

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

### **Decision notice**

**Date:** 19 January 2023

**Public Authority:** Upton Bishop Parish Council  
**Address:** clerk@uptonbishop.gov.uk

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

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1. The complainant requested information from Upton Bishop Parish Council ("the Council") relating to its response to a previous decision notice served on 17 August 2022 by the ICO.
2. The Council provided a redacted copy of information in scope of the request, and cited section 40(2) (personal information) of FOIA for the redaction of the disclosed information and stated it did not hold any further information within scope of the request.
3. The Commissioner's decision is that the Council is entitled to rely on section 40(2) of FOIA to withhold the redacted information, and on the balance of probabilities, the Council holds no further recorded information relevant to the complainant's request and has complied with section 1(1) of FOIA.
4. The Commissioner does not require any steps to be taken as a result of this decision notice.

## Request and response

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5. On 17 March 2022, the complainant wrote to the Council and requested information in the following terms:

"This is a Freedom of Information Request made in accordance with the Gov.UK website, see link;

<https://ico.org.uk/for-organisations/guide-to-freedom-of-information/receiving-a-request/#11>

The information we seek is, as stated above; everything pertaining to the employment of the Parish Clerk. This position, up until 1st March this year, had been formally offered to the co-writer (name redacted), and this was recorded in the Minutes of March and April 2021, until you withdrew it on 1st March 2022, telling her she needed to re-apply for her job. We need this information so we can decide what course of action we may take next.

For the avoidance of doubt this includes, but is not limited to:

- Minutes of meetings held on Tuesday 1st and Thursday 17th March regardless of whether they are in Draft or Approved form
- Any notes taken by Councillors either in writing or on an electronic device of any kind at either meeting
- Any notes issued by any Councillor pertaining to summarise the events that took place at those meetings
- Any audio or video recordings of either meeting
- All email exchanges between Councillors that have any relationship to this matter (this includes any message sent and the reply/replies received)
- All emails exchanged with any other body or third party outside of the Parish Council, e.g. (name redacted), and including any exchange with persons who were not entitled to be party to such information
- Emails to the Chairman from two Councillors confirming they wished the debate about the Closed Session held on 1st March to be re-opened and reconsidered

- Any message exchanges by any Councillor to any other person using any other electronic form e.g. Whatsapp, Messenger, Messages or any other social media based system.
- All documents provided by HALC in relation to the original interviewing of the Clerk including the confirmation that the position had been made in February/March 2021
- All documents/email exchanges with HALC in relation to the meetings held on Tuesday 1st and Thursday 17th March
- Any ongoing documents/emails that are exchanged by any Councillor in relation to the Clerk's appointment after receipt of this FOI request until the matter is concluded
- Any other relevant information we may have overlooked

We are happy to receive the information in paper or electronic format. If you wish, we can provide a USB Memory Stick for each Councillor to copy their data on to. Alternatively, you can email everything in your possession by attaching it to an email and returning it to the email provided. If necessary, please ask us to set up a Dropbox where you can deposit the information."

6. The final position of the Council was that it has provided all the information it holds within the scope of the request.
7. As a result of the Commissioner's investigation, a decision notice was served on 17 August 2022 ([IC-165093-Q2V6](#)), the Council responded disclosing information which included redactions under section 40 of FOIA and stated that no further information in scope of the request was available.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 26 September 2022, to complain about the way their request for information had been handled.
9. The Commissioner considers the scope of his investigation is to determine if the Council has correctly cited section 40(2) of FOIA for the withheld redacted information, and correctly refused to provide further information requested under section 1(1) of FOIA.

## Reasons for decision

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### Section 40(2) – personal information

10. 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.
11. 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').
12. 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.
13. 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?

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

“any information relating to an identified or identifiable living individual”

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.

17. 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.
18. In this case the withheld information is the personal email addresses of Councillors and third parties as well as names of third-party individuals, the Commissioner is satisfied that data subjects could be directly identified by the complainant in this case if this information were to be disclosed.
19. In the circumstances of this case, having considered the information available to him, the Commissioner is satisfied that this information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
20. 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.
21. The most relevant DP principle in this case is principle (a).

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

22. 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."

23. 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.
24. 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**

25. 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>"

26. 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.

27. 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**

28. In considering any legitimate interest(s) in the disclosure of the requested information under 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.

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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) 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"

29. 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.
30. In this case, the Council recognises that there is a general legitimate interest in openness and transparency.

### **Is disclosure necessary?**

31. '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.
32. In this case, the personal information which has been redacted is that of Councillors' own personal email addresses and third-party individuals. The Council says that it is not necessary to disclose the personal details of individuals in order to fulfil the legitimate interest being pursued. The complainant has argued: "They have redacted every name on the emails. Given that we all know who was involved I am unclear why they thought they could do this or that it was necessary unless they have something to hide, which we suspect they do. Part of the reason for getting the emails was to see who was involved and who made which comments. Also to see if anyone who should not have been involved had been copied in."
33. The Commissioner considers that the complainant is pursuing a legitimate interest but that disclosure of this personal information through FOIA is not necessary to satisfy it. This is because the legitimate interest has already been met through the provision of redacted email letters. The withheld information would add no further understanding, or context. The Commissioner considers that disclosing the requested information would be unlawful as it would contravene a data protection principle; that set out under Article 5(1)(a) of the UK General Data Protection Regulation. The public authority was therefore correct to apply section 40(2) of FOIA to this request.
34. The Commissioners decision is that the Council is entitled to rely on section 40(2) of the FOIA to refuse to provide the information it has withheld to this request.

