

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 June 2022

Public Authority: Datchworth Parish Council
Address: clerk@datchworth-pc.gov.uk

Decision (including any steps ordered)

1. The complainant requested from Datchworth Parish Council (the council) a copy of an email and attachments sent between the Responsible Finance Officer and the chair of the council on a specific date. The council refused the request on the basis that section 14 of FOIA applied (vexatious requests). Subsequently, it agreed to disclose the majority of the information to the complainant, making a small number of redactions under section 40(2) (personal information).
2. The Commissioner's decision is that the council was correct to withhold the personal data which it redacted under section 40(2) of the FOIA.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - To disclose the withheld information to the complainant, subject to the redactions which the council informed the Commissioner that it intended to make under section 40(2) of FOIA.
4. The council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Request and response

5. On 16 March 2021 the complainant wrote to the council and requested information in the following terms:

“Thirdly, Under the Freedom of Information Act 2000, I am here making a formal request for any correspondence (e-mails and attachments) between the chair of DPC and the RFO bearing a date of 23 September 2020.”
6. DPC refers to the council, whilst the RFO is an abbreviation for the Responsible Finance Officer.
7. The council responded 19 March 2021 and refused the request; however, it did not provide any justification for doing so in terms of the complainant’s rights under the FOI Act.
8. Following an internal review, the council wrote to the complainant on 25 May 2021. It revised its position to apply section 14 of the Act to refuse the request (vexatious requests).

Scope of the case

9. The complainant contacted the Commissioner on 24 March 2021 to complain about the way his request for information had been handled. He believes that the council should provide him with the information which he requested.
10. During the course of the Commissioner's investigation the council changed its decision. It said that it no longer wished to rely upon section 14 of the Act, and said it wished to rely upon section 21 of the Act (information easily accessible to the requestor). However, following further discussions with the Commissioner, the council accepted that it should disclose the information to the complainant, subject to the redaction of some information under section 40(2) of FOIA. It therefore withdrew its reliance upon section 21 and provided the Commissioner with copies of the information highlighting the redactions it was intending to make.
11. The following decision notice therefore considers whether the council was correct to withhold the redacted sections of information under section 40(2) of the Act.

Reasons for decision

Section 40 personal information

12. 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.
13. 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').
14. 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.
15. 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?

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

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

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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.
19. 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.

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

20. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects.
21. The information which has been redacted is the identities and contact details of individuals, and details relating to the employment of some individuals, including salary details, tax details, and details on personnel matters. 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. 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.

² Article 6(1) goes on to state that:-

28. 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.
29. 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

30. In considering any legitimate interest(s) in the disclosure of the requested information under the 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.
31. 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.
32. In this case the public has a legitimate interest in knowing about the spending of public money by the council, and the decisions which it takes as regards the use of public money.

"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".

Is disclosure necessary?

33. '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.
34. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified. The council has disclosed the majority of the information but has redacted a small amount of personal data, such as the name and contact details of individuals, salary information, or where the salary of individuals might be calculated from the information, such as information on the tax paid on the individual salaries. A small amount of redaction has also occurred to information which relates to a personnel issue.

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

35. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject 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.
36. 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.
37. 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.

38. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
39. The Commissioner is satisfied that, insofar as the personnel matter is concerned, the individual would have no expectation that that information would be disclosed to the whole world, as with disclosures under FOIA. The Commissioner also considers that a disclosure of the information would be likely to cause distress to the individual involved.
40. The Commissioner is also satisfied that a disclosure of exact salary details and information about those salaries, of identifiable individuals would be an unwarranted intrusion into their private lives. The individuals are not senior employees of the council, and they would not expect specific data about their salary to be disclosed under FOIA. A disclosure of their exact salaries would be likely to cause a degree of distress to those individuals.
41. The Commissioner also accepts that the redaction of personal contact details is appropriate. Disclosing personal contact details allows unwanted contact from third parties, and potentially that information being collected by third parties used to send spam emails and other unwanted purposes. Balanced against this, a disclosure of the information would add little to the transparency of the council's procedures, or to the ability of the public to scrutinise the council's actions to meet the legitimate interests which the Commissioner has identified.
42. 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 disclosure of the information would not be lawful.
43. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent. The exemption provided by section 40(2) of the FOIA is engaged and the council was not obliged to disclose the requested information.

Right of appeal

44. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. 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

Ian Walley
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