

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 November 2021

Public Authority: Middlewich Town Council
Address: The Town Hall
Victoria Buildings
Lewin Street
Middlewich
Cheshire
CW10 9AS

Decision (including any steps ordered)

1. The complainant has requested from Middlewich Town Council ("the Council") information relating to the appointment of a Deputy Community Mayor. The Council withheld part of the requested information under section 40(2) (personal information) of the FOIA, and stated that all remaining information had been disclosed.
2. The Commissioner's decision is that the Council was entitled to withhold part of the requested information under section 40(2), and that all remaining information has been disclosed.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 18 March 2020, the complainant wrote to the Council and requested information in the following terms:

"Deputy Community Mayor

- 1. Details of the process followed to create the position of Deputy Community Mayor including the names of the proposer and seconder of the motion – item 6 FTC 20th August 2019. Resolved 8229*
 - 2. The Council minutes of 21st October 2019 (item 6) states that "3 strong candidates had been interviewed". Would you therefore please advise me of their names, when they were contacted and interviewed and the criteria used to choose the candidates. It should be noted that the Information Commissioner has already stated that this should be made available, regardless of whether it is in Council records or in Councillors' private PC records etc.*
 - 3. The names of the Councillors who interviewed the 3 candidates and chose the Deputy Mayor.*
 - 4. Please supply a copy of all emails, documents and correspondence (from the Council and Members) relating to the process, interviewing and appointment of the Deputy Community Mayor."*
5. The Council responded on 23 May 2020. It disclosed information in respect of requests 1, 3, and 4, but withheld information under section 40(2) in respect of request 2.
6. Following an internal review, the Council wrote to the complainant on 24 December 2020. It maintained the applied exemption and stated that all remaining information had been disclosed.

Scope of the case

7. The complainant contacted the Commissioner on 19 November 2021 to complain about the way requests 2 and 4 had been handled, and specifically that the Council was not entitled to withhold information under section 40(2) (for request 2), and further, had not disclosed all held information (for request 4).
8. The scope of this case and of the following analysis is whether the Council is entitled to withhold information under section 40(2) (for

request 2), and whether it holds further information besides that already disclosed (for request 4).

Reasons for decision

Section 40 - Personal information

9. 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.
10. 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").
11. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ("the DPA"). If it is not personal data then section 40 of the FOIA cannot apply.
12. 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?

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

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

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

16. 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.
17. The withheld information in this case are the names of three unsuccessful applicants for the role of Deputy Community Mayor. The Commissioner is satisfied that the withheld information clearly both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
18. 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.
19. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

20. 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".

21. 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.
22. 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

23. 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.
24. 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.

25. 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.
26. 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

27. 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 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

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".

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

28. In the circumstances of this case, there is a legitimate interest in ensuring that the selection process for the role of Deputy Community Mayor was conducted appropriately.

Is disclosure necessary?

29. '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.
30. In the circumstances of this case, the Commissioner understands that the selection process was undertaken by Councillors. As such, it is reasonable for the Commissioner to conclude that the process was therefore subject to appropriate oversight by elected representatives, and that this provides a less intrusive means of addressing the legitimate interest.
31. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she 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

32. 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).

Section 1 – General right of access to information

33. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled—

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
(b) if that is the case, to have that information communicated to him.

34. Section 1(1) requires that any person making a request for information to a public authority must be informed in writing by the public authority

whether it holds information relevant to the request, and if so, to have that information communicated to them. This is subject to any exclusions or exemptions that may apply.

35. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
36. In other words, in order to determine such complaints, the ICO must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).

What information is sought?

37. Request 4 seeks all recorded information relating to the process by which the Deputy Community Mayor was appointed.

The Council's position

38. The Council has confirmed that it has reviewed, and provided, the information held on the Council's servers and in officer's email inboxes. At the time of its initial response, officers did not have access to the Council's premises due to the Covid-19 pandemic. By the time of the internal review, officers had attended the Council's premises and, following a review of the hardcopy records held there, had not identified any additional information that would fall within the parameters of the request.
39. The Council has explained that the application process for Deputy Community Mayor was run by councillors. As such, it is possible that former councillors may have undertaken correspondence through their email accounts (which would have been personal email accounts, due to the Council not having the use of gov.uk email addresses until April 2020). However, the Council has confirmed that departing Councillors are asked to manually search for, and deposit with the Council, any official information relating to Council business; and that any such deposited information would have been included in the Council's searches.

The Commissioner's conclusion

40. An officer familiar with the information has manually reviewed that held by the Council electronically (either on the Council's servers, or within officer's email accounts) and in hardcopy form. All information identified through this manual review has been disclosed.

41. There is no evidence available to the Commissioner that indicates that Council's searches have been deficient.
42. On this basis the Commissioner has concluded that, on the balance of probabilities, all relevant information has now been disclosed.

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.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

Daniel Perry
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