

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 23 August 2021

**Public Authority:** Longstock Parish Council

**Address:** Longstock  
Stockbridge  
Hampshire  
SO20 6DR

#### Decision (including any steps ordered)

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1. The complainant requested from Longstock Parish Council ("the Council") information relating to a complaint made to the Council by a named individual.
2. The Commissioner's decision is that the Council is entitled to rely on section 40(5B)(a)(i) of the FOIA to refuse to confirm or deny that it holds the information requested. Therefore, the Commissioner does not require the Council to take any steps as a result of this decision.

#### Request and response

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3. On 18 December 2020 the complainant wrote to the Council and requested information in the following terms:
4. *"Under the Freedom of Information Act, please provide me with a copy of the following: All information relating to [name redacted] complaint, and the subsequent discussion and handling of it once it by Longstock Parish Council. This request should include; all e-mails, letters, notes of telephone calls and meetings, and anything else recorded by the Council.*

*I'm also aware that Longstock Parish Council use a WhatsApp messaging group. For the avoidance of doubt, this request is made in my personal capacity and it does not have any association with [name redacted]."*

5. On 15 January 2021 the Council responded. It refused to confirm or deny whether it holds the information requested and cited sections 40(2) and 40(5) of the FOIA.
6. On the same day the complainant asked the Council for an internal review. He believed the reasons for not providing the information to be incorrect and that the Council had misunderstood the exemptions which it cited.
7. On 10 February 2021 the Council provided its internal review response and maintained its original position.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 11 February 2021 to complain about the way his request for information had been handled.
9. The following analysis focuses on whether the Council is entitled to rely on section 40(5B)(a)(i) of the FOIA to refuse to neither confirm nor deny whether it holds information falling within the scope of the request.

### **Reasons for decision**

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#### **Section 40 – personal information**

10. The decision to use a neither confirm nor deny response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
11. A public authority will need to use the neither confirm nor deny response consistently, over a series of separate requests, regardless of whether it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
12. It is sufficient to demonstrate that either a hypothetical confirmation, or a denial, would engage the exemption. In other words, it is not necessary to show that both confirming and denying information is held would engage the exemption from complying with section 1(1)(a) of the FOIA.

13. Section 40(5B)(a)(i) of the FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
14. Therefore, for the Council to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
  - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
  - Providing this confirmation or denial would contravene one of the data protection principles.

**Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?**

15. Section 3(2) of the DPA 2018 defines personal data as:

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

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
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 is satisfied from reviewing the request, that should the Council confirm or deny whether it held the requested information, it would reveal whether any personal data is held relating to the specific individual concerned. Given the nature of the request, this would be a disclosure of personal data about that individual. The first criterion set out is therefore met.
19. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party (or parties) does not automatically prevent the Council from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
20. The Commissioner considers that the most relevant data protection principle is principal (a).

**Would confirming whether or not the requested information is held contravene one of the data protection principles?**

21. Article 5(1)(a) GDPR states that:

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

22. 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 – or as in this case, the public authority can only confirm whether or not it holds the requested information – if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair and be transparent.

**Lawful processing: Article 6(1)(f) 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" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

24. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:

25. *"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>1</sup>

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

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<sup>1</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 2018) 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 confirming or denying that the requested information is held 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(s).
27. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.
- (i) *Legitimate interests*
28. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOI request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sake as well as case specific interests.
29. 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.
30. In this case, the complainant made a request to the Council for information which he believes the Council holds. This is regarding an agenda item he said had been discussed publicly by the Council and minuted.
31. The complainant has not provided the Commissioner with any reasons as to why he has requested the information or what his interest in this is. However, there is the general principle of accountability and transparency for their own sake.
32. The complainant deems that the Council has “*not acted correctly*”, and that it has deliberately sought to find a reason to prevent him from being provided with the information. He also believes that the Council has misinterpreted the FOIA. He explained to the Commissioner that “*the subject of the item that was publicly discussed and minuted was in relation to allegations made by [name redacted] and [name redacted] about [name redacted], concerning their personal friend.*”

33. The Commissioner notes the complainant's belief is that the information "*could contain comments and conclusions*" that the Council does not wish to share, the complainant said "*as they may not have ever thought the correspondence would become public.*" He also argued that this is not the reason to refuse the request, and that the Council being a public body, is accountable to the public. The complainant also said that the information he requested "*is not private or personal, as it was discussed publicly, and subsequently minuted.*" He therefore referred the Commissioner to the Council's minutes of September 2020, and highlighted the section which he considers to be information he requested, and had been discussed publicly.

34. On review of this information within the minutes, and the Council's confirmation which she subsequently received, the Commissioner accepts that this is the only written information held by the Council with regard to the matter in question. It is clear that the complainant is of the view that there is information held by the Council containing "*comments and conclusions*" relating to his request.

(ii) *Is confirming whether or not the requested information is held necessary?*

35. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.

36. The Commissioner is satisfied in this case that 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*

37. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if a data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.

38. The Council explained to the Commissioner that it had "*recognised at an early stage that this was a very sensitive matter...*". The Council believed that if it confirmed it holds relevant information about [name redacted] it would inadvertently identify the individual as the complainant, thus breaching the DPA/GDPR. It also believed that it could "*potentially inflame what is already a very difficult situation*".
39. The Council described in great detail to the Commissioner, the consequences of confirmation or denial (if it would cause any unnecessary or unjustified damage or distress to the individual, or other individuals, concerned).
40. The Commissioner is satisfied that any data subjects which such information might refer to, would have no reasonable expectation that the Council would confirm or deny whether it held the information requested. She also accepts that confirming or denying whether or not information is held may potentially cause damage and distress to the those individuals. The Commissioner has therefore weighed this against the legitimate interests in disclosure in this case.
41. Given the background to the request and the complainant's concerns, the Commissioner recognises that the complainant strongly believes that the Council has incorrectly relied on the exemption to refuse to comply with his request. He argued that "*this exemption has been used to deny making a disclosure, rather than using the exemption for its intended purpose.*" The complainant also argued that the exemption has been used "*in order to withhold information which the public are already aware they have.*"
42. The Commissioner notes the complainant's opinion and speculation about the Council and its handling of his request. However, the complainant has not provided evidence for confirmation or denial that the information is held that is so compelling that it overrides the data subject's legitimate rights and freedoms.
43. Based on the circumstances of this case, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. She has therefore determined that confirming whether or not the requested information is held, would not be lawful.

*Fairness/Transparency*

44. Given the above conclusion the Commissioner has reached on lawfulness, which included considerations of fairness, the Commissioner does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and/or transparent.

**Conclusion**

45. As confirmation or denial would be unlawful, such processing would breach the first data protection principle. The Commissioner has therefore determined that the Council was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5B)(a)(i) of the FOIA.



## Right of appeal

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46. 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)

47. 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.
48. 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**  
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