

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 June 2014

Public Authority: London Borough of Merton
Address: Civic Centre
London Road
Morden
SM4 5DX

Decision (including any steps ordered)

1. The complainant has requested correspondence from Stephen Hammond MP to the London Borough of Merton (the "Council") about parking in Wimbledon. The Council initially refused citing the exemptions at section 34 (Parliamentary Privilege) and section 41 (Information provided in confidence). Following an internal review it withdrew reliance on these exemptions and cited section 40 (Unfair Disclosure of Personal Data) as its basis for refusal.
2. The Commissioner's decision is that the Council is entitled to rely on section 40 as a basis for withholding the requested information.
3. No steps are required.

Request and response

4. On 2 October 2013 the complainant requested information of the following description:

"On 28th January 2013 [named officer at the Council] wrote an email to Stephen Hammond MP in which he stated that Mr Hammond had agreed to write to Councillor Judge on the subject of parking in Wimbledon Village. I am affected by the proposals that followed from these discussions and I would like to see what Mr Hammond wrote to Councillor Judge on this subject".

5. On 23 October 2013, the Council responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so: section 34 (Parliamentary privilege); and section 41 (Information provided in confidence).
6. The complainant requested an internal review on 1 November 2013. The Council sent him the outcome of its internal review on 29 November 2013. It set aside reliance on section 34 and section 41 but introduced reliance on section 40 (unfair disclosure of personal data).

Scope of the case

7. The complainant contacted the Commissioner on 6 February 2014 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the Council is entitled to rely on section 40 as its basis for withholding the requested information.

Reasons for decision

9. Section 40(2) of FOIA states that personal data is exempt if its disclosure would breach any of the data protection principles contained within the DPA. The Council has argued that disclosure of the withheld information would be unfair and thus breach the first data protection principle which states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

at least one of the conditions in Schedule 2 is met, and

in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

10. The term "personal data" is defined specifically in the DPA.¹

¹ <http://www.legislation.gov.uk/ukpga/1998/29/contents>

Is this information personal data?

11. In determining whether information is personal data, the Commissioner has referred to his own guidance and considered the information in question.² He has looked at whether the information relates to living individuals who can be identified from that information and whether that information is biographically significant about them.
12. The complainant set out detailed arguments as to why the information was not Stephen Hammond MP's personal data. He observed that the focus of the withheld information was likely to be parking in Wimbledon Village rather than Mr Hammond himself. The Commissioner recognises the merit of this point but has concluded that correspondence from Mr Hammond where he makes comment about the subject of parking in Wimbledon is Mr Hammond's personal data in the circumstances of this case. It relates to him in that it is correspondence that he sent and includes his comments on a particular topic.
13. The Commissioner notes that the withheld information contains the personal data of several individuals including Stephen Hammond MP; named Councillors (including Councillor Judge) and named officials (including the official named in the request). Some of these are included on the circulation list for the correspondence in question. The fact that these individuals received correspondence from Stephen Hammond MP on the topic in question constitutes these individuals' personal data. It shows that they have a connection to the matter covered in the correspondence.

Stephen Hammond MP's personal data

14. The Commissioner will now consider whether the requested information is exempt under section 40 because disclosing it would involve the unfair processing of Mr Hammond's personal data. As noted above, this is the entire text of the correspondence in question.
15. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

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http://www.ico.org.uk/for_organisations/data_protection/the_guide/~media/documents/library/Data_Protection/Detailed_specialist_guides/PERSONAL_DATA_FLOWCHART_V1_WITH_PREFACE001.ashx

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, e.g. established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor, the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
16. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in public disclosure.
17. In considering 'legitimate interests', in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.
18. The Council initially took the view that the information was subject to parliamentary privilege and was therefore exempt under section 34. Upon review, it found this to be incorrect. The Commissioner has produced detailed guidance on this exemption but, in short, members' correspondence to public authorities or to constituents on constituency

business, where such information is held by a public authority (as is the case here), is not covered by parliamentary privilege, nor is their general correspondence with ministers or other members. Correspondence relating to current or potential proceedings of the relevant House or of a parliamentary committee may be privileged but such correspondence is not at issue here.³

