

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

### **Decision notice**

**Date:** 4 July 2024

**Public Authority:** Chard Town Council  
**Address:** The Guildhall  
Fore Street  
Chard  
Somerset  
TA20 1PP

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

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1. The complainant requested a copy of a recording of a zoom meeting held by Culturally Chard. Chard Town Council ("the council") refused the request on the basis that section 40(2) of FOIA applies (personal data of third parties).
2. The Commissioner's decision is that the council was not correct to apply section 40(2) to withhold the information from disclosure.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
  - To disclose the requested information to the complainant.
4. The public authority must take these steps within 30 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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6. On 21 July 2023, the complainant wrote to the council and requested information in the following terms:

“Please may you provide me with the Zoom recording from the last Culturally Chard meeting which I attended and took place on Tuesday 11th July 2023.”
7. The council responded on 18 August 2023. It said that the information belonged to Culturally Chard. It stated that Culturally Chard is not a public body, and that it is not subject to FOI. It therefore refused to disclose the information.
8. Following an internal review, the council wrote to the complainant on 6 October 2023 and changed its position. At this stage it said that the information was a recording of a zoom meeting which contains images of other private individuals, and it therefore refused to provide the information under section 40(2) of FOIA.

## Scope of the case

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9. The complainant initially contacted the Commissioner on 23 August 2023 to complain about the way their request for information had been handled.
10. The scope of the following analysis is to determine whether the council was correct to apply section 40(2) to withhold the information from disclosure.

## Reasons for decision

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### Background information

11. Culturally Chard is a Chard High Street Heritage Action Zone cultural programme, funded by Historic England, Arts Council England, and the National Heritage Memorial Fund. Its membership is a consortium of public and private bodies, and community associations. It lists members of its consortium as including Somerset Council, Chard Town Council, Somerset Art Works, Chard Museum, Chard Carnival Committee, Holyrood Academy, Chard One Team, and Chard Town Team.

12. Its website<sup>1</sup> states that its remit is a three-year programme celebrating the local character, culture, history, and heritage of Chard, exploring what makes the evolving high street a special and unique place, relevant to current and future generations.

### **Section 40 - personal information**

13. 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.
14. In this case the relevant condition is contained in section 40(3A)(a). 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').
15. 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.
16. 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?**

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

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

18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. 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><https://culturallychard.org/about/>

20. 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.
21. In the circumstances of this case, having considered the nature of the withheld information, the Commissioner is satisfied that the information does relate to the data subject(s). This is because it is a video recording of the individuals participating in the meeting concerned. The individuals would therefore be identifiable from the withheld information, along with the comments and contributions they made to the meeting.
22. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
23. The fact that information constitutes the personal data of identifiable living individuals 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.
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 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.
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.

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

28. 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>.

29. 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.
30. 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**

31. 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.
32. 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.

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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 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".

33. The Commissioner notes that Culturally Chard does not provide details of its minutes on its website. However, its decisions rely upon a grant of public money, and they have a direct effect upon the community in Chard. The public therefore has a legitimate interest in understanding more about how its decisions are taken, and in knowing more about the decisions it makes. The Commissioner does recognise, however, that decisions taken by Culturally Chard may become public when, for instance, they announce a decision to hold a particular event.

### **Is disclosure necessary?**

34. '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.
35. As Culturally Chard does not provide minutes of meetings on its website it would be necessary for the council to disclose the requested information, or a transcript of this, in order for the public to be aware of how its decisions were made.
36. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

37. 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.
38. 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.
39. In the Commissioner's view, a key issue is whether the individuals concerned 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.
  40. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
  41. Culturally Chard is not a public authority, and the Commissioner is not aware that previous meeting recordings have been made available to the general public. Therefore, due to previous practice, meeting participants may not expect that the requested recording would be disclosed in response to an FOI request in this case.
  42. However, although it is not a public authority, its goals and aims are community minded, and there is strong representation from public bodies and other publicly minded organisations on its decision-making board. It is also making decisions on the use of public money which has been provided as a grant to it. In acting as representatives of their organisations, the individuals are making decisions in relation to the use of that public money, and which will have a direct effect on the community in Chard. As decision makers, the individuals would therefore have a degree of expectation that their representations may subsequently need to be disclosed in order that Culturally Chard, and the public authorities relevant to it, can be transparent about their decisions and the use of the public money awarded to it.
  43. Given that the decisions relate to the public and the community of Chard, and the individuals concerned are representing the interests of Chard, as well as their own organisations, the Commissioner considers that the information relates primarily to the individual's public and representative roles rather than to their private lives.
  44. The Commissioner is not aware of any reasons to consider that a disclosure of the recording would be distressing to the individuals. He has also not been made aware of any objections to the information being disclosed.
  45. Based on the above factors, the Commissioner has determined that the legitimate interest identified outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of the information would be lawful.

46. Given the above conclusion that disclosure would be lawful, the Commissioner considers that the council was not correct to apply section 40(2) to withhold the requested information.

### **Other matters**

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47. The council's lack of engagement and lack of input into the Commissioner's investigation necessitated the issuing of an Information Notice under section 52 of FOIA in order to obtain a response from the council. It responded to say that it could not now access a copy of the recording as it was no longer subscribed to its zoom account, and that it was unsure whether a copy had been retained on this account.
48. The Commissioner notes that the council's zoom subscription was terminated during the course of his investigation. The council was aware that the Commissioner was investigating its refusal to disclose the information to the complainant in response to their request. The Commissioner considers that the council's failure to retain a copy of the information for the purposes of responding to the request, and the Commissioner's subsequent investigation, is a substantial failing in its obligations under FOIA. He therefore advises the council to put in place a process to ensure that such an error does not occur again in the future. Subsequently, the council did agree to resubscribe to the account in order to obtain a copy of the information.
49. The Commissioner considers the council's engagement with his office in this case to have been unacceptably poor, and its handling of the complainant's information request to be indicative of serious shortcomings in its FOIA compliance. The Commissioner will therefore be engaging with the council to ensure that improvements are made.



## **Right of appeal**

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50. 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)

51. 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.
52. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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