

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 March 2022

Public Authority: North Yorkshire County Council
Address: County Hall
Racecourse Lane
Northallerton
North Yorkshire
DL7 8AL

Decision (including any steps ordered)

1. In a five part request, the complainant has requested information about a complaint. North Yorkshire County Council (NYCC) advised that it holds no information relevant to some parts of the request. NYCC also disputed that the remaining parts of the request were valid requests under FOIA.
2. The Commissioner's decision is as follows:
 - All parts of the request can be categorised as a valid request for information under section 8(1) of FOIA. However, NYCC should have relied on section 40(5B)(a)(i) of FOIA to neither confirm nor deny it held any of the requested information.
 - NYCC Breached section 17(1) of FOIA as it did not refuse the request within the required timescale of 20 working days.
3. The Commissioner does not require NYCC to take any corrective steps.

Request and response

4. On 5 June 2020 the complainant wrote to NYCC and requested information in the following terms:

“Question 1 - My scrutiny of paragraphs 1 to 9 inclusive finds not a single reason or explanation to support your decision about [redacted] complaint, despite the title being ‘Reasons for Decision’. # Please confirm if my understanding is correct, in that paragraphs 1 to 9 inclusive contain not a single reason or any explanation whatsoever to substantiate your Decision. However, if I’m mistaken, please provide information to identify exactly where the reasons are stated in these 9 paragraphs.

Question 2 - Your paragraph 10 states, I contend erroneously, that Councillor [Redacted] has not breached [redacted] Code of Conduct “because Parliament has determined” that this is “a matter for the ballot box”. However, I am advised that Parliament would not make sure [sic] a ruling, as to do so would be in direct conflict with the principles of public life. # Please confirm if I am advised correctly, in that Parliament has not made such a ruling. However, if I am mistaken, please provide information, such as a copy of the Parliament ruling you refer to, as evidence to support your complaint.

Question 3 - Your paragraph 11 states two seriously deficient assertions about Councillor [Redacted]. Please confirm if you have understood the data published in the Parish Council’s June 2017 Minutes, which demonstrates that both your assertions are unsustainable and utterly false. # Please confirm that you now accept that both your assertions are false and should be withdrawn. Otherwise, please provide information to explain why the data in the Parish Council’s Minutes can possibly be interpreted to support your assertions.

Question 4 - Your paragraph 12 states that the issues raised about Councillor [Redacted] do not identify with a breach of [redacted] Code of Conduct. However, I contend that making such an entirely unsubstantiated and clearly false statement, without any explanation or supportive reasons, is mendacious. # Please confirm if you now accept that this statement is false and should be OFFICIAL withdrawn. Otherwise, please provide information, with clear reasons, why you consider this statement to be valid.

Question 5 - Councillor [Redacted] has described my behaviour as “vindictive” during a public meeting and this description has been published by the Parish Council on its website. As your decision was to take no action against Councillor [Redacted], I must infer that your assessment document records your adjudication that Councillor [Redacted]’s description of “vindictive behaviour” is rational, fair or just and that your reasoning to support your judgement is recorded clearly. # Please provide information (such as page or line number) to state clearly where your reasoning for this key allegations is recorded,

as I can't find it anywhere. Otherwise, please confirm that this information is not recorded or held."

5. The complainant did not receive a response to the request and their complaint to the ICO was considered by one of its data protection teams. In February 2021, that team instructed the Council to respond to the request. The ICO advised the Council in March 2021 that, once it had responded to request, any complaint received about the response would also be considered under FOIA.
6. On 8 March 2021 NYCC responded to the request – as follows:
 - Q1, Q3 and Q4 – NYCC advised that it considered these were requests for an opinion, not requests for recorded information. However NYCC then advised that, with regards to Q3, it held "no other data".
 - Q2 – NYCC explained about the role of councillors, generally, and directed the complainant to published information it considered the complainant might find of interest.
 - Q5 - NYCC confirmed it does not hold this information.
7. The complainant requested an internal review on 22 April 2021.
8. NYCC provided an internal review on 2 June 2021. It acknowledged that it had not provided its original response within 20 working days and explained why that had happened.
9. NYCC then confirmed that it considered that questions 1, 3 and 4 were requests for opinion which FOIA does not oblige it to respond to. Finally NYCC advised it had disclosed to the complainant the information they had requested in question 2 and that it did not hold the information requested in part 5.

Scope of the case

10. The complainant contacted the Commissioner on 15 March 2021 to complain about the way their request for information had been handled. They confirmed that they remained dissatisfied with NYCC's response to questions 1, 3 and 4 of the request.
11. The Commissioner has first considered whether questions 1, 3 and 4 of the request can be categorised as a valid request for information under section 8 of FOIA. His investigation has then focussed on NYCC's handling of the request as a whole. As the regulator of the data protection legislation, he will actively apply what he considers to be the correct exemption to the requested information, if necessary.

12. Finally, the Commissioner has considered the timeliness of NYCC's response.

Reasons for decision

Section 8 – Request for information

13. Section 8(1) of FOIA describes a valid request for information as a request which is in writing, states the applicant's name and address for correspondence and describes the information requested.
14. The Commissioner tended to agree with NYCC that questions 1, 3 and 4 of the complainant's request were framed more as requests for opinion or explanation – neither of which are covered by FOIA. FOIA concerns only information a public authority holds in recorded form. From their correspondence with him the Commissioner considers that the complainant appears to be seeking to make a point, rather than to be seeking specific recorded information.
15. However, after corresponding with the complainant the Commissioner was prepared to accept that these questions could be categorised as requests for recorded information, as follows:
 - Question 1 – a request for recorded information on reasons or explanations in paragraphs 1 to 9 of a particular document, if held, that support a decision made.
 - Question 3 – a request for recorded information that evidences that data in a Parish Council's minutes supports assertions made in paragraph 11 of a document, if held.
 - Question 4 – a request for recorded information that evidences that a statement in paragraph 12 of a document, if held, is valid.

Section 40(5) – Personal data

16. Under section 1(1) of FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the requested information – this is referred to as the duty to confirm or deny.
17. However, section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether the authority holds the information does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the GDPR.
18. For NYCC to be entitled to rely on section 40(5B)(a)(i) the following two criteria must be met:

- confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
- providing this confirmation or denial would contravene one of the data protection principles.

Would confirming or denying that the requested information is held constitute the disclosure of a third party's personal data?

19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
20. If NYCC was to confirm or deny it held any information within scope of any part of the request it would be indicating whether or not a complaint had been made about a named individual. Given that an individual is named in the request, it would be possible to identify that individual, and whether or not a complaint has been made about that individual is that individual's personal data.
21. The Commissioner therefore considers that confirming or denying whether the information is held constitutes the disclosure of a third party's personal data – that of the named Councillor. If NYCC was to confirm or deny it held the requested information, it would be disclosing to the wider world whether or not a particular Councillor had been the subject of a complaint.
22. The Commissioner is therefore satisfied that confirming or denying that the information is held constitutes the disclosure of personal data.
23. The fact that confirmation or denial constitutes the disclosure of 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 confirmation or denial 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 UK 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 a 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 UK GDPR must apply to the processing. It must also be generally lawful.
28. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

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

29. 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.
30. 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”¹.

31. In considering the application of Article 6(1)(f) of the UK 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;

¹ 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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) 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”.

- ii) **Necessity test:** Whether disclosure of the information/confirmation or denial 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.
32. 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

33. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, or confirmation or denial that it is held, 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 be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
34. In this case the complainant has an interest in a particular Councillor and a report. In the Commissioner's view, the complainant's interest is a private concern that has limited wider public interest. However, it is nonetheless a valid interest for the complainant to have.

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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
36. The Commissioner appreciates that the complainant may have exhausted some or all of them, but he considers that there will exist other, more appropriate, routes through which they can pursue with NYCC the interest they have in a particular Councillor and any report referred to in the request. Such routes would not involve disclosing other people's personal data to the wider world, under FOIA which the Commissioner considers would be unnecessarily intrusive.

37. The Commissioner has therefore decided in this case that confirmation or denial is not necessary to meet the legitimate interest in disclosure and he has not gone on to conduct the balancing test. As confirmation or denial 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).
38. Given the above conclusion that confirmation or denial would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether confirmation or denial would be fair or transparent.

The Commissioner's view

39. The Commissioner has therefore decided that NYCC should have relied on section 40(5B)(a)(i) of FOIA to neither confirm nor deny it holds information within scope of any part of the request.

Section 17 – refusal of request

40. Under section 17(1) a public authority that is relying on an exemption to refuse a request must issue the applicant with a refusal notice within the same timescale for complying with section 1(1) ie promptly and within 20 working days following the date of receipt of a request.
41. In this case, the complainant submitted their request on 5 June 2020 and NYCC did not provide a refusal notice refusing the request under section 40(5) within 20 working days, or at all. NYCC therefore breached section 17(1) of FOIA.

Right of appeal

42. 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

43. 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.
44. 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

Cressida Woodall
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