19. The Council, in its response to the Commissioner's enquiries appeared to take the view that MPs' correspondence, as a class of information, is exempt from disclosure under section 40 even if it is not subject to parliamentary privilege. This is incorrect. The Commissioner must consider the application of section 40 on a case by case basis.
20. The complainant has set out detailed arguments as to why disclosure of correspondence between an MP and a public official would not be unfair and why there is a compelling and legitimate interest in disclosing the withheld information.
21. He noted that the requested correspondence relates to Mr Hammond's official role as constituency MP and not to any matters that are private to him. He also noted that the person to whom he wrote (Councillor Judge) is the leader of the governing Labour Party on the Council and that, as such, this means the information is less likely to be confidential. He compared it to correspondence that may take place between two members of the same political party. He was sceptical as to the expectation of confidentiality and observed that disclosure would show that Mr Hammond was representing the views of local businesses on the matter. He also observed that, in terms of any effect disclosure might have on Mr Hammond, it would be more likely to damage his reputation where he refuses to disclose the information. The complainant had made a direct appeal to Mr Hammond for the information and had been refused. He argued that he had a right to see what his MP writes to the Council, noting that the Council manages services that he pays for through Council Tax. He stressed also that the communication was about a policy that directly affected him.
22. A key element of this case is Mr Hammond's explicit objection to his personal data being disclosed in this case. Regardless of Mr Hammond's status as an MP, the Commissioner must take this objection into consideration. It indicates that Mr Hammond has an expectation that his personal data will not be disclosed.

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_34_parliamentary_privilege.ashx

23. The Commissioner has next considered whether this expectation is reasonable.
24. While such correspondence is not subject to parliamentary privilege, the Commissioner acknowledges that MPs would generally expect their correspondence to remain confidential unless they themselves take steps to make it public. While there is a clear public expectation of openness on the part of MPs in relation to their official work, the Commissioner recognises that it is reasonable, in the circumstances of this case, that Mr Hammond would expect this correspondence, expressing his personal views, not to be disclosed. In reaching this view, the Commissioner notes (and should emphasise) that there is nothing in the correspondence which could be characterised as an unprofessional or otherwise inappropriate comment.
25. The Commissioner recognises that there is a wholly legitimate interest in making public that which Stephen Hammond MP has said to the Council on the matter of parking in Wimbledon Village. The question of town centre and residential parking charges is the subject of debate in communities across the country. Small businesses object to the parking difficulties (including charges) that potential customers might face when shopping locally. Potential customers may prefer to take their business to out-of-town retail parks or to shop on-line instead for convenience. Other local residents may find shopping locally more convenient and the decline in variety of local shops is disadvantageous to them. In order to lobby for improvements to the local shopping experience, small businesses and local residents may enlist the support of their local representatives including their local MP. There have also been nationwide initiatives to promote local retail businesses. Disclosure of the requested information would show, by way of a practical example, how this particular MP was engaging with the Council within their constituency on this particular topic. While it would be of particular interest to business and residents within the Wimbledon area, it may also be of interest to anyone who is more generally concerned about the pressing problem of improving the local retail sector.
26. However, on balance, and by a narrow margin, the Commissioner thinks that there is a more compelling interest in withholding the requested information because, in the circumstances, disclosure of Mr Hammond's personal data would be unfair, given his objection.

Section 40 - Conclusion

27. In light of the above, the Commissioner is satisfied that, in the circumstances of this case, the Council is entitled to rely on section 40(2) as a basis for withholding the requested information. The Commissioner would take this opportunity to stress that correspondence

from MPs to public authorities is not automatically exempt from disclosure under FOIA. Public authorities must consider the prevailing circumstances in each case.

Right of appeal

28. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

29. 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.
30. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF