

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 July 2013

**Public Authority:** Babergh District Council  
**Address:** Corks Lane  
Hadleigh  
Ipswich  
IP7 6SJ

#### Decision (including any steps ordered)

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1. The complainant has requested specific information provided to Babergh District Council (the council) in relation to a complaint made about her in her capacity as a parish councillor. The council initially stated that the information was not held however, once the information was located, the council withheld it under section 31(1)(g) with section 31(2)(b).
2. The Commissioner has investigated the complaint and found that all the information is exempt from disclosure under section 31(1)(g) with section 31(2)(b).
3. The Commissioner does not require the council to take any steps.

#### Request and response

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4. On 17 July 2012 the complainant made the following request for information to the council for:

*"[Named independent investigator] informs me that he passed this email and copy minutes to you, would you please send me copies of these as soon as possible"*

5. The complainant wrote again to the council on 4 August 2012 to chase a response to her email of 17 July 2012. She specifically asked again for the following information:

*"On 17 July I asked you by email for a copy of the email [named individual] sent [named independent investigator] attempting to use unsigned minutes of a parish council meeting as a further complaint against me. Would you now please forward this to me by return of post."*

6. Finally on 31 August 2012, the complainant reiterated her request on a Freedom of Information Request Form and asked for the following information:

*"a copy of the email sent by [named individual] to [named independent investigator], attempting to use unapproved minutes of a [named parish council] meeting."*

7. The council responded on 19 September 2012 and stated that the email was not held.
8. It provided a further response on 16 October 2012 in which it confirmed that the information was held but stated that it was withheld under section 31(1)(c) and (g) and section 31(2)(b).
9. Following the Commissioner's involvement in the case, the council then conducted an internal review on 10 May 2013. This upheld its original position that section 31(1)(g) with section 31(2)(b) applied.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 3 November 2012 to complain about the way her request for information had been handled.
11. During the course of the Commissioner's investigation, he noted that part of the information was the complainant's personal data and was therefore exempt from disclosure under section 40(1) of the FOIA. He has therefore made an assessment under section 42 of the Data Protection Act 1998 (the DPA). This found that the council was likely to have complied with the DPA in respect of withholding the complainant's personal data.
12. The Commissioner considers the scope of this case to be to determine whether the council is entitled to rely on an exemption to withhold the requested information which is not the personal data of the complainant.

### **Reasons for decision**

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13. Section 31 of the FOIA states that:

- (1) *"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would or would be likely to, prejudice –*
- g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).*
- (2) *The purposes referred to in subsection (1)(g)-(i) are –*
- b) the purpose of ascertaining whether any person is responsible for any conduct which is improper."*
14. The council stated that the exemption applies to the withheld information because it did not form part of the investigation into the complainant and a formal complaint had not subsequently been submitted about the matters raised within the withheld information. The council argued that customers would be discouraged from complaining if informal complaints were disclosed and also any investigation that may need to be carried out in the future in relation to the matters raised could be prejudiced.
15. The Commissioner's guidance on the application of section 31 states that the functions referred to in 31(2) must be imposed by statute and the Commissioner is unlikely to accept that the exemption is engaged unless legislation specifically imposes a positive duty on the public authority to fulfil the relevant purpose<sup>1</sup>. Therefore, in order to engage the exemption, the council must identify that it has been entrusted with a function to fulfil the purpose of ascertaining whether a person is responsible for any conduct which is improper. It must then confirm that the function has been specifically designed to fulfil that purpose, and finally, it must demonstrate how the disclosure of the withheld information would or would be likely to prejudice that function.
16. However, in relation to section 31(2)(b), the Commissioner recognises that on a case by case basis the function may not be supported by statute. He generally expects there to be a formal code of conduct to which members of a profession are expected to adhere and which contains a specific definition of improper conduct. Whilst in most cases this will be supported and underpinned by statute, it is not a prerequisite. The Commissioner therefore finds that the exemption will

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[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/law-enforcement-foi-section-31.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/law-enforcement-foi-section-31.ashx)

apply where disclosure would prejudice the public authority's ability to ascertain whether a person breached an element of a code of conduct which falls within the stated definition of improper conduct.

17. In identifying the function that it has been entrusted to carry out for the purpose of determining whether a person is responsible for improper conduct, the council explained that allegations of misconduct by members is covered by the Localism Act 2011 which provides a framework for investigating complaints and making findings.
18. Section 27 of the Localism Act 2011 requires relevant authorities to adopt a code of conduct. The Commissioner considers it relevant to note that the complainant is a councillor of a parish council and that allegations were made about her conduct to Babergh District Council. The Localism Act states that parish councils may adopt the code adopted by its principal authority. It also requires relevant authorities to have arrangements in place which allow for allegations to be investigated and decisions about such allegations to be made. The Localism Act allows for written allegations to be made to the principal authority about members of parish councils failing to comply with their code of conduct. As Babergh District Council is the principal authority for the parish council in question, the Localism Act allows for an allegation about the complainant in her role as parish councillor to be made to the council, and for the council to investigate and make a decision about that allegation.
19. The Commissioner therefore accepts that the council has been entrusted to carry out a function supported by statute to ascertain whether a person is responsible for improper conduct. He also accepts that the investigation into the complainant was designed to fulfil that function.
20. The next question therefore is whether the council has demonstrated that disclosure of the withheld information would prejudice that function.
21. The council has explained that although the requested information was submitted to the investigator during the investigation into the allegations about the complainant's conduct, it was not considered as part of the investigation, and it has not subsequently been raised as a separate allegation of improper conduct. The council has stated that it wants the public to feel comfortable in raising complaints and that there is a principle of confidentiality when a complaint or allegation is first raised.
22. In its internal review response the council stated that:

