

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 January 2024

Public Authority: South Kesteven District Council
Address: Council Offices
The Picture House
St Catherine's Road
Grantham
NG31 6TTX

Decision (including any steps ordered)

1. The complainant has requested from South Kesteven District Council ('the Council') information relating to a Code of Conduct review panel hearing. The Council disclosed some information and refused the remainder of the request under section 40 (Personal information) of FOIA.
2. The Commissioner's decision is that the Council was entitled to rely on section 40(2) of FOIA to withhold the remaining information. However, it breached sections 1 and 10 of FOIA by failing to respond within the statutory time for compliance.
3. The Commissioner requires no steps as a result of this decision.

Background

4. The request concerns a closed hearing to consider whether a councillor had breached the Members' Code of Conduct.
5. The press and public were excluded from the hearing in accordance with section 100(a)(4) of the Local Government Act 1972 ('the LGA'). An anonymised summary of the process followed by the hearing panel, its

decision and the remedial steps required, was published on the Council's website¹.

6. Four months prior to making this request, the complainant had made a similar request for documents that related to the hearing². In that case, he limited the request to information that was "not protected under the Local Government Act 1972" and in response he was referred to the aforementioned information published on the Council's website.
7. Part 1 of Schedule 12A of the LGA lists the types of information that are exempt from the requirements of Part VA of the LGA. Part VA contains a requirement for councils to make certain information available to the public, proactively (for example, the agendas, minutes and reports from council meetings). If a report that is to be considered at a meeting is of the type listed in Part 1 of Schedule 12A (eg information relating to individuals or financial and business affairs), a council does not have to proactively make it available under the LGA. The Council said that this was the case with the requested information.
8. However, this does not mean that such information cannot be disclosed at all. An exemption from the duty to publish information under the LGA is not the same as a prohibition on disclosing it. If an FOIA request is received for information that would otherwise be exempt under the LGA, the LGA does not prohibit disclosure under FOIA. The Council must disclose the information unless an exemption under FOIA provides legitimate grounds for withholding it³.

Request and response

9. On 17 April 2023, the complainant wrote to the Council and requested information in the following terms:

"Under the Freedom of Information Act, I would like to request the following information: -

All documentation held by South Kesteven District Council including notifications, forms, letters, emails, minutes of meeting, date of

¹<https://moderngov.southkesteven.gov.uk/ieListDocuments.aspx?CIId=723&MIId=4378&Ver=4>

²<https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024969/ic-211943-k5j2.pdf>

³<https://ico.org.uk/media/for-organisations/documents/1186/section-44-prohibitions-on-disclosure.pdf>

telephone calls, note of telephone calls, file notes, diary notes, proposals, assessments, reports in respect to the notifications, investigation, conclusions, relating to the Code of Conduct Review Panel Hearing dated 12 December 2022 into the complaints against [councillor's name redacted].

I would request the information is provided in electronic format.”

10. Following the Commissioner's intervention, the Council responded on 15 June 2023.

11. It disclosed some emails, which were chiefly concerned with the formation and administration of the hearing panel, with redactions made to conceal the names and contact details of non-senior Council staff. It withheld some emails in their entirety under section 42 (Legal professional privilege) of FOIA.

12. The Council also disclosed a letter of Delegation of Monitoring Officer function. It said the Council did not hold any forms, letters, dates of telephone calls, notes of telephone calls, file notes and diary notes relating to the Code of Conduct Review Panel Hearing.

13. It said there were no minutes for the Review Panel Hearing, and that information about its outcome had already been provided to the complainant. It refused the related part of the request under sections 21 (Information accessible to the requester) and 14(2) (Repeated request) of FOIA.

14. The Council said information relating to:

“...proposals, assessments and reports in respect of the notifications, investigation and conclusions relating to the Code of Conduct Review Panel Hearing were exempt under the Local Government Act 1972 at the meeting of the Review Panel and are exempt under Section 40(1) [sic] of the FOIA 2000 in respect of your Freedom of Information Request, as was the case with regard to your previous request.”

15. The complainant requested an internal review on 26 June 2023, on the following grounds:

1. Various emails referred to documents but these had not been provided.
2. No emails had been provided regarding the complaints or the panel.
3. The redactions made under section 40 went beyond what was necessary to protect personal data.
4. He disagreed with the application of section 42.
5. He disagreed with the application of section 14(2).
6. He disagreed with the application of section 40 to withhold proposals, assessments and reports in respect of the notifications,

investigation and conclusions relating to the Code of Conduct Review Panel Hearing.

