

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 November 2021

Public Authority: **Whitchurch Town Council**
Address: **Civic Centre**
High Street
Whitchurch
Shropshire
SY13 1AX

Decision (including any steps ordered)

1. The complainant has requested information relating to an officer of the council's employment records, council policy and procedures
2. Whitchurch Town Council withheld some information under section 40(2) of the FOIA (personal information).
3. The Commissioner's decision is that Whitchurch Town Council was entitled to rely on section 40(2) to withhold the information.
4. The Commissioner does not require any steps.

Request and response

5. On 23 April 2020 the complainant requested information from Whitchurch Town Council ("the council") in the following terms (numbering added by ICO):
 1. *"Can you please tell me your policy on employment of convicted criminals?"*
 2. *Do you retain them in positions of trust, such as [redacted]?"*
 3. *I note that [redacted] is a convicted criminal, who pleaded guilty to lying and fraudulently deleting records. Is [redacted] still employed by you? If so, why?"*
 4. *Is [redacted] in a position of trust? What procedures have you now put in place to prevent such crimes, by [redacted] and others, in future?"*
 5. *What salary was / is [redacted] paid?"*
 6. *What audit procedures would have found [redacted] crimes, undetected until a member of the public raised the issues?"*
 7. *What training records for [redacted] are available, and how can I view them?"*
 8. *How many other convicts do you employ?"*
 9. *How can taxpayers respect your council if it is infested with criminals?"*
 10. *What confidence can we have in your ability to hold employees to account?"*
 11. *What disciplinary action has [redacted] received from you?"*
 12. *Why would [redacted] lie and delete public records?"*
 13. *How much of [redacted] previous work have you now checked?"*
6. The council responded on 27 April 2020. It provided some information within the scope of the request, but refused to provide the remainder but did not cite an exemption. The council withheld information in scope of questions (5), (7) and (8) on the basis that it is personal data.
7. The complainant requested an internal review on 28 April 2020.
8. On 7 May 2020 the complainant received a letter from Aaron & Partners LLP, acting on behalf of the council. It requested details of the complainant's name and address and stated that once the information

was received the request would be answered. It also stated that under section 14 the council is not obliged to respond to vexatious requests.

9. On 18 May 2020 Aaron and Partners LLP provided an internal review response on behalf of the council. The council revised its position to refuse the request on the grounds of section 14 (vexatious requests).
10. On 4 October 2021, during the course of the Commissioner's investigation, the council provided a revised response answering most of the complainant's questions. The council denied holding some information. The council withheld information on the basis of section 40(2) (personal information) in relation to the request questions (5), (7) and (11).

Scope of the case

11. The complainant contacted the Commissioner on 28 November 2020 to complain about the way the request for information had been handled. Initially the complainant was dissatisfied that the outcome of the internal review was provided by solicitors acting on behalf of the council, and that the request had been refused on the basis of section 14.
12. Following the updated response of 4 October 2021, the complainant advised the council that they disputed the application of section 40(2) to withhold information, and remained dissatisfied with the earlier application of section 14.
13. The Commissioner contacted the complainant to verify the scope of their complaint following the council's final response, however she did not receive a reply.
14. During a complaint investigation, the Commissioner will invite public authorities to review their position on a request. Decisions made by the Commissioner are based upon the final response that is given to a request. The Commissioner will not, therefore, be considering the earlier application of section 14 to refuse the request.
15. As the complainant has raised no specific grounds of complaint with the Commissioner in relation to the revised request, she will consider the application of section 40(2).
16. The scope of the case is to decide whether the council was correct to withhold information in scope of the request on the basis of section 40(2).

Reasons for decision

Section 40 personal information

17. 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.
18. 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').
19. 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.
20. 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?

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

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

22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
23. 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.
24. 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.

25. The withheld information comprises details of a named individual's salary, their training record, and their disciplinary record.
26. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to an individual officer of the council. She is satisfied that this information both relates to and identifies the person concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
27. 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.
28. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

29. 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".

30. 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.
31. 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

32. 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.
33. 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.

34. 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.
35. 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

36. 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

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) 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".

be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

37. The background to this request is that a council officer was found to be in breach of section 77 of the FOIA. The matter was dealt with through the judiciary process. The Commissioner finds no reason to revisit the matter in this decision notice
38. The Commissioner surmises that the complainant's legitimate interest is in the transparency of the council's management and development of the council officer, given the context of the court findings.
39. The Commissioner considers that this legitimate interest could be applicable to questions (7) and (11) which relate to training and disciplinary records.
40. However the Commissioner finds no such purpose for the disclosure of salary information. The Commissioner concludes that there is no legitimate interest in the disclosure of the information in scope of (5), therefore she has not considered this part of the request any further.

Is disclosure necessary?

41. '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.
42. The Commissioner considers that disclosure may provide some transparency of the council's management and development of the individual. As no alternative measures have been identified, the Commissioner has gone on to conduct the balancing test.
43. 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.
44. 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.
45. 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.
46. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
47. The council concurs that the withheld information relates to the individual's role at the council and not their private life. However, it states that the individual would have no reasonable expectation that specific details of their employment and working arrangements would be disclosed to the wider world.
48. In the council's opinion, disclosure of the information would be an invasion of the individual's privacy and could be distressing.
49. The Commissioner considers that whilst the information does relate to the individual's professional life, they were not of a suitably senior and accountable level to expect such details of their employment to be disclosed.
50. The Commissioner considers that the council's response to the request provides a degree of transparency regarding the individual's employment, the policies and procedures the council has adopted and details of forthcoming audits.
51. The issue was dealt with through the judiciary process and the outcome was reported in the press. The Commissioner considers that publishing details from the individual's employment records could cause unnecessary distress without furthering any public interest in the transparency of council actions, relating to the matter, to a significant degree.
52. 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.

53. 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 Commissioner's view

54. 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).
55. Since the end of the transition period following the UK's departure from the EU, the GDPR were replaced by the UK GDPR. As this request was received before the end of that transition period, the application of section 40(2) has been decided by reference to the GDPR. However the Commissioner is also satisfied that the disclosure of the personal data to which that exception was applied would not contravene the UK GDPR for exactly the same reasons.

Other matters

56. The Commissioner notes the aggressive and accusatory tone of some of the complainant's correspondence to the council in regard to this request, which has included the use of offensive language. Furthermore, some of questions raised by the complainant are not valid requests for recorded information.
57. Section 50(2)(c) provides that "*On receiving an application under this section, the Commissioner shall make a decision unless it appears to her that the application is frivolous or vexatious.*"
58. Whilst not forming part of this decision notice, the Commissioner advises the complainant that, in accordance with section 50(2)(c), she may refuse to make a decision on future complaints where the requests have been made in a similar manner.

Right of appeal

59. 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

60. 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.
61. 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

Janet Wyles
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