

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 September 2021

Public Authority: Causeway Coast and Glens Borough Council
Address: Civic Headquarters
Cloonavin
66 Portstewart Road
Coleraine
BT52 1EY

Decision (including any steps ordered)

1. The complainant has requested information about an incident in Portrush during the "Open Week" in 2019. The Council disclosed some information but withheld the names of various individuals in reliance on the exemption at section 40(2) of FOIA (third party personal data). The complainant disputed the Council's reliance on section 40(2) and asked the Commissioner to investigate whether further relevant information was held.
2. The Commissioner's decision is that the Council was entitled to rely on section 40(2) in respect of the withheld information. The Commissioner further finds that the Council does not hold any further information relevant to the request. The Commissioner does not require any steps to be taken.

Request and response

3. The complainant wrote to the Council on 16 September 2019 regarding an incident in Portrush during the "Open Week".¹ The
-

¹ The Open golf tournament was held at Royal Portrush between 14-21 July 2019.

Council responded on 27 September 2019, and on 1 October 2019 the complainant requested the following information:

"I wish... to request all notes and records pertaining to this incident, all documentation generated in consequence of it, including in respect of the decision to not have any follow up visits or additional action and all guidance or policy in respect of handling such incidents and the investigation thereof. This request extends to all documentation howsoever held, including all notes, records, emails, memos of conversations, action sheets and all other forms of records."

4. The Council responded to the complainant on 18 November 2019. It provided some information, with names and contact details redacted in reliance on the exemption at section 40(2) of FOIA.
5. The complainant was dissatisfied with this response and requested an internal review on 20 November 2019. The complainant was of the view that the Council was likely to hold more information than had been disclosed to him. The complainant suggested that the Council may hold information from the daily action sheets, as well as a text sent by the Chief Executive on 17 July 2019. The complainant also queried whether the Council held any records relating to directions given to staff by management.
6. In addition the complainant asked the Council to check whether it held any information relating to a planned council meeting on 18 July 2019, and whether it held any response to a letter the Council issued on 18 July 2019.
7. The Council provided the outcome of the internal review on 20 January 2020. The Council explained how it had searched for the requested information, and provided one further document that had been identified. The Council maintained its decision to withhold information under section 40(2) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 21 January 2020 to complain about the way the Council handled his request.
9. The complainant asked the Commissioner to consider whether the Council had identified all the information it held in scope of the request. He also asked the Commissioner check that the redactions made by the Council were warranted.

10. The Commissioner wrote to the Council on 11 February 2020 to advise it of the complaint. However the Commissioner's substantive investigation of this complaint was delayed owing to the consequences of the Covid-19 pandemic.
11. The Council confirmed to the Commissioner on 27 January 2021 that its circumstances had improved to the extent that it could now deal with the complaint.

Reasons for decision

Section 1: information held by the Council

12. Section 1 of FOIA says that public authorities are required to respond to requests for information. The authority is required to disclose information in response to a request, unless an exemption or exclusion applies. If a public authority does not hold recorded information that would answer a request, the Commissioner cannot require the authority to take any further action.
13. In cases where there is a dispute as to the information held by a public authority, the Commissioner will use the civil standard of proof, ie the balance of probabilities. Accordingly her investigation will consider the public authority's reasons for stating that it does not hold the information in question (or does not hold any further information), as well as the extent and reasonableness of any search conducted. The Commissioner will also consider any arguments put forward by the complainant as to why the information is held (as opposed to why it ought to be held). Finally, the Commissioner will consider whether there are any further steps she could require the public authority to take if the complaint were upheld.
14. The Commissioner notes that the Council had explained to the complainant that it searched records held by Environmental Health, the Chief Executive, Environmental Services Director, Leisure and Development Director and the relevant Head of Service.
15. The complainant maintained to the Commissioner that he would have expected the Council to hold the types of information described in his request for internal review (set out at paragraph 5 above). Therefore the Commissioner asked the Council to confirm how it was satisfied that its searches were sufficient to identify all the information held by the Council that was relevant to the request.

16. The Council explained that it initially consulted the Director of Environmental Services and the Head of Health and Built Environment, as the relevant business areas. Searches returned information from the Council's case management system and documents held by the Director. When the complainant requested an internal review consultation was undertaken with the Chief Executive and the Director of Leisure and Development, in addition to further consultation with Environmental Services. The Council said that the complainant's representations were also put to relevant business areas for response.
17. The Commissioner also asked the Council to confirm the steps it took to obtain the text message sent by the Chief Executive as referred to by the complainant in his request for internal review. The complainant had pointed out that an email disclosed by the Council had referred to a text sent by the Chief Executive to the Director of Environmental Services. The Commissioner reminded the Council that information held on a personal mobile phone may be considered held on behalf of the public authority if it is information relating to the individual's employment or the public authority's functions.
18. In response the Council advised the Commissioner that the Chief Executive and relevant Directors were again asked to search their records. The Council confirmed that the Chief Executive had searched his emails and mobile phone but had found no relevant information. The Council advised the Commissioner that the Chief Executive had subsequently confirmed that he did not hold any information relating to a text message as described by the complainant. The Chief Executive advised that he had sent a voicemail rather than a text message, but had no record of this.
19. The Council further advised that the Director of Environmental Services and the Director of Leisure and Development had undertaken searches using relevant keywords, but had similarly found no relevant information.
20. The Commissioner is satisfied that the Council directed its searches appropriately, since if relevant information were held it would most likely be held by one or more of the individuals specified. Therefore the Commissioner finds, on the balance of probabilities, that the Council does not hold any further information relevant to the request.
21. The Commissioner understands why the complainant disputed the Council's response in some respects. For example, the Commissioner has inspected the email which refers to the Chief Executive Officer (the Chief Executive) having texted the Director of Environmental Services. This clearly suggests that a text was sent, rather than a

voicemail. However the Commissioner observes that the email was sent by an individual other than the parties involved, ie the Chief Executive or Director of Environmental Services. In the Commissioner's opinion the email is not itself conclusive evidence that a text was sent, and the Commissioner must give due regard to the Chief Executive's explanation that he had sent a voicemail rather than a text.

22. In light of the above the Commissioner cannot be satisfied that a text message was in fact sent. Therefore, on the balance of probabilities the Commissioner finds it more likely that a voicemail was sent. However the Commissioner also notes that the recipient of the voicemail, the only person likely to hold this communication, undertook a search of his phone but did not find the voicemail in question. Therefore, and again on the balance of probabilities, the Commissioner finds that the Council does not hold the voicemail.

Section 40(2): third party personal data

23. Section 40(2) of FOIA provides an exemption from disclosure where:

- the information in question is the personal data of an individual other than the applicant, and
- disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 2018 (DPA).

24. Accordingly the first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 of FOIA cannot apply.

Is the information personal data?

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

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

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

27. 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.
28. 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.
29. The withheld information in this case comprises the names of Council staff below Head of Service, and the names of individuals from other organisations, namely PSNI (the Police Service of Northern Ireland) and NIFRS (Northern Ireland Fire and Rescue Service). The withheld information has been redacted from documents provided to the complainant.
30. The Council advised the Commissioner that it had also redacted information that did not fall within the scope of the request. The Commissioner has inspected the information disclosed to the complainant and has compared it with the unredacted information. The Commissioner is satisfied that the redacted information is as described by the Council. A public authority is only required to consider disclosing information that falls within the scope of a request. If the requested information is contained within a particular document that also contains information falling outside the scope of the request, then the public authority is only obliged to consider the requested information for disclosure, not the entire document.
31. The Commissioner is satisfied that the information withheld under section 40(2) is personal data of individuals other than the complainant. This is because the individuals could be identified from their names and job titles, and this information clearly relates to the individuals in the context of their employment. The Commissioner has therefore gone on to consider whether disclosure of this information into the public domain would contravene any of the principles of the DPA.
32. 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 principles.

33. The Commissioner is of the opinion that the most relevant principle in this case is principle (a), which is set out at Article 5(1)(a) of the GDPR:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

34. 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.

35. 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

36. The Commissioner considers that the lawful basis most applicable to a disclosure under FOIA is Article 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.

37. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:

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".

- 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.

38. The Commissioner further considers that these tests should be considered in sequential order, ie if the legitimate interest is not met then there is no need to go on to consider the necessity test, and so on.

Legitimate interests

- 39. In considering any legitimate interest(s) in the disclosure of the requested information under 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.
- 40. 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.
- 41. The Commissioner understands that the incident referred to in the complainant's request was a concern about crowding outside a bar. The complainant wanted to know why further action had not been taken in respect of this incident, which he felt could have been a public safety risk.
- 42. The Council acknowledged that there is a legitimate interest in the public being able to see whether or not inspections undertaken by its Environmental Health Officers are undertaken in line with Council procedures.
- 43. The Commissioner considers that there is a wider legitimate interest in informing the public how the Council handled a particular concern about a matter of public safety. Therefore the Commissioner is satisfied that the legitimate interest test is met in this case.

Is disclosure necessary?

44. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
45. The Council argued that the disclosed information was sufficient to meet the legitimate interest in disclosure, and that it was not necessary to disclose the redacted information.
46. The Commissioner agrees with the Council. In this case the information disclosed by the Council records concerns about the bar, and the fact that PSNI engaged with the bar owner as well as PSNI and NIFRS. It also records the discussions of senior Council staff by email. The only redacted information relevant to the request is the names of relatively junior Council staff and individuals from other organisations.
47. The Commissioner does not consider that disclosure of the names of these individuals, over and above the information already disclosed, is reasonably necessary to meet the legitimate interest set out above. The Commissioner is not satisfied that disclosure of the names and job titles of Council employees is necessary to inform the public or increase understanding of the Council's actions.
48. In light of the above the Commissioner finds that the necessity test is not met, therefore the Council cannot rely on Article 6(1)(f) as a lawful basis for processing the personal data in question. It follows that disclosure of this information would not be lawful, and would contravene principle (a). For this reason the Commissioner finds that the Council was entitled to rely on the exemption at section 40(2) of FOIA.

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: 0203 936 8963
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

**Sarah O’Cathain
Senior Case Officer
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**