16. The Council responded on 20 July 2023, as follows:
 1. It asked the complainant to specify the documents he believed had been omitted.
 2. It said that complaint emails were exempt under section 40(1) of FOIA, all emails regarding the forming of the panel had been disclosed and that it held no other emails regarding the panel.
 3. It said that section 40(1) had been applied correctly to redact personal data.
 4. It said that the information was subject to legal professional privilege and that section 42 had been applied correctly.
 5. It withdrew reliance on sections 21 and 14(2) and disclosed the Code of Conduct Hearing Procedure, Complaints Procedure and Council Code of Conduct. It said any remaining information was exempt under section 40(1) of FOIA.
 6. It made no comment on the complainant's final point.
17. Then, on 28 July 2023, the councillor who was the subject of the Review Panel Hearing wrote to the Council, confirming that they had no objection to their personal data being disclosed in response to the request.
18. On 3 November 2023, the Council disclosed to the complainant several email exchanges with the councillor regarding the complaints against them, with redactions for the personal data of third parties, which it held to be exempt under section 40(2) of FOIA. It confirmed that the remaining information continued to be exempt from disclosure under section 40(2) of FOIA.

Scope of the case

19. The complainant contacted the Commissioner on 31 July 2023 to complain about the following aspects of the Council's handling of the request:
 - The delay in responding to the request;
 - The extent of information identified by the Council as falling in scope; and
 - The application of section 40 to withhold information.
20. In follow-up correspondence, he expressed the view that the Council was applying FOIA exemptions to 'cover up' its actions and that this was not an appropriate use of FOIA.

21. The Commissioner's duty under FOIA is to decide whether a request for information has been dealt with in accordance with the requirements of Part 1 of FOIA, which is concerned with the disclosure of information held by public authorities. The Commissioner has explained to the complainant that any concerns he has about breaches of law not explicitly covered by FOIA should be pursued with the relevant law enforcement agencies.
22. The Council has clarified to the Commissioner that, in its responses to the complainant, it cited section 40(1) of FOIA (which concerns an applicant's own personal data) in error. It confirmed that it considered that section 40(2) of FOIA applied (which is concerned with the personal data of third parties).
23. The analysis below considers the application of section 40(2) of FOIA to the withheld information. The Commissioner has also considered the extent of the information in scope and the timeliness of the response.
24. The complainant did not complain to the Commissioner about the Council's application of section 42, and so that has not been considered in this decision notice.

Reasons for decision

Information in scope

25. The complainant says that certain information has not been provided to him. He wrote to the Council on 28 July 2023, listing the items which he had expected to receive. The Commissioner notes that this list is virtually identical to a list of outstanding information he submitted to the Council after it responded to his previous request. In that case, the Council explained to the complainant that it did not hold most of the information, a position the Commissioner upheld in his decision notice (see footnote (2)). As regards the information it did hold, it said it fell outside of the scope of that request.
26. The complainant did not appeal the Commissioner's decision notice in that case. In this case, the Commissioner has therefore not found it necessary to re-investigate whether the Council holds the same information. His previous decision still stands on that point.
27. As regards the information the Council said it did hold, the Commissioner is satisfied that it falls within the scope of this, wider request.
28. Therefore, the withheld information in question is:

- Two complaint letters
- The councillor's apologies
- The initial assessment of the complaints
- The councillor's response to the complaints
- Five interview notes
- The councillor's response to the draft investigation report
- The final investigation report
- Email correspondence (in whole and in part) and covering emails regarding the complaints and the hearing.

29. The Council said it had applied section 40(2) of FOIA to refuse to disclose this information.

30. The Commissioner has viewed the withheld information.

Section 40(2) – Personal information

31. Under section 40(2) of FOIA, information is exempt from disclosure if it is the personal data of someone other than the requester and a condition under section 40(3A) is satisfied.

32. In this case, the relevant condition is contained in section 40(3A)(a). This applies where disclosing 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').

33. First, the Commissioner must determine whether the withheld information can be categorised as 'personal data' as defined by the Data Protection Act 2018 ('the DPA'). If it is not personal information, then section 40(2) of FOIA cannot apply.

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

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

35. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier, such as their name. 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.

36. The Council said that the withheld information was the personal data of the complainants, and of the councillor about whom they complained.

37. The Commissioner acknowledges that the councillor is named in the request, and the complaint and hearing were about their alleged

conduct. As the withheld information identifies and relates to the councillor, it is clearly their personal data.

38. However, the Council says that it has recently received the councillor's consent to disclose their personal data in response to this request. It says it has disclosed as much of their personal data as it is able to, without breaching the privacy rights of the third parties who made the complaint.
39. The Council says the councillor's remaining personal data cannot be disclosed because it is inextricably intertwined with the personal data of the third parties who made the complaint against the councillor; it says that the remaining information is therefore exempt from disclosure under section 40(2) of FOIA.
40. The third parties who made the complaint are not identified in the information the Council has published on its website, but they are repeatedly named in the withheld information and they are frequently referred to by their position within the Council and their relationship to the councillor. For the same rationale set out in paragraph 35, the Commissioner is satisfied that the withheld information comprises their personal data. However, unlike the councillor, the Council does not have the consent of the third parties to disclose their personal data in response to the request.
41. Although not raised by the Council, the Commissioner notes that the withheld information also includes the names and contact details of Council staff who administered the Council's handling of the complaint. Clearly, this is also their personal data.
42. The second element of the test is to determine whether disclosing the information would breach any of the DP principles. The most relevant principle is that under Article 5(1)(a) of the UK GDPR.

