue, any examples, (with personal details redacted). Any communications or records from the Monitoring Officer's attempt to understand the matter with the Standards Committee, in order to find a way forward. If the information was shared in a 'closed session' where the public were excluded, I would like a reference number and/or date to which meetings this subject was discussed, in person or other communication.

I am trying to obtain a full picture of the matter that brought about the action by the Monitoring Officer."

5. The Council responded on 9 February 2021. It disclosed information subject to some redactions under the exemption provided by section 40(2) of the FOIA.
6. Following an internal review, the Council wrote to the complainant on 22 June 2021. It maintained its original position

Scope of the case

7. The complainant contacted the Commissioner on 18 May 2021 to complain about the way their request for information had been handled, and specifically that the Council was not entitled to withhold the information under section 40(2).
8. During the course of investigation, the Council revised its position and disclosed a small amount of the previously withheld information on 30 November 2021.
9. The scope of this case and of the following analysis is whether the Council was entitled to rely upon section 40(2) to withhold the remainder of the withheld information.

Reasons for decision

Section 40 - Personal information

10. 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 requestor and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
11. In this case the relevant condition is contained in section 40(3A)(a)¹. 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').
12. 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.
13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

17. 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.
18. The Commissioner has reviewed the withheld information, this being an un-redacted copy of an email sent on 13 February 2018 from the appointed 'independent person' to the Council's monitoring officer in respect of a Standards Complaint relating to a specific Councillor. The Council has explained that the Standards Complaint has been considered under the appropriate process, which is a requirement of Part 7 of the Localism Act 2011.
19. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to an identifiable individual. He is satisfied that this information both relates to and identifies the identifiable individual concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
20. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
21. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

22. 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".

23. In the case of an 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, fair and transparent.
24. 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

25. 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.

26. 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"².

27. 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.

28. 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

29. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be

² 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".

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".

the requestor's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requestor is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

30. In the circumstances of this case the Commissioner recognises that there is a legitimate interest that Standards Complaints are subject to appropriate transparency.

Is disclosure necessary?

31. '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.
32. The Commissioner understands that Standards Complaints are treated as confidential unless they proceed to a standards hearing and a finding of fault, in which event the decision is published. The Commissioner understands, from the Council's website, that complaints are reviewed by the Monitoring Officer, in conjunction with the Independent Person and the Independent Chair of the Standards Committee, and that should a complainant feel the Council has failed to address their complaint properly, they may make a complaint to the Local Government and Social Care Ombudsman ("the LGSCO"). In such a scenario, it is reasonable for the Commissioner to consider that the legitimate interest is served by the availability of both a complaints process, and a subsequent route of appeal to the LGSCO. The Commissioner does not, therefore, believe that disclosure in response to the complainant's request is necessary to satisfy the legitimate interest.
33. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's view

34. The Commissioner has therefore decided that the Council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

35. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

36. 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.
37. 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

Daniel Perry
Senior Case Officer
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