

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 February 2020

Public Authority: Ferryhill Town Council
Address: Town Hall
Ferryhill
County Durham
DL17 8JL

Decision (including any steps ordered)

1. The complainant requested information from Ferryhill Town Council ("the Council") relating to a complaint submitted to the Council by a third party. The Council withheld the information under section 41(1) of the FOIA – information provided in confidence.
2. The Commissioner reviewed the withheld information and pro-actively considered whether it is exempt from disclosure under section 40(2) of the FOIA – third party personal data. Having done so, her decision is that all of the information is exempt under section 40(2).
3. The Commissioner does not require the Council to take any steps.

Background to the request

4. The Council has explained that the allotments situated at a particular site in County Durham were managed by an association of allotment-holders until April 2018, when the Council took over the direct management of the site.
5. While there were various reasons for the management change, a relevant factor was a dispute that had occurred over an allotment-holder's tenancy. The allotment association had decided to evict that individual, which had led to him seeking an injunction, and to the Council carrying out an investigation.

6. As part of its investigations into the decision to evict the allotment-holder, the Council gathered certain evidence. Following the investigation, the Council decided not to evict the allotment-holder, overturning the earlier decision of the allotment association.
7. This led to the complainant making an initial request for information to the Council on 16 April 2018, as follows:

"All information [redacted name 1] has submitted to Ferryhill Town Council Complaints Panel dealing with [his] complaint. This includes all information in paper and electronic copies, audio format and photographs.

All information given to Ferryhill Town Council and the Complaints Panel by [redacted name 2] with regard to [redacted name 1]'s complaint."

8. On 14 May 2018, the Council responded. It provided him with what it described as *"the information available"* but declined to provide some information that was *"confidential"*.

Request and response

9. On 2 January 2019, the complainant wrote to the Council again, explaining that he believed more information should be considered for disclosure than he had received the previous May. His request was as follows:

"I would like to once again formally request that ALL information submitted to Ferryhill Town Council regarding [redacted name 1]'s complaint, including electronic recordings and ALL correspondence between Ferryhill Town Council (staff and councillors) and [redacted name 2], to include any offer of financial incentives, be released to me."

10. On 6 February 2019, the Council responded and stated that its position had not changed since it had responded to the complainant's request of 16 April 2018: that is, it could not release any further information.
11. Following an internal review, the Council provided the outcome to the complainant on 9 May 2019. It provided some general explanations regarding the information it held. It also stated that it now considered the request for information to be vexatious, and refused it under section 14(1) of the FOIA.

Scope of the case

12. The complainant contacted the Commissioner on 14 March 2019 to complain about the way his request for information had been handled. The Commissioner advised the Council that, due to the length of time that had elapsed since the request of 16 April 2018, the Council should treat the request of 2 January 2019 as a new request and it should therefore carry out an internal review.
13. As stated above, the Council provided the outcome of its internal review to the complainant on 9 May 2019 in which it stated the request to be vexatious and refused to respond under section 14(1) of the FOIA.
14. During the course of the investigation, the Council advised the complainant that it now considered that the information it held was exempt from disclosure under section 41(1) of the FOIA – information provided in confidence. The Council confirmed to the Commissioner that it considered this exemption "*replaces*" its application of section 14(1). The Commissioner therefore regards the citing of section 14(1) to have been withdrawn.
15. In cases where the Commissioner, on reviewing the withheld information, considers that it is likely to comprise the personal data of individuals, she can use her discretion to consider whether the information is exempt under section 40 of the FOIA – personal information. This notice considers whether the information is exempt, specifically, under section 40(2) of the FOIA – third party personal data – and if necessary will go on to consider whether any of the information is exempt from disclosure under section 41(1).

Reasons for decision

Section 40(2) – third party personal data

16. 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.
17. In this case, the relevant condition is contained in section 40(3A)(a). 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').

18. 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.
19. 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?

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

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

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. 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.
23. 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.
24. The Commissioner has reviewed the withheld information in this case. She is satisfied that it all relates to a small number of living individuals and has considered whether the individuals are identifiable.
25. The Commissioner notes that the individuals are identified by name in the withheld information. In addition, they are named in the request and are known to the complainant.
26. For this reason, the fact that the information falls within the scope of the request means that it identifies and relates to the named individuals. It would, therefore, not be possible to redact and/or transcribe, the information in order to anonymise it. In the context of the request, the information would still be the individuals' personal data. In addition, the information refers to certain specific actions and opinions which, in the context of further information that is already known to the wider community, would enable the individuals to be identified.

27. The Commissioner is therefore satisfied that it is not possible to anonymise the information in order to prevent the relevant individuals being identified.
28. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that all of the information relates to certain living individuals. She is satisfied that this information both relates to and identifies them. 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 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 GDPR must apply to the processing. It must also be generally lawful.

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

34. 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.
35. 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".

36. 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:-

- Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
- Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;
- Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

37. 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

38. 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.

39. 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.

40. In this case, the complainant was seeking information which related to a specific complaint to the Council and also more widely to the management of the allotments.

41. In this case, the Commissioner is satisfied that there was a legitimate interest in the information being requested.

Is disclosure necessary?

42. '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.

43. In this case, the Commissioner is satisfied that the requested information would not be available to the public other than through a freedom of information request. She is therefore satisfied that disclosure would be necessary in order to achieve the legitimate interest.
44. However, the Commissioner will balance this against the data subjects' interests and fundamental rights and freedoms when deciding whether to order disclosure.

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

45. 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 subjects 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.
46. 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.
47. 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.
48. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
49. In this case, the Commissioner notes that the Council has held the information in confidence and it has not been made available to the public. In one case, a piece of information is marked "Private and confidential" which is a clear indication that the writer had no expectations that it would be disclosed to the world at large.

50. With regard to the remainder of the withheld information, the Commissioner is satisfied that it is of a personal nature and contains details of private matters and opinions. In her view, it is reasonable that individuals may expect to engage in correspondence of a private nature with the Council, and not expect the correspondence to be disclosed to the public.
51. The Commissioner is also satisfied that, since matters on the allotments had become somewhat acrimonious in the period leading up to the complainant's initial request of April 2018, there would be a risk of damage and distress being caused to individuals if the information were disclosed in response to the request.
52. The Commissioner has considered the strength of the legitimate interests in the disclosure of the information. In her view, there is little legitimate interest in further illuminating the particular dispute in this case, which was of a personal nature. She accepts, however, that decisions taken by the Council affecting the management of the allotments are potentially of wider significance, since this reflects on how a public authority conducts its business.
53. In respect of this, however, she notes that the decisions which were made are a matter of public record. Having considered the withheld information, she is satisfied that its disclosure would not add to the public's understanding of the Council's reasons for the decisions it took regarding the management of the allotments. Neither does it reveal any controversial actions or wrongdoing by the Council.
54. 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.
55. Given the above conclusion that disclosure would be unlawful, the Commissioner does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's decision

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

Other matters

57. The Commissioner notes that part of the withheld information relates to the complainant. In respect of this part, she would remind the Council of its obligation to issue a response to the complainant under the DPA.

Right of appeal

58. 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

59. 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.
60. 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

Ben Tomes
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