Would disclosure contravene principle (a)?

43. 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".
44. In the case of an FOIA request, personal information 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.
45. 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

46. Article 6(1) of the UK GDPR sets out the requirements for lawful processing. It says 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.

47. 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."

48. When he considers the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, the Commissioner has to consider the following three-part test:

Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;

Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question; and

Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of those who made complaints against the councillor and the Council staff who administered the complaints and subsequent hearing ('the data subjects').

49. The Commissioner considers that the test of 'necessity' must be met before the balancing test can be applied. If it cannot be met, the processing will be unlawful.

Legitimate interests

50. In considering any legitimate interest(s) in disclosing 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.

51. A wide range of interests may also be legitimate interests. They can be the requester's own interests, the interests of third parties, 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.

52. The complainant has an interest in this information which stems from his belief that the complaint against the councillor may have been maliciously motivated, and that the hearing panel may not have followed proper procedures.
53. As regards the Council's position, it told the Commissioner:

"The Council has identified certain legitimate interests in the release of this information. There is a level of transparency required by the Council due to its public facing nature. There is also a legitimate interest in the conduct of its councillors who are elected on behalf of the public and a higher level of transparency and scrutiny is therefore required."
54. The Commissioner acknowledges that there is a wider legitimate interest in transparency, regarding the Council's handling of conduct complaints against elected officers. The Commissioner therefore agrees that disclosure of the information in this case would go some way towards informing the public about the Council's response to, and handling of, complaints about elected members.
55. Therefore, the Commissioner recognises there is a legitimate interest in disclosure in this case.

Necessity test

56. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves considering 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.
57. The Commissioner accepts that disclosing the withheld information about the complaint and the hearing, insofar as it contains the third party complainants' personal data, would be necessary to meet the complainant's legitimate interest and, to a lesser degree, the more general interest of transparency.
58. However, he can see no equivalent argument that disclosing the names and contact details of non-senior Council staff, whose contact details are not in the public domain in connection with this matter, is necessary to meet the interests of transparency. Their details would add nothing to the public's understanding of the matter or its handling by the Council, and the information in scope is not diminished by their details being omitted.
59. The Commissioner is therefore satisfied that disclosure of the names and contact details of Council staff is not necessary to meet the legitimate

interests identified above. As the Commissioner has decided that their disclosure is not necessary he has not gone on to conduct the balancing test. As disclosure 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).

Balancing test

60. In view of the above decision, the Commissioner need only consider the balancing test in respect of the third party complainants' personal data.
61. In balancing the complainant's legitimate interests and the data subjects' rights and freedoms, it is necessary to consider the impact of disclosure. For example, if the data subjects wouldn't reasonably expect that their personal data 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.
62. When conducting the balancing test, in the Commissioner's view, a key issue is whether the data subjects would 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.
63. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
64. The Commissioner has found in this case that the requested information is the personal data of third parties. Although the information relates to them in their professional capacity, the Commissioner is satisfied that they would reasonably expect that information about them, and the complaints they had submitted (which had been withheld from proactive publication under the LGA), wouldn't be disclosed to the wider world. As such, disclosing this information under FOIA would be likely to cause them harm or distress. It may also deter them, and others, from making such complaints in future, due to fear of disclosure to the world at large under FOIA.
65. There is some public interest in how public officials behave and carry out their elected roles, and in how the Council deals with complaints against them, which the requested information may shed a little light on. However, a summary of the issues considered by the hearing, and the outcome, have been placed in the public domain; the Commissioner considers the general interest in transparency to be served by this to a considerable degree. Furthermore, the councillor who was the subject of the complaints is free to pursue appeals mechanisms if they consider

they were dealt with unfairly or unreasonably by the Council. To the Commissioner's knowledge, they have not done so.

66. The Commissioner is therefore satisfied that the complainant's interest and the general interest in transparency, while legitimate, aren't sufficient to outweigh the data subjects' fundamental rights and freedoms in this case.
67. The Commissioner therefore finds that there is no Article 6 basis for processing and so disclosing the third parties' personal data would not be lawful. Given the above conclusion that disclosure would be unlawful, the Commissioner does not need to go on to consider separately whether disclosure would be fair or transparent.
68. The Commissioner's decision is therefore that the Council was entitled to withhold the requested information under section 40(2) of FOIA, by way of section 40(3A)(a).

Procedural matters

69. The Council exceeded the 20 working day time for compliance when responding to the request. This is a breach of sections 1 (General right of access) and 10 (Time for compliance) of FOIA.
70. The Commissioner has logged this breach for monitoring purposes.

Right of appeal

71. 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

72. 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.

73. 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

Samantha Bracegirdle
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