*"To allow disclosure of information or comments made as part of a complaint which are not then pursued as a complaint is prejudicial to the investigation the public authority may have to conduct."*

23. The council also stated that:

*"Complainants may provide much information to support their complaint but not all of it will necessarily be relevant to the actual complaint once that has been determined. Such additional information may go on to be the basis of another complaint but if the complainant does not choose to follow this course of action, then this additional information should remain confidential."*

24. It appears that the council is essentially arguing that disclosing the requested information could prejudice a future investigation if the matters raised in the withheld information are subsequently raised in a formal complaint. It is also arguing that information submitted by a complainant in relation to an investigation, but not considered in that investigation, should remain confidential.

25. The Commissioner considers that the disclosure to the public of information which is likely to form the basis of a complaint which the council has an obligation to investigate would be likely to prejudice that investigation. He also accepts that people making complaints and allegations to the council would not expect the information they provide to be made public. The Commissioner finds that it is reasonable to conclude that disclosure could deter future complaints and allegations about members being brought to the council.

26. With regard to the likelihood of prejudice occurring in this particular case, the council has explained that there is a principle of confidentiality when a complaint is first raised and this is to ensure that the public feels comfortable about lodging complaints about the conduct of members. Publishing the requested information in this case would be likely to have the effect of deterring individuals from making complaints to the council about the conduct of members. This would therefore reduce its ability to ensure that it fulfils its duty under the Localism Act to maintain high standards of conduct of members.

27. The Commissioner therefore accepts that the function of ascertaining whether any person is responsible for any conduct which is improper would be likely to be prejudiced by disclosure of the withheld information to the extent of the deterrent effect on potential complainants. With regard to the argument that a future investigation would be prejudiced by the disclosure of the specific withheld information, the Commissioner has not been provided with any evidence to suggest that the individual intends to submit any further complaints

about the complainant. In addition to this, given the amount of time that elapsed between the provision of the information to the council and the internal review, it seems to the Commissioner that the possibility of a further complaint was already greatly diminished. However, overall, the Commissioner finds that disclosure of the withheld information would be likely to prejudice the council's function of ascertaining whether a person is responsible of improper conduct.

28. Section 31 is a qualified exemption and therefore the Commissioner has carried out a public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.
29. The council has acknowledged that the public interest in disclosure includes the need for transparency of the council's procedures, the need for openness in dealing with complaints, and the ability of the public to scrutinise the council's actions.
30. The complainant has not provided any arguments to suggest why disclosure of the requested information is in the public interest but has informed the Commissioner that she seeks the information for personal reasons.
31. In favour of withholding the information, the council has stated that there is a public interest in the need to protect the confidentiality of the complainant and their submissions until a formal complaint has been made. It has also argued that there continues to be a public interest in maintaining the confidentiality of statements, submissions and documents if a complaint is not pursued, particularly in relation to sensitive cases such as those about bullying and harassment. The reason the council has given for this is that it is important that the public have confidence in the council that their views will be treated in confidence, even if a complaint is not pursued. This is to protect and maintain public confidence in the council's complaint procedures and its ability to promote and maintain high standards of conduct among its members and those of the parish council's for which it is the principal authority.
32. In balancing the public interest, the Commissioner finds that there is a strong public interest in maintaining the confidentiality of complaints and submissions in relation to alleged breaches of codes of conduct in order to ensure that there is confidence in the council's complaint and investigation procedure. He does not consider that the disclosure of the withheld information will greatly serve the public interest in transparency as knowing the detail of a complaint or allegation does not disclose any information about the way in which the council processes such complaints or deals with any resulting investigations.

33. In all the circumstances of the case the Commissioner has found that the public interest in maintaining the exemption at section 31(1)(g) with section 31(2)(b) outweighs the public interest in disclosure.

**Other exemptions – personal data**

34. For the record, although the Commissioner has found that the council was correct to apply section 31 in this case, he notes that much of the remaining information is the personal data of third parties, and that some of this information is sensitive personal data as defined by section 2 of the DPA. He therefore considers that it should be noted that he would have gone on to consider the application of section 40(2) of the FOIA in the event that he found that the exemption at section 31 had been cited incorrectly.

## Right of appeal

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35. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

36. 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.
37. 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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