

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 25 May 2022

**Public Authority:** Bicester Town Council  
**Address:** The Garth  
Launton Road  
OX26 6PS

#### **Decision (including any steps ordered)**

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1. The complainant requested information from Bicester Town Council ("the Council") relating to the agendas of Personnel Committee Meetings the Council have held in the past five years. The Council withheld the requested information under section 40(5B)(a)(i) (neither confirm nor deny) of FOIA. During the course of the Commissioner's investigation, the Council revised its position, and cited section 40(2) (personal information) of FOIA for personal information contained in the agendas and committed to start publishing the redacted agendas on its website.
2. The Commissioner's decision is that some of the requested information is the personal data of third parties and is exempt under section 40(2) (personal information) of FOIA. However, some of the information appears to be information that should be published on the Council's website but is not.
3. The Commissioner requires the Council to take the following step to ensure compliance with the legislation.
  - Disclose, the Personnel Committee meeting agendas for the past five years, that should be visible on the Council's website, with appropriate redactions for personal data.
4. The Council must take this step 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**

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5. On 12 August 2021, the complainant contacted the Council and requested information in the following terms:

“Please supply me with copies of all of the agenda of the Personnel Committee Meetings for the past 5 years.

As you know these are a public document and must be so under the Local Government Act 1972 to make lawful decisions.”

6. The Council responded on 24 August 2021 refusing the requested information citing section 40(5B)(a)(i) of FOIA to do so. The Council did not offer an Internal Review of its response to the requester.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 27 August 2021 to complain about the way their request for information had been handled.
8. The Commissioner considers the scope of this case to be to determine if the Council is entitled to rely on section 40(2) of FOIA to withhold the requested information (third party data).

## Reasons for decision

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### Section 40 personal information

9. 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.
10. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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').
11. 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.

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.

### Is the information personal data?

12. Section 3(2) of the 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. 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.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

15. 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.
16. The information withheld under section 40(2) of FOIA is that contained within the agendas of personnel meetings regarding discussions around personal details of employees of the council.
17. In the circumstances of this case, having considered the sample of withheld information, the Commissioner is satisfied that the information relates to data subject(s), that is employees of the Council. He is satisfied that this information both relates to and identifies the data subject(s) concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
18. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

19. 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"

20. 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.
21. 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**

22. Article 6(1) of the UK 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.
23. 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"<sup>2</sup>.

24. 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.

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

25. 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**

26. 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

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<sup>2</sup> 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) of 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 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"

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.

27. In this case the requester has a personal interest in disclosure of the withheld information to ensure the Council has followed its own guidance and procedures and its obligations under the Local Government Act (LGA) 1972.
28. The requester has stated that the Council could redact any personal information that may be held within the requested data, and therefore cannot understand why the redacted information could not be disclosed, and that section 228 of the LGA applies to the agendas of meetings held by the Council. Regarding the LGA - paragraph 5 says 'Subject to any provisions to the contrary in any other enactment or instrument.'
29. The Council acknowledges that the legitimate interest is that of transparency and openness, as well as an understanding of how decisions are made within the Council. However, in consideration of disclosure they argued that given they only employ a small number of staff, along with the information already disclosed in the public domain, there would be a high probability of individuals being identifiable. They also argued that information about any personnel meetings would identify those individuals involved and to the extent that they would be distinguishable from other individuals.
30. The Council cannot identify a legitimate interest in the public or applicant having access to the specific withheld personal information, other than the fact a meeting took place. Employee's demand and would expect a level of confidentiality to be upheld within their employment.
31. The Commissioner considers that disclosure of the withheld information, could further public debate or contribute towards the transparency and accountability of the Council, also given that a number of other public authorities routinely publish meeting agendas, suitably redacted, for example: [BPCPersonnelCommittee25thNovember2021websitecopy.pdf \(brinsleyipc.org\)](#) in order to comply with section 228 of the LGA, there would seem to be a legitimate interest in disclosure of some of the information. However, the Commissioner does not consider publication of the personal information of employees involved in the personnel meetings, aside from those acting in their official capacity when officiating the meeting, would be conducive to the fair and lawful processing of their information. Additionally, disclosure under FOIA is disclosure to the world at large and not just to the requester. It is the

equivalent to the Council publishing the personal information of employees on its website.

32. As the Commissioner does consider there is a legitimate interest in openness and transparency of the Council, he has therefore gone on to consider whether disclosure was necessary.

**Is disclosure necessary?**

33. '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.
34. It is clear there would appear to be no other means for the complainant to obtain the detail of the information they requested other than through release of the requested information. However, this must be balanced against the subject's rights to have their personal data protected.

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

35. 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 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.
36. 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.
37. In the Commissioner's view, a key issue is whether the individual(s) concerned has a reasonable expectation 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.

38. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
39. The Commissioner considers that disclosure of this information would be disproportionately intrusive to the individuals as it would reveal information about council employees which is not otherwise in the public domain.
40. The law provides that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate.
41. Whilst the Commissioner understands the complainant's wish to obtain this information and the wider public interest in openness and transparency in the Council, he is mindful that disclosure under FOIA is disclosure to the world at large and not just to the requester.
42. 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 in this case. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
43. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to consider whether disclosure would be fair or transparent.

### **The Commissioner's view**

44. The Commissioner has therefore decided that the Council was entitled to withhold some of the information that includes third party personal data under section 40(2), by way of section 40(3A)(a).

### **Other Matters**

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45. The Commissioner has advised the requester that the ICO cannot advise in any regard to the Local Government Act 1972 (LGA), and any specific requirements under that legislation, and that If they believe the council have not adhered to the Act, this will need to be pursued through the relevant channels for that legislation.

## Right of appeal

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46. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

47. 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.
48. 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 .....**

**Phillip Angell  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**