## **Section 1 FOIA - determining whether information is held**

35. Section 1(1) of the FOIA states:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

If a public authority does not hold recorded information that falls within the scope of the request, the Commissioner cannot require the authority to take any further action.

36. In cases where there is a dispute as to the information held by a public authority, the Commissioner will use the civil standard of proof, i.e., the balance of probabilities. In order to determine such complaints, the Commissioner must decide whether, on the balance of probabilities, a public authority holds any information which falls within the scope of the request.

37. Accordingly, the investigation will consider the scope, quality, thoroughness, and results of the searches, and/or other explanations offered by the Council as to why the information is not held.

38. The Commissioner will also consider any arguments put forward by the complainant as to why the information is likely to be held (as opposed to why it ought to be held). Finally, the Commissioner will consider whether there are any further steps the public authority could be required to take if the complaint were upheld.

### **The complainant's position**

39. The complainant has argued that their request was for information relating specifically to "everything pertaining to the employment of the Parish Clerk" and "We need this information so we can decide what course of action we may take next." They also argued that "The requirement from the Commissioner was to release "all" information requested, not just a small selection, this includes ongoing information they produce and share."

### **The Council's position**



40. The Council have responded to the complainant and have confirmed that: "The information uncovered as part of this FOI request is all held in a folder on the personal laptop of the councillor who I asked to review the FOI after we received the decision notice from the ICO in August 2022. Once this FOI is complete all this information will be transferred to the official Upton Bishop laptop and data storage device. Normally FOIs would be investigated by the clerk and all the information uncovered would automatically be saved to the official Upton Bishop laptop or data storage device. However, in the absence of a clerk, this information has been temporarily stored on the individual councillor's computer as the councillor concerned does not have access to the Parish Council laptop. All the information uncovered has been retained and nothing has been destroyed." The information released was the only information falling in scope of this request.
41. They also said that: "Since the volunteer clerk withdrew their labour on March 2nd, 2022, Upton Bishop Parish Council has not had a clerk and therefore there have been no staff consultations. The Parish Council owns one laptop, one official email account (clerk@uptonbishop.gov.uk), an external data storage device and paper files. Until May 13th 2022 these were in the possession of (name redacted) (FOI requestor), the volunteer clerk. Once they were in the Council's possession they were searched by date, subject matter, and by name."
42. And "I do believe we have done everything possible to satisfy (name redacted) request. We have searched the PC laptop, email address, back up hard drives and paper files and have not found any information which has been withheld from (name redacted) and (name redacted). We have written confirmation from the three remaining councillors that they have not withheld any information requested under the FOI."

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

43. The Commissioner has carefully considered the points made by the complainant and the Council.
44. The Commissioner appreciates that the complainant has concerns about the way their request was handled by the Council. However, the Commissioner considers that the Council's responses have adequately addressed these points.
45. In addition, the Commissioner is unable to identify any further action that the Council could reasonably be expected to take as part of its statutory obligations under FOIA in order to identify or locate any further information falling within the scope of this request. As has been

set out above, if information is not held then it cannot be disclosed in response to a request.

46. In order to clarify a point raised by the complainant, any information produced after the request for information is received by the public authority (after 17 March 2022) will not be considered, as it is out of scope of that request for the purposes of FOIA.
47. In conclusion, the Commissioner finds, on the balance of probabilities, the Council does not hold any further recorded information falling within the scope of this request.

### **Other matters**

48. The Commissioner, after conducting his enquiries on this case, feels it necessary to highlight some concerns he has about the Council's practices in relation to the retention and secure storage of information pertaining to Council business.
49. Information gathered in response to the initial request was not secured by the then Chairman and information held by Councillors on their own email accounts was not secured when those Councillors resigned resulting in the loss of potentially relevant information.
50. Whilst the Commissioner takes the view that this action was borne of naivety rather than unscrupulous intent, the Council have placed themselves in a position where their motives can be legitimately questioned. This was entirely avoidable, and the council is advised to consider the Codes of Practice issued under [sections 45](#) – request handling and [section 46](#) - records management of the Freedom of Information Act 2000 in redressing the obvious shortcomings in policies that this episode has highlighted.
51. Although the Council has recognised its failings in dealing with the request, it has highlighted the difficulties faced due to the resignation of the Chairman, Clerk and several Councillors during the period concerned, and has implemented new guidance around the use of the Council's email account and laptop to help prevent a recurrence of the issues it faced.
52. The Commissioner would stress to the Council that when future requests for information are made and it withholds information, the Council should ensure that any withheld information is stored appropriately if a complaint is brought to the Commissioner to investigate.

53. The Commissioner would also strongly suggest to the Council that it considers a more appropriate retention policy with regards to requests for information that involve withheld information. The Commissioner does not expect to see a repeat of such errors in the future.

## Right of appeal

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54. 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)

55. 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.
56. 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**  
**Head of Freedom of Information Casework**  
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