

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 December 2011

Public Authority: Felliscliffe Parish Council
Address: Tang Beck Farm
Felliscliffe
Harrogate
HG3 2J

Decision

1. The complainant has requested information relating to named properties, as well as copies of any notes circulated among parish council members at a specified meeting.
2. In response, Felliscliffe Parish Council (the "Parish") provided some of the requested information or otherwise claimed that the requested information was not held. It did, however, redact a limited amount of information contained in emails which identified the individual who had taken photographs of the specified properties, under section 40(2) (third party personal data) of FOIA. These photographs had been passed to the planning enforcement officer of Harrogate Borough Council ("Harrogate") by the Parish.
3. The Commissioner's decision is that the Parish has correctly applied section 40(2) of FOIA. He does not therefore require the Parish to take any steps as a result of this notice. The Commissioner has, though, found that the Parish breached section 17(7) of FOIA by its handling of the request.

Request and response

4. On 18 January 2011, the complainant wrote to the Parish and requested information in the following terms:
 1. "Any records of comments / documents that relate to planning applications or alleged breaches of planning control by any of our above named clients in relation to [named properties]."

2. "Any information / records relating to the activities carried out / on behalf of our clients at / on land referred to as [named properties]."
3. "Please disclose the details contained on a "post-it" or similar type sheet circulated amongst parish council members at the meeting held 16 December 2010."
5. The Parish responded on 16 February 2011. It enclosed some relevant records, although it also explained that the:

"...redacted 'photographic evidence' referred to is the property (personal information) of third party parishioners (whose names are also redacted), and the Parish Council's involvement was by way of forwarding the evidence, on behalf of these parishioners, to Harrogate Borough Council's Enforcement Officer."
6. In respect of request 3, the Parish advised that it had not retained information of the type described.
7. Following a further exchange of correspondence, the Parish wrote to the complainant again on 6 May 2011. It confirmed that it did not hold the photographic evidence referred to previously as this had been passed to Harrogate. The Parish also stated that it had upheld its decision to redact information contained in emails, clarifying that it considered that section 40(2) of FOIA applied.

Scope of the case

8. The complainant contacted the Commissioner to complain about (1) the decision of the Parish to redact information under section 40(2) and (2) the contents of the Parish's refusal notice.

Reasons for decision

9. Section 40(2) of FOIA provides an exemption to the right to access recorded information where it is the personal data of any third party. For a public authority to rely on section 40(2) it must be satisfied that:
 - the disputed information constitutes the personal data of a third party; and if so
 - disclosure of the disputed information would contravene a data protection principle contained in the Data Protection Act 1998 (DPA).

10. The Commissioner addresses each of these points in turn.

Is the disputed information personal data?

11. The Commissioner would confirm that he has had sight of the withheld information that forms the focus of this notice.
12. The Commissioner has observed that the disputed information features the name of an individual, the disclosure of which it can be reasonably assumed would allow that individual to be identified. The Commissioner is therefore satisfied that the information represents third party personal data and has gone on to consider the question of whether the release of the disputed information would conform with the data protection principles.

Would disclosure contravene a data protection principle?

13. The relevant data protection principle for the purposes of the request is the first. This requires the fair and lawful processing of personal data. The Commissioner's considerations here dwell on the general issue of whether the disclosure of the disputed information would be fair.

Fairness

14. The application of the first data protection principle in respect of fairness involves striking a balance between competing interests, the arguments around which are now well-trodden. However, in summary, the Commissioner will be guided by the following factors when weighing up these competing interests:
- (i) A data subject's reasonable expectations of what would happen to their personal data.
 - (ii) The consequences of disclosure.
 - (iii) The balance between the rights and freedoms of the data subject and the legitimate interests of the public.
15. In this case the data subject had asked the Parish to refer copies of photographs to Harrogate for the purposes of highlighting a possible breach of controls on the use of the land. The emails in which the redacted information is contained testify to the process of transferring the photographs to Harrogate.
16. It is a widely accepted principle that an individual should have the right to some degree of privacy. Yet, to echo the Information Tribunal in

*Norman Baker*¹, where a data subject carries out a public function they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives.

