

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

### **Decision notice**

**Date:** 10 August 2022

**Public Authority:** Hampton Lucy Parish Council  
**Address:** hamptonlucyclerk@gmail.com

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

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1. The complainant requested an audio recording of a meeting from Hampton Lucy Parish Council, Warwickshire ("the Parish Council"). The Parish Council previously refused the request under section 14(1) FOIA: vexatious requests, but it was found by the Commissioner that the request was not vexatious, and the Parish Council was ordered to make a fresh response. After reconsidering the request, the Parish Council refused it under section 36(2) of FOIA: prejudice to the effective conduct of public affairs; specifically, under section 36(2)(b)(ii) which can be cited where disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.
2. The Commissioner's decision is that the exemption is engaged. However, he considers that on the balance of the public interests, the audio recording should be disclosed.
3. The Commissioner requires the Parish Council to take the following step to ensure compliance with the legislation.
  - Disclose the recording to the complainant.
4. The Parish 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 24 September 2020, the complainant wrote to the Parish Council to request information of the following description:  
  
"As you know, I have stated on more than one occasion over the past months that I wish to hear the recording on the PC meeting held on 28th January [2020] – and I have suggested below possible solutions as to how this could be arranged in my email below. I have not had a reply from you to my latest email, so I am now repeating my request formally to you as a Freedom of Information request."
6. On 22 October 2020, the Parish Council responded and said the request was being refused because it was vexatious. Following an internal review, the Parish Council wrote to the complainant on 14 November 2020, upholding its position.
7. The Parish Council's handling of the request was considered by the Commissioner under case reference IC-88076-Q2H4. On 22 April 2022, the Commissioner issued a decision notice, finding that the request was not vexatious, and ordering the Parish Council to make a fresh response to the complainant.
8. On 17 May 2022, the Parish Council wrote to the complainant explaining that it was relying on section 36(2)(b)(ii) of FOIA: an exemption which can be cited where disclosure would, or would be likely to, prejudice the free and frank exchange of views for the purposes of deliberation. It also considered that the balance of the public interests favoured maintaining the exemption, rather than the disclosure of the information.
9. After carrying out an internal review on 10 June 2022, the Parish Council maintained its position.

## **Scope of the case**

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10. The complainant advised the Commissioner on 17 June 2022 that she wished him to investigate whether the audio recording had been correctly withheld.
11. This notice covers whether the audio recording was correctly withheld under section 36(2)(b)(ii) FOIA.

## Reasons for decision

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### Section 36(2) FOIA: prejudice to effective conduct of public affairs

12. Section 36(2) of FOIA states that information requested from a public authority is exempt where, in the reasonable opinion of the qualified person, disclosure:
  - b) would, or would be likely to, inhibit—
    - (i) the free and frank provision of advice, or
    - (ii) the free and frank exchange of views for the purposes of deliberation, or
  - c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
13. The above subsections provide qualified exemptions, and so, if engaged, the public interest test must also be carried out.
14. In order to engage any of the limbs of section 36(2), it is necessary for a public authority to obtain the opinion of its qualified person ("QP") as to whether the inhibition or prejudice relevant to the subsection cited would be at least likely to occur, as a result of disclosure of the information in question.
15. The Parish Council has confirmed that the QP for the purposes of considering the request was the Chair, Alex Jones.
16. In his opinion, the exemption at section 36(2)(b)(ii) was engaged with regard to the recording: he considered that disclosure of the audio recording would be likely to inhibit people from contributing in a free and frank manner at meetings.
17. He did not cite either of the other subsections.
18. In order to make a finding as to whether any of the subsections of section 36(2) are engaged, the Commissioner must consider whether the QP's opinion was a "reasonable" opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the QP in a particular case. The opinion also does not have to be the only reasonable opinion that could be held, or the most reasonable opinion. The Commissioner only needs to satisfy himself that the opinion was reasonable; in other words, that it was an opinion that a reasonable person could hold.

19. The Commissioner will consider all relevant factors to assess whether the opinion was reasonable. In this case, he is satisfied that the QP had knowledge of and involvement in this matter. Indeed, having chaired the meeting in question, he appears on the audio recording. The QP was therefore well-placed to express an opinion on the likely outcome of disclosure.
20. The Commissioner accepts that the opinion is reasonable. Specifically, he accepts that it is reasonable for the QP to hold the opinion that disclosure of the recording would be likely<sup>1</sup> to result in the envisaged inhibition.
21. The Commissioner is satisfied that the exemption is engaged, and has considered the balance of the public interests.

