

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 March 2022

Public Authority: Sedgeberrow Parish Council
Address: clerk@sedgeberrowpc.org.uk

Decision (including any steps ordered)

1. The complainant requested information collected as part of the Sedgeberrow Parish Neighbourhood Plan Household Survey.
2. Sedgeberrow Parish Council (the Parish Council) refused to provide the requested information on the basis that it is personal information (section 40 of FOIA).
3. The Commissioner's decision is that the requested information was appropriately withheld under section 40(2) of FOIA. However, he found a procedural breach of section 17 (refusal of request).
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 15 February 2021, the complainant wrote to the Parish Council and requested information in the following terms:

"I am writing to you under the Freedom of Information Act 2000 to request data collected as part of the Sedgeberrow Parish Neighbourhood Plan Household Survey. Please may you provide me with copies of the responses to Q)24 to Q29) submitted by the 40 households who indicated at Q24) that they had a housing need within the next 5yrs?

...

If it is not possible to provide the data requested due to the information exceeding the cost of compliance limits identified in

Section 12, please provide advice and assistance, under the Section 16 obligations of the Act, as to how I can refine my request”.

6. The Parish Council responded on 3 March 2021, advising that the requested information is not currently held by the Parish Council.
7. The complainant expressed dissatisfaction with that response on 4 March 2021 and 16 March 2021.
8. The Parish Council wrote to the complainant on 1 June 2021 telling him that his request for household information “is specifically precluded by the privacy notice displayed on the survey”.
9. In separate correspondence, also dated 1 June 2021, the Parish Council advised the complainant that an internal review had been undertaken and its response was unchanged.

Scope of the case

10. Following earlier correspondence, the complainant contacted the Commissioner on 17 June 2021 to complain about the way his request for information had been handled.
11. He disputed that the Parish Council was unable to disclose the requested information, telling the Commissioner:

“We contend there is nothing sensitive, in terms of data protection, within the material we have requested and that information can be released without breaching codes on personal data protection”.
12. During the course of his investigation, the Commissioner found it necessary to issue the Parish Council with an Information Notice, in accordance with his powers under section 51 of FOIA. By way of that Notice the Commissioner required the Parish Council to furnish him with further information about its handling of the request for information in this case.
13. Having received its response, the Commissioner continued his investigation, albeit in the absence of a copy of the information within the scope of the request that the Parish Council wishes to withhold. In doing so, he has taken into account his own research into, and knowledge of, the information sought by surveys relevant to the neighbourhood planning process.

14. The Commissioner is mindful that the Parish Council told the complainant:

“The information you have requested is not currently held by the Parish Council. It is with their consultants...”.
15. However, the Parish Council did not raise the issue of whether or not it holds the information for the purposes of FOIA in its correspondence with the Commissioner.
16. Nor did the Parish Council explicitly cite which exemption of FOIA it is relying on to refuse the request. However, the Commissioner considers its arguments relate to section 40(2) (personal information) of FOIA.
17. Accordingly, the analysis below considers the Parish Council’s application of section 40(2) of FOIA to the requested information.

Reasons for decision

Section 40 personal information

18. Section 40(2) of 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.
19. 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 UK General Data Protection Regulation (‘UK GDPR’).
20. 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 FOIA cannot apply.
21. 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.

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

Is the information personal data?

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

“any information relating to an identified or identifiable living individual”.

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

24. 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.

25. 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.

26. As noted above, the Commissioner has not been provided with a copy of the withheld information in this case. However, he has been provided with a copy of a 'flyer', reminding parishioners to complete the neighbourhood survey, which invites them to respond online using their unique reference code.

27. He has also taken into account that the request relates to specific responses – namely those submitted by the 40 households who indicated at that they had a housing need within the next five years.

28. In the circumstances of this case, having considered the nature of the requested information, the Commissioner is satisfied that the information relates to parishioners who completed the questionnaire with a particular response. He is satisfied that this information 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.

29. 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.

30. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

31. Article 5(1)(a) of the UK GDPR states that:

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

32. 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.
33. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

34. 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.

35. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under 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;

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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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”.

- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
36. 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

37. 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 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 requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
38. The complainant told the Commissioner that the requested information was collected by the Parish Council for the purposes of informing a statutory Development Plan. He argued:
- "If that process is to be an open and transparent one, the primal data being used to inform that process should be widely and publicly available. We contend this is a fundamental matter that goes to the heart of the principles of open government and accountability".
39. The Commissioner recognises there is a legitimate interest in ensuring transparency and accountability in the process of developing a neighbourhood development plan.

Is disclosure necessary?

40. '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.
41. During the course of his investigation, the Parish Council told the Commissioner:

“The information requested was protected by the privacy notice stated on the questionnaire, which states the information supplied will be used solely for the use of producing Sedgeberrow neighbourhood development plan and will not be shared with any other parties for any other purpose other than this”.

42. The Parish Council provided the Commissioner with a copy of the privacy notice. He notes that it states that information may be shared with the Parish Council’s named consultants to undertake additional analysis, but will not be shared with any other parties.
43. In light of the wording of the privacy notice, the Commissioner considers that the parishioners who completed the questionnaire would not expect to have their responses disclosed to the general public via FOIA.
44. The Commissioner is also mindful that there are a number of phases to the development of a neighbourhood plan, including public consultations and independent examination by the Planning Inspectorate.
45. The Commissioner considers that any legitimate interests in transparency and accountability of the neighbourhood plan process will be met by those aspects of the established planning process.
46. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he 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

47. The Commissioner has therefore decided that the Parish Council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 17 refusal of request

48. Public authorities have two basic duties under FOIA: to confirm or deny whether requested information is held and to provide the requester with that information. If a public authority is refusing to meet either of these duties it will usually need to issue a refusal notice to the requester explaining why.

49. The Commissioner's published guidance³ 'Refusing a request' explains when and how to refuse a request made under FOIA. His guidance also states:

"If a public authority is refusing a request because it has decided that a Part II exemption applies then its refusal notice will usually need to include the following information:

- The exemption(s) on which the authority is relying, including section, subsection, and wording of the exemption concerned.
- The reasons why the exemption applies.

AND, where applicable

- A breakdown of the public interest factors which were taken into account.
- The reasoning behind the authority's conclusion that the public interest lay in maintaining the exemption".

50. In this case, the Commissioner considers that the refusal notice issued on 3 March 2021 was inadequate because it did not inform the complainant which sections of FOIA applied.
51. He also observes that it did not state whether or not the Parish Council has an internal review procedure and did not inform the complainant of his right, under section 50 of FOIA, to bring a complaint to the Commissioner.
52. He therefore considers that the Parish Council breached section 17 of FOIA in responding to the request.

³ https://ico.org.uk/media/for-organisations/documents/1628/refusing_a_request_writing_a_refusal_notice_foi.pdf

Right of appeal

53. 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

54. 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.

55. 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

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