17. The Commissioner accepts that the disputed information is held by a public authority that should be accountable to the public it serves. Nevertheless, he considers that the information ultimately relates to an individual acting in a private capacity who, in the context of bringing a complaint to an authority, would have had a reasonable expectation that their identity would not be disclosed to the wider world. As a consequence, there appears a cogent argument that says that disclosure could not be deemed fair in the circumstances.
18. As a countervailing argument, however, the complainant has indicated that the identity of the data subject will have become public knowledge as a result of the data subject producing the photographs in the first place. This could, the Commissioner acknowledges, strengthen the case that disclosure would be fair - circumstances may readily be imagined where no damage can arise to a data subject where the disputed information is already known to the public.
19. The Commissioner is, though, satisfied that the identity of the data subject can not be meaningfully said to have been placed in the public domain. In making this finding the Commissioner has been informed by the Council's following assertions:
 - That the photographs were personally delivered to a councillor's house and not produced in a public meeting;
 - Although the photographs themselves, and the steps being taken by the Parish, were discussed in an open meeting, there is no indication that the name of the photographer was mentioned.
 - The name of the photographer is not referred to in any documents that are accessible to the public, including minutes of meetings.
20. The Commissioner has therefore taken the view that the complainant's argument has not sufficiently demonstrated that the reasonable expectation of the data subject to confidentiality should be offset. In coming to this position the Commissioner notes that he has not been

¹ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i83/HoC.pdf>

presented with any evidence that conflicts with the points set out above, although he is aware that any such evidence would likely refer to the name of the data subject and therefore render the question of redaction redundant.

21. There would also appear, in the Commissioner's opinion, no compelling legitimate public interest in the release of the information. The Commissioner considers that there will often be occasions when the anonymity of an individual making a complaint should be preserved so that they are free to express their concerns without fear of reprisal or intimidation. The Commissioner is aware that the complainant has provided reassurances on this point but he does not consider this negates the validity of the general premise of the argument in this case.
22. The Commissioner further respectfully disagrees with the complainant that the Parish's refusal to disclose the information goes against the principle of transparency in its decision making process. In this respect, the Commissioner sees the identity of the photographer as immaterial to any decision that would ultimately be effected by Harrogate, the authority which would consider the concerns raised.
23. Similarly, the Commissioner is not convinced by the complainant's secondary argument which relates to the issue of trespassing. On this point, the complainant has contended that:
 - there has been a history of trespassers on the premises featured in the requests;
 - the position of the photographs suggest that the data subject may have been trespassing; and as such
 - disclosure is necessary to prevent any further trespassing from the data subject and anybody else.
24. There would appear, on the face of it, to be a tension between this argument for disclosure and the reassurance referred to at paragraph 21. In any case, the Commissioner considers that any evidence of trespassing could be passed to the relevant body, such as the police, without the identity of the photographer being confirmed. The relevant body could make their own enquiries to the Parish as to the identity of the photographer if this was thought necessary.
25. In summary, the Commissioner has concluded that, in the limited circumstances to which the information relates, the strength of the legitimate interest in disclosure is not sufficient to supersede the right of the data subject to privacy. This decision has, as set out above, been informed by the Commissioner's considerations of the reasonable expectations of the data subject combined with the possible consequences of disclosure.

26. The Commissioner has therefore taken the view that the disclosure of the disputed information would be unfair and is therefore exempt information by virtue of section 40(2) of FOIA.

Procedural issues

27. Section 17 of FOIA governs the refusal of a request where a public authority considers it is not obliged to comply with that request. Should a public authority decide that requested information is exempt information, section 17(1) requires the public authority to (a) state that fact (b) specify the exemption in question and (c) state (if that would not otherwise be apparent) why the exemption applies.
28. The complainant has submitted that the Parish failed to act in accordance with FOIA by failing to provide a substantial explanation demonstrating why information was being withheld – a potential breach of section 17(1)(c).
29. In the Parish's letter of 6 May 2011, which effectively represented its internal review, it cited section 40(2) and stated that the identity of the photographer had been "redacted in order to protect the individual and for fear of reprisal."
30. The Commissioner considers that it may have been helpful for the Parish to expand on the reasons why it believed section 40(2) applied. Nevertheless, this does not alter the fact that the Parish did set out its grounds for applying section 40(2) and so the Commissioner finds that the Council met the basic requirement of section 17(1)(c).
31. The Commissioner has, however, observed that the Parish did not meet section 17(7) of FOIA by its handling of the request. Section 17(7) requires a public authority to inform an applicant of any "procedure provided by the public authority for dealing with complaints about the handling of requests or state that the authority does not provide such a procedure." It also states that a public authority should notify an applicant of his or her right to contact the Commissioner under section 50.
32. By its failure to provide the particulars described, the Commissioner has decided that the Parish breached section 17(7).

Right of appeal

33. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

34. 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.
35. 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

Andrew White
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