

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 5 February 2021

**Public Authority:** West Suffolk Council  
**Address:** St. Andrews Street North  
Bury St. Edmunds  
IP33 1TZ

#### Decision (including any steps ordered)

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1. The complainant has requested information from West Suffolk Council ("the Council") regarding meeting minutes and emails between Councillors, Councillors and staff members and submissions from the public in relation to the West Suffolk Parking Review Group.
2. The Commissioner's decision is that the Council has correctly relied upon section 40(2) of the FOIA to withhold the requested information.
3. The Commissioner does not require the public authority to take any further steps.

#### Request and response

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4. On 29 June 2020, the complainant wrote to the Council and requested information in the following terms:

*"Dear West Suffolk Council*

*Under the Freedom of Information Act 2000, please provide me with the following information:*

- 1) *Membership of the West Suffolk Parking Review Group that was setup by the Overview and Scrutiny Committee last July, please also provide details of meetings that were held by the West Suffolk*

*Parking Review Group, including the dates and attendance at each meeting.*

*2) Minutes of all meetings of the West Suffolk Parking Review Group.*

*3) Emails between councillors, between councillors and council staff and submissions from members of the public relating to the West Suffolk Parking Review Group (redacted personal information for members of the public is fine) which are not covered under point 1 or 2 above.*

*If my request is denied in whole or in part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all non-exempt material. I reserve the right to appeal your decision to withhold any information or to charge excessive fees."*

5. The Council responded on 22 July 2020. It advised that it does hold information that falls within the scope of the request. However, the cost of locating, retrieving and extracting the information is over a defined limit and as such, section 12(1) of the FOIA is applied. It explained that this was specifically in relation to part 3 of the request.
6. On 22 July 2020, the complainant contacted the Council and advised that it could provide a response to parts 1 and 2 of the request and that they would submit a further request for more targeted information in relation to part 3 of the request.
7. The Council responded on 23 July 2020, providing a response to part 1 and 2 of the request. It provided a table setting out dates and attendance at the meeting for part 1 of the request. For part 2 of the request, the Council advised that formal minute taking was not carried out, but notes were taken. It advised that upon review of the notes, they contain personal data and if they were to be redacted, they would not be understandable. The Council applied section 40(2) of the FOIA – personal data, to the notes.
8. Following an internal review the Council wrote to the complainant on 14 September 2020, upholding its original position.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 14 September 2020 to complain about the way their request for information had been handled.
10. During the Commissioner's investigation, the Council responded to explain that while it was relying on section 40(2), it had also considered

section 36(2) of the FOIA – prejudice to the effective conduct of public affairs.

11. The Commissioner accepted that the Council has also looked at this exemption and asked them to inform the complainant of this, as it will be considered, should the Commissioner find that section 40(2) of the FOIA is not applicable.
12. The Commissioner considers that the scope of her investigation is to determine whether the Council is entitled to rely on section 40(2) of the FOIA to withhold the information. If not, the Commissioner will go on to consider if the Council is entitled to rely on section 36(2) of the FOIA to withhold the information.

## **Reasons for decision**

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### **Section 40 personal information**

13. 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.
14. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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').
15. 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.
16. 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 DP principles.

### ***Is the information personal data?***

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

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

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

18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. 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.
20. 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.
21. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to individual Councillors and their opinions on the various topics discussed within the West Suffolk Parking Review Group meetings. The Commissioner is satisfied that the information both relates to and identifies the tenant(s) concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
22. 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.
23. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

24. 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".*

25. 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.
26. 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**

27. 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.

28. 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"*<sup>2</sup>.

29. 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.

30. 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*

31. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and

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<sup>2</sup> 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".*

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, the narrower and more trivial the interest, the less likely it is that the interest in disclosure to the world at large will outweigh the rights of the data subject(s).

