

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 October 2019

Public Authority: Kirby Muxloe Parish Council

Address: The Parish Office
Station Road
Kirby Muxloe
Leicestershire
LE9 2EN

Decision (including any steps ordered)

1. The complainant has made two requests seeking specific minutes and related documents. Kirby Muxloe Parish Council ("the Council") disclosed some information, and withheld some under section 40(2) of the FOIA.
2. The Commissioner's decision is that the Council is entitled to withhold some of the information under section 40(2), but that other parts do not represent personal data and therefore do not fall under the exemption. The Commission is satisfied that all other relevant held information has been disclosed, but finds that the Council breached section 10(1) by not responding to the second request.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose paragraphs 3, 4, and 5 (on the second page) of the closed session minutes of the meeting held on 5 August 2016.
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 the Act and may be dealt with as a contempt of court.

Request and response

5. On 22 September 2017, the complainant wrote to the Council and requested information in the following terms:

I should be grateful if you would provide me with copies of the two following documents.

- *The minutes of the Extraordinary meeting of the Council held on 5 August 2016.*
 - *The minutes of the Finance Committee meeting held on 1 August 2016.*
6. The Council acknowledged the request, but failed to provide a substantive response. The Commissioner subsequently issued decision notice FS50708012¹, which required the Council to issue a response.
7. The Council issued a response on 22 August 2018. In this response it:
- Disclosed the minutes of the meeting held on 5 August 2016 (subject to redactions under section 40(2)).
 - Denied that the minutes of the meeting held on 1 August 2016 were held.
8. On 30 August 2018, the complainant asked the Council to undertake an internal review. He also made a second request for:

In relation to the Finance Committee meeting, the explanation for the failure to provide these minutes is entirely unconvincing. In response I require the parish council to supply to me all papers and correspondence held by the council in relation to that meeting and the items on the agenda.

9. The Council did not respond.

Scope of the case

10. The complainant contacted the Commissioner on 1 October 2018 to complain about the way his request had been handled, and specifically
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¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2018/2259284/fs50708012.pdf>

that the Council was incorrect to withhold information under section 40(2), and that further information was held in respect of both requests.

11. The Commissioner recognises that the complainant has made an additional request when making an internal review. In the circumstances of this case, the Commissioner has elected to include it in this determination.
12. The Commissioner considers the scope of the case to be whether the Council has correctly withheld information under section 40(2), and whether the Council holds any further information in respect of both requests.

Reasons for decision

Section 40(2) - Personal information of third parties

13. 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.
14. In this case the relevant condition is contained in section 40(3A)(a)². 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').
15. 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.
16. 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?

17. Section 3(2) of the DPA defines personal data as:
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² As amended by Schedule 19 Paragraph 58(3) DPA.

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

18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. 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.
20. 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.
21. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that part of the information relates to identifiable living individuals, either because it relates to the terms of a junior officer's employment, or the Council's interaction with named individuals. She 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.
22. However, the remaining part of the information (paragraphs 3, 4, and 5 on the second page of the minutes) does not relate to identifiable living individuals. This is because it relates to a general recruitment process that the Council intended to take for the vacancy of Clerk, including the proposed salary that it would advertise for the vacancy, and the steps that the Council would undertake to prepare for recruitment process.
23. In respect of that information which is personal data, 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.
24. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

25. 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".

26. 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.
27. 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

28. 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.

29. 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”³.

30. 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;

³ 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”.

- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
31. 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

32. 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.
33. 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.
34. The Commissioner recognises that there is a general public interest in ensuring that public authorities handle both employment matters, and general business, in accordance with their obligations.

Is disclosure necessary?

35. '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.
36. In the circumstances of this case, there is no indication to the Commissioner that the disclosure of that information relating to a junior officer's employment, would serve any apparent public need.
37. In respect of that information relating to the Council's interaction with named private individuals, the Commissioner recognises that it is necessary for the Council to consider matters raised by individuals as a matter of course. The Commissioner is particularly mindful that the complainant's wider concerns appear to relate to the external auditing of the Council's finances, and the Commissioner does not perceive that the disclosure of this information would be necessary for, or otherwise assist, public transparency about that subject.

38. 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).
39. 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.

Section 1(1) – General right of access to information

40. Section 1(1) of the FOIA states that any person making a request for information to a public authority is entitled to 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.
41. Where there is a dispute between the information located by a public authority, and the information a complainant believes should be held, the Commissioner follows the lead of a number of First-tier Tribunal (Information Rights) decisions in applying the civil standard of the balance of probabilities.

What information has been requested?

42. Within the two requests, the complainant has requested:
 - a) The minutes of a meeting held on 5 August 2016;
 - b) The minutes of a meeting held on 1 August 2016, and any papers and correspondence relating to it.

The Commissioner's analysis

43. The complainant contests that whilst he has received information in respect of a), it is not a copy of the final approved minutes, as it has underlining and annotation added by hand.
44. The Council has informed the Commissioner that this is the only extant copy of the final approved minutes that it has been able to identify in its searches. None of the present Council staff were in post during 2016, and the Council is not able to provide any elaboration as to why parts of the text have been underlined by hand. In respect of the heading at the top of the minutes ("*These minutes are published subject to approval*"), the Council has clarified that these minutes were approved in the following meetings of 18 August 2016 and 29 September 2016, as noted in the minutes for those meetings.

45. Whilst the Commissioner appreciates the rationale by which the complainant has concluded the disclosed information cannot be the final approved minutes, as formally held by the Council, the explanation provided by the Council has confirmed that this is the only extant copy that the Council has been able to identify in its searches.
46. The complainant further contests that the information sought by part b) must be held, as a notice of the meeting was issued by the Council on 25 July 2016.
47. The Council has informed the Commissioner that the meeting, whilst planned, did not take place due to the internal circumstances of the Council at that time. There is no evidence available to the Commissioner that suggests that this is incorrect. It is therefore reasonable for the Commissioner to conclude that if no such meeting took place, then no derivative information will be held.

Section 10(1) – Time for compliance

48. Section 10(1) of the FOIA states that a public authority must comply with section 1(1) within 20 working days following the date of receipt. In this case the Council did not respond to the second request.

Right of appeal

49. 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

50. 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.
51. 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

Andrew White
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