### **The balance of the public interests**

22. Having accepted that the opinion of the QP (that inhibition to the free and frank exchange of views would be likely to result from disclosure) was reasonable, the role of the Commissioner here is not to challenge or reconsider his conclusion on the reasonableness of that opinion. Instead, his role is to consider whether the public interest in disclosure equals or outweighs the concerns identified by the QP.
23. Having found that the QP's opinion was reasonable, appropriate weight must be given to that here. It would not be in the public interest to harm the ability of the Parish Council to carry out its work. However, as to how much weight this should carry in the balance of the public interests, the question here is what the severity, extent and frequency would be of the inhibition identified by the QP.
24. With regard to the severity, extent and frequency of the envisaged inhibition to public affairs (specifically, to the free and frank exchange of views for the purposes of deliberation) the Commissioner does not consider that it would be significant.
25. This is because, having considered the relevant parts of the recording, he notes that the chief participants are the Chair, the Clerk and a councillor. He does not consider that individuals holding these important

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<sup>1</sup> As per the judgement of the Information Tribunal in *John Connor Press Associates v Information Commissioner* (EA/2005/0005, 25 January 2006), the Commissioner interprets the expression "likely to" prejudice as meaning that the chance of prejudice being suffered "should be more than a hypothetical or remote possibility; there must have been a real and significant risk."

posts would cease to debate candidly, as a result of the disclosure of the audio recording in this particular instance.

26. He also considers that any "chilling effect" on the exchange of views in future, would be minimal. Parish Council meetings such as this one are a public forum and are minuted; individuals are already aware that their contributions are recorded, and may form part of the official public record.
27. The Commissioner has also considered the public interest in disclosure.
28. The Commissioner is aware that the Parish Council considers that there is very little, if any, public interest in the disclosure of audio recordings, due to having in place what it considers to be robust procedures for producing accurate, official minutes. It explained that meetings are recorded as an aide-memoire for the clerk, who then produces draft minutes. The draft minutes are provided, in confidence, to councillors, who can make comments or suggest amendments. If necessary, the clerk makes amendments and the revised minutes are then agreed and signed off at a future meeting, and stand as the official public record of the meeting.
29. The Parish Council therefore considers that its official minutes may reasonably be taken as an accurate record, and that there cannot be any significant public interest in disclosing audio recordings of meetings, including in this case.
30. The Commissioner accepts these general arguments, but notes that, in this specific case, not all councillors were happy for the amended minutes to be approved and signed, although this was done after some ensuing delays and discussions.
31. Indeed, the reason why the complainant requested the audio recording in this specific case, and considers that there is a public interest in disclosure, is because she considers there is a discrepancy between what happened in the meeting and what was recorded in the official minutes. The discrepancy relates to a section of the meeting when questions were being posed about the effectiveness of a working group.
32. The Commissioner is aware that the complainant has a particular interest in this matter. However, he agrees that, if the official minutes were found not to be an accurate record of proceedings, this would lend weight in favour of disclosure, in view of the Parish Council's assertions, and because it is important that the minutes can be relied on as an accurate public record.
33. The Commissioner has considered the accuracy of the official minutes, below, but would reiterate that, since the recording was made openly at

a public meeting, in his view there would, in any case, need to be compelling factors to outweigh the public interest in disclosure, for the exemption to be maintained.

34. He has considered the relevant parts of the audio recording alongside both the draft minutes and the official minutes. He notes that the draft minutes (which are not available to the public) recorded the relevant discussion in more detail, and are more reflective of the tone that was being adopted by the Chair and Clerk. The official version, in contrast, presents a shorter summary of the discussion, and it is not possible from it to gauge the tone of the speakers.
35. In the Commissioner's view, the key points were recorded accurately in the official minutes, but in a somewhat summarised form. He considers therefore that this lends some additional weight in favour of disclosing the recording, albeit not significant.
36. On balance, having considered the competing public interests, the Commissioner's decision is that the public interest in favour of maintaining the exemption does not outweigh the public interest in favour of disclosure of the audio recording.
37. He therefore orders the Parish Council to disclose the recording.

## Right of appeal

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

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

39. 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.
40. 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 .....**

**Sophie Turner**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**