32. In this case, it is clear that the complainant is seeking access to the withheld information to determine how the West Suffolk Parking Review Group came to the conclusions that were published in the final report.
33. The Council has explained that there is a legitimate interest in disclosure of the information as it would add further evidence that the conclusions formed by the West Suffolk Parking Review Group, were reached after extensive deliberation and how relevant evidence was taken into account.
34. In this particular case, the Commissioner recognises that there is a broad interest in public authorities being transparent and accountable for the decisions that are made which impact the local community.

*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. As disclosure under the FOIA is disclosure to the world at large it is rare that such processing will be necessary to achieve a legitimate interest.
37. The Commissioner is satisfied that the specific information requested in this case has not otherwise been made available to the public and that, therefore, in this case there are no less intrusive means of achieving the legitimate aims identified.

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

38. 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.

39. 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 individual expressed concern to the disclosure;
- and
- the reasonable expectations of the individual.
40. 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.
41. The Commissioner is mindful that disclosure under the FOIA is disclosure to the world at large and not just to the requestor. It is the equivalent of the Council publishing the information on its website.
42. The Commissioner notes that the complainant asked the Council to explain why it did not adhere to the Terms of Reference that were set up by the Overview and Scrutiny Committee, for the West Suffolk Parking Review Group.
43. The Council has explained that whilst the terms of Terms of Reference were set up for the review, there were no specific Terms of Reference produced for the West Suffolk Parking Review Group itself. It says that due to this, there were no expectations set for members of the groups as to how meetings would be operated, or the confidential nature of proceedings.
44. The Council has also advised that formal minutes of the review group were not taken, as there was a more informal approach. It went on to explain that the notes take on a more verbatim approach than minutes would do.
45. The Council explained that the notes of the meetings reflect the thoughts and opinions of individual members of the working group and council officers, which constitutes personal data. It went on to explain that should the personal data be removed, the notes would lose context and be difficult to understand.
46. The Council has advised that if the notes were redacted to remove the personal data, it is likely that users would generally be able to make a well informed assumption as to which Councillor had made which

statement. This is because the Councillors are local ward Councillors for specific areas.

47. The Council has explained that the West Suffolk Parking Review Group's conclusions were publicly reported to the Overview and Scrutiny Committee on 23 January 2020 and were also included on the agenda for the Cabinet meeting of 11 February 2020. The minutes for these meetings are available on the Council website.
48. The Commissioner has viewed the withheld information and is satisfied that it contains personal information about the Councillors.
49. The Commissioner accepts that disclosure of the withheld information could be distressing to those involved, as they had no expectation that their personal information could be made public. 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.
50. The Council has stated that it accepts that the Council and Councillors are required to be accountable and transparent. However, whilst disclosure may aid additional understanding on how conclusions were reached, the information explaining what the conclusions are is available in the public domain.
51. It also added that had the Car Park Review Group been made aware that the notes would be published, their discussions would have been muted and the overall report would have been less beneficial.
52. The Council states that, in conclusion, whilst disclosure would be necessary to aid the understanding of individual members of the group's thoughts, it is not necessary to understand the conclusions of the Car Park Review Group.
53. The Council says that, having considered the above, there are not sufficient grounds on which legitimate interests can be used as a lawful basis for processing the data. As such, disclosure would be unlawful.
54. The complainant argues that the West Suffolk Parking Review Group should be bound by the Terms of Reference outlined by the Overview and Scrutiny Committee. The Council has argued that the Terms of Reference were not for the West Suffolk Parking Review Group, they were simply for the overall review. The Commissioner concludes, based on the evidence provided, that the West Suffolk Parking Review Group did not have a reasonable expectation that their personal information would be disclosed.
55. 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 discloser of the information would not be lawful.

56. Given the above conclusion that disclosure would be unlawful, disclosure of the requested information would contravene principle (a) and the Commissioner does not need to go on to separately consider whether disclosure would be fair or transparent.
57. As the Commissioner has found that the Council was correct to apply section 40(2) to the requested information, she does not need to consider section 36(2).

In conclusion, the Commissioner finds that the Council was entitled to rely on section 40(2) of the FOIA to withhold the requested information.

## Right of appeal

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58. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

59. 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.

60. 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 .....

**Phillip Angell**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**