

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 April 2023

Public Authority: Spelthorne Borough Council
Address: Knowle Green
Staines-upon-Thames
Middlesex
TW18 1XB

Decision (including any steps ordered)

1. The complainant has submitted an information request to Spelthorne Borough Council ("the Council") regarding an investigation report into the use of social media by a Councillor.
2. The Commissioner's decision is that the Council was correct to withhold the information under section 40(2) of FOIA.
3. The Commissioner does not require the Council to take any steps as a result of this decision notice.

Request and response

4. On 6 June 2022, the complainant wrote to the Council and requested information in the following terms:

"Would you please confirm

Q1. The title of the report and the date it was produced.

Q2. The organisation responsible for conducting the investigation and preparing the report.

Q3. The basis on which you determine a publicly funded report into the conduct of a publicly elected Councillor is not a public document."

5. A response was provided on 1 July 2022 in which the Council confirmed that it held the information but that it is exempt from disclosure under sections 30(1)(a), 40(2), 40(3) and 41(1)(b) of FOIA.

6. Upon receiving this response, the complainant asked the Council to conduct an internal review on 6 July 2022 and the Council provided its internal review response on 25 July 2022 in which it maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 1 July 2022 to complain about the way their request for information had been handled, and they were informed to request an internal review.
8. After involvement from the Commissioner, the Council provided the complainant with a revised response on 13 February 2023. In its revised response, the Council withdrew its reliance on section 30(1) and stated that the information, requested in questions one and two, was being withheld under sections 40(2) and 41(1)(b). Regarding question three, the Council confirmed that the report contains exempt information within the meaning of Part 1 of Schedule 12, Paragraph a of the Local Government Act 1972¹, namely information relating to any individual.

¹ [Local Government Act 1972 \(legislation.gov.uk\)](https://legislation.gov.uk)

9. The Commissioner now considers the Council's handling of the complainant's request, in particular its application of section 40(2) of FOIA to the information requested.
10. Should section 40(2) not apply to the information requested in questions one and two, the Commissioner will go on to consider the application of section 41(1)(b).

Reasons for decision

Section 40(2)-personal information

11. Section 40(2) of FOIA provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
12. Section 3(2) of the Data Protection Act 2018 (DPA) defines personal data as:

“any information relating to an identified or identifiable living individual.”
13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. The Commissioner has seen the withheld information and is satisfied that it is personal data, for it relates to the individuals involved with the report.
15. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focused here on principle (a) which states:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”
16. 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 if to do so would be lawful, fair, and transparent.
17. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider if there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.

18. The Commissioner considers that the complainant is pursuing a legitimate interest in seeking the investigation report into the behaviour of an elected member, and that disclosure of the requested information is necessary to meet that legitimate interest.
19. The Commissioner is aware that there is already some information in the public domain about matters relating to this request, albeit via a paid for subscription.
20. The Commissioner's guidance on information in the public domain² states that a public authority should bear in mind what is already in the public domain and should also consider whether the disclosure would still be harmful because it would draw more attention to or re-open a debate.
21. In balancing the legitimate interests in disclosure against the fundamental rights and freedoms of the data subjects involved, the Commissioner must also consider the impact of disclosure and whether it would be fair to those individuals involved, who may wish to put the event behind them, now that the investigation has been concluded.
22. Furthermore, the Commissioner has not seen any evidence to suggest that the individuals involved would have a reasonable expectation that their personal data would be disclosed in response to an information request.
23. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's 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. He therefore has not gone on to separately consider whether disclosure would be fair or transparent.
24. As the Commissioner considers that section 40(2) applies to the requested information, he has not gone on to consider the application of section 41.

² <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/information-in-the-public-domain/>

Right of appeal

25. 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

26. 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.
27. 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

Joanna Marshall
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF