

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 November 2019

Public Authority: Chepstow Town Council
Address: The Gatehouse
High Street
Chepstow
Gwent
NP16 5LH

Decision (including any steps ordered)

1. The complainant has requested a copy of a confidential report which was considered at a meeting of the full council. Chepstow Town Council ("the Council") release a redacted version of the report but not its enclosures. It claimed that releasing the remaining information would prejudice the commercial interests of third parties and could constitute an actionable breach of confidence. It thus relied on sections 41(1) and 43(2) of the FOIA to withhold information.
2. The Commissioner's decision is that the Council has failed to demonstrate that either exemption applies and is thus not entitled to rely on those exemptions. However, she considers that there is personal data within the information which would otherwise be disclosed and she has thus applied sections 40(1) and 40(2) proactively to prevent release of this information into the public domain. The Commissioner also considers that the Council breached both section 17 and section 10 of the FOIA in the way it responded to the request.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose, to the complainant, the information identified in the confidential annexe to this notice.
4. The Council must take these steps within 35 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

5. On 11 May 2019, the complainant wrote to a councillor and requested information in the following terms:

"Assuming the report that you have prepared for the extraordinary meeting 15 May is about the Chamber, please take this as an FOI request for us to receive a copy of that report either by email or post."

6. The councillor responded on 16 May 2019. She stated that:

"After seeking advice, the confidential papers will not be released because it is not in the public interest to do so."

7. The complainant sought an internal review on the same day by responding to the councillor's email. The Council completed its internal review on 30 September 2019. It provided a redacted version of the report. It stated that it was relying on section 41(1) and 43(2) to withhold information.

Scope of the case

8. The complainant first contacted the Commissioner on 22 May 2019 to complain about the way her request for information had been handled. At that point, the Council had yet to complete its internal review.
9. The Commissioner contacted the Council on 13 June 2019 to notify it that she did not consider its response of 16 May 2019 to fulfil the requirements of a refusal notice as set out in section 17 of the FOIA. She considered that the most practical way forward was for the Council to carry out a thorough internal review and she therefore asked the Council to expedite that process. The Council responded on 24 July to say that it was unaware of the request or of the complainant's request for an internal review.
10. As no internal review was forthcoming, the Commissioner exercised her discretion and accepted the complaint without waiting for the Council to complete its review.
11. At the outset of her formal investigation, the Commissioner wrote to the Council on 16 September 2019 to ask it to reconsider its position and either provide a copy of the information to the complainant or issue a refusal notice citing the exemptions on which it wished to rely.

12. During the course of the Commissioner's investigation, the complainant also raised a concern that the information she was eventually provided with was not the information which had been presented to the meeting. The Commissioner therefore included this element within the scope of her investigation.
13. Thus, the analysis that follows is split into five parts to reflect the various issues which the Commissioner has found it necessary to consider during the course of her investigation:
 - a. Determine whether the request was valid and if so;
 - b. Establish whether the Council has identified all the information within the scope of the request and if so;
 - c. Determine whether or not the Council is entitled to rely upon either or both of the exemptions it has cited to withhold that information and;
 - d. Consider whether any further redactions are necessary to protect personal data.
 - e. Identify any possible procedural breaches of the FOIA in the way the request was handled.

Reasons for decision

(A) Was the request valid?

14. The Commissioner notes from the correspondence that the request itself was submitted to an individual councillor and not to the Council as a corporate identity. It does not appear that this councillor had an executive role within the Council.
15. The Commissioner would not normally consider individual councillors to be a part of a public authority when they are acting in their capacity as ward councillors. However, the complainant has also provided correspondence showing that the Council had previously advised her that she should submit any correspondence via that particular councillor and not via the Council's clerk – which is the Council's published route for making FOI requests.
16. As the Council did not appear to indicate in the correspondence that the any information requests the complainant wished to make should be submitted in a different manner, the Commissioner considers that, at the time of the request, the Council had designated the particular

councillor as the complainant's point of contact for all correspondence – including information requests.

17. The Commissioner therefore considers that the Council *did* receive the request on 15 May 2019 and was thus obliged to deal with it under the FOIA.

B) Has the Council identified all information within the scope of the request?

18. During the course of the investigation, the complainant expressed a concern to the Commissioner that the redacted copy of the report she had been provided with was not the report which was presented at the meeting in question. Despite stating several times that she was able to prove that this was the case, the complainant did not supply any evidence which would corroborate this view.
19. As part of her investigation, the Commissioner asked the Council to provide copies of all the information it was withholding from the complainant in respect of this request. The Council provided the Commissioner with a number of documents which, it confirmed, represented all the information provided to councillors at the meeting.
20. The withheld information consists of:
 - a. the unredacted report which was presented
 - b. item 1 – copies of various social media posts
 - c. item 2 – an email exchange between an individual and the Council
 - d. item 3 – a report of an incident
 - e. item 4 – an email exchange between an individual and the Council
21. The Commissioner notes that items 1-4, were withheld but this was not explained clearly to the complainant. She also notes that, as part of its redactions, the Council “cut” sections out of the report that it wished to withhold. Whilst such an activity is permissible under FOIA, the Commissioner considers that this would have disturbed the format of the original document such that the redacted version would, at first glance, look different to the unredacted version and this may explain the discrepancy.
22. However, for the avoidance of doubt and in the absence of contrary evidence, the Commissioner considers that she has been provided with all the information the Council holds within the scope of the request.

C) Is the Council able to rely on the exemptions it has cited?

23. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

Section 43(2) – prejudice to commercial interests

24. Section 43(2) of the FOIA states that:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

- 25. The exemption can be engaged on the basis that disclosing the information either "would" prejudice commercial interests, or the lower threshold that disclosure only "would be likely" to prejudice those interests. For the Commissioner to be convinced that prejudice "would" occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of "would be likely to" occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.
- 26. The Council informed the Commissioner that it considered that disclosure of the requested information "would" prejudice the commercial interests of third parties.
- 27. In relation to the report, the Council argued that disclosure of the information in full would expose to the world at large that the Council was in dispute with another entity. The Council argued that this would be "prejudicial" to that entity.
- 28. It also argued that release of items 2 and 4 would be "commercially damaging" to one of its staff members but it failed to set out what the commercial damage would be or how it would occur.
- 29. In the Commissioner's view the Council has failed to demonstrate that section 43 is applicable in this case. It has failed to specify a commercial interest which would be damaged and it has been vague about what prejudice would be caused to what party. The Council did not identify why the withheld information would have been of use to commercial

competitors or to individuals who might wish to cause “commercial damage.”

30. The Council itself chose the higher bar of “would” prejudice but it has failed to demonstrate a causal link between disclosure of the information and prejudicial effect that would be more likely than not to occur.
31. It is not sufficient for a public authority to simply assert that (unspecified) prejudice would occur. It must identify the prejudice and explain *how* the prejudice would arise from disclosure.
32. In addition, the Commissioner considers that there is sufficient information already in the public domain to enable most of the redacted sections of the report to be deduced – further weakening any argument that disclosure would cause prejudice.
33. The Commissioner has included, in the confidential annexe to this notice, further, more detailed arguments setting out why she believes that section 43(2) is not engaged in relation to the withheld information. These arguments are necessary but they are so intrinsically linked to the withheld information that including them in the published decision notice would, in effect, disclose a large part of that information.
34. Whilst the Commissioner is ordering disclosure of this part of the withheld information, she is conscious that the Council may wish to appeal her decision. Setting out these findings in the published part of the decision notice would deny the Council any meaningful right of appeal.
35. The Commissioner therefore considers that section 43(2) is not engaged and thus the Council is not entitled to rely on that exemption to withhold information.

Section 41(1) – Information provided in confidence

36. Section 41(1) of the FOIA states that information is exempt from disclosure if –
 - (a) *It was obtained by the public authority from any other person (including another public authority), and*
 - (b) *The disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*
37. Item 3 of the withheld information is a report made by an individual (Individual 1) about another individual (Individual 2). There is also a

reference to this incident within the report considered by the full council. The Commissioner is satisfied that item 3 has been obtained by the Council from "another person." As a section of the report presented to the council meeting refers to the content of item 3, the Commissioner considers that this information would also meet the definition of having been obtained from another person.

38. The Commissioner's guidance on section 41¹ states that a public authority wishing to rely the exemption should consider the test of confidence set out in *Coco v A N Clark (Engineers) Limited [1968] FSR 415* in assessing whether a disclosure would constitute an actionable breach of confidence.
39. *Coco* suggested that three elements were usually required to bring an action for a breach of confidence:
- the information must have the necessary quality of confidence,
 - it must have been imparted in circumstances importing an obligation of confidence, and
 - there must have been an unauthorised use of the information to the detriment of the confider.
40. The Commissioner asked the Council to set out, with reference to the tests set out above, why it considered that disclosure of such information would constitute an actionable breach. The Council response to this query was:

"unauthorised disclosure would cause a specific detriment to either the party which provided it or any other party."

41. Whilst there is no public interest test in section 41, a public authority must consider whether, if it were required to defend itself in an action for a breach of confidence, it might be able to rely on a public interest defence. The Commissioner therefore also asked the Council what factors it had considered then deciding whether or not it would be able to defend itself. The Council commented that:

"The public interest arguments considered were:

Can the information be released without harm?

¹ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

If not, do any exemptions or exceptions apply?

If so, are they FOI qualified exemptions?

"Consideration to the public interest in having the information released.

"It was considered that if the information was released then it would cause harm to [individual 1] and [individual 2]. Consideration was given as to whether the information was in the public good and not what is of interest to the public and decided that the information was not in the public good...It is also noted that the information requested is in the interests of the requestor and not in the public interest."

42. The Commissioner does not consider that the Council has demonstrated that section 41(1) applies to the withheld information.
43. The responses the Council has provided suggest a poor understanding of the exemption and the tests which a public authority must consider in determining when it applies. Indeed, at times the Council's submission appeared confused as to which exemption it was providing arguments for.
44. Having viewed the withheld information, the Commissioner is conscious that item 3 is likely to have been provided in an expectation of confidence by individual 1 – however the Council's arguments have not demonstrated that disclosure would constitute an *actionable breach* of that confidence.
45. Given the possibility of a reasonable expectation of confidence, the Commissioner considered whether it would be reasonable to seek further submissions from the Council on the matter – as opposed to ordering disclosure immediately. However, given her findings set out below in relation to personal data, she considers that this would only have delayed the decision without increasing the chances of additional information being disclosed.
46. The Commissioner therefore considers that the Council has failed to demonstrate why section 41(1) applies to this information and it is thus not entitled to rely on the exemption.

D) Does the withheld information contain personal data?

47. When the Commissioner finds that a public authority is not able to rely on an exemption found in Part II of the FOIA to withhold information, she would normally order the public authority to disclose all the

information it is withholding under that exemption. In this case, that would apply to the entirety of the information the Council has withheld.

48. However, the Commissioner is of course also the regulator of Data Protection legislation and, as a responsible regulator, she has to consider whether disclosure would breach the rights of any individuals.
49. Having considered the withheld information, the Commissioner considers that individuals are identifiable from it and she thus considers it necessary to apply section 40 redactions herself proactively.
50. The Council has not attempted to cite section 40 at any point during the process, although the Commissioner notes that its section 41(1) submission made reference to information "withheld under GDPR".

Is any of the information the personal data of the requestor?

51. Section 40(1) states that:

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

52. The Commissioner notes that the complainant is mentioned several times throughout the withheld information in relation to various interactions with the Council. The withheld information therefore contains the personal data of the requestor.
53. Disclosure under the FOIA is considered to be disclosure to the world at large and not to the requestor specifically. It is the equivalent of the Council publishing the information on its website.
54. In this case, the Commissioner considers that the Council should not be identifying an individual and she has thus applied section 40(1) to prevent the information being disclosed. Section 40(1) is an absolute exception and the Commissioner is not required to consider either the balance of public interest or the complainant's wishes.
55. The Commissioner has therefore set out, in the confidential annexe to this notice, appropriate redactions which the Council must make to minimise the possibility that the complainant would be identifiable from the information of which she is ordering disclosure.

Are any other individuals identifiable from the information?

56. The Commissioner notes that, in addition to the complainant, other individuals are mentioned throughout the withheld information.

57. Individual 2 is mentioned several times within the report itself in relation to interactions with the Council.
58. Having considered that information disclosed under the FOIA is disclosed to the world at large, the Commissioner considers that disclosing Individual 2's interactions with the Council would infringe Individual 2's data protection rights.
59. Whilst the Commissioner acknowledges that there is always a legitimate interest in understanding how a public authority is spending taxpayers' money, she does not consider that disclosure of Individual 2's interactions with the Council is necessary to achieve that interest.
60. Likewise, the Commissioner notes that the name of a Council staff member is visible in item 2 and item 4. The staff member in question is not a senior individual within the Council and, again, disclosure of the staff member's name is not necessary to achieve a legitimate interest.
61. Whilst the Commissioner considers that the complainant may well be aware of the identity of both individuals, this is irrelevant as the consideration here is whether the information can be disclosed to the world at large.
62. The Commissioner has therefore set out, in the confidential annexe to this notice, appropriate redactions which the Council must make to minimise the possibility that the two individuals referred to above would be identifiable from the information of which she is ordering disclosure.
63. In relation to item 3 and the reference to the content of this document in the report, the Commissioner considers that this information is the personal data of Individual 1. Individual 1 is named in the document and the Commissioner considers that the report also contains sufficient detail about the incident as to identify the person who made the report – even if their name were not included.
64. The reference to this incident in the report presented at the council meeting would, in the Commissioner's view, also contain sufficient clues as to enable those with local knowledge to identify Individual 1.
65. Whilst the Commissioner is conscious that there would be a legitimate interest in knowing how incidents, such as the one described, are responded to by the Council, she does not consider that disclosure of the withheld information would be necessary to achieve this interest. The Council should have its own internal procedures to deal with such correspondence and the matter could be referred to the Local Government and Social Care Ombudsman or the Police if that were necessary. Such a course of action would clearly be less intrusive upon the privacy of Individual 1.

66. The Commissioner therefore concludes that section 40(2) is engaged in respect of item 3 and in respect of the reference to this item in the report presented to the council meeting. She is therefore content for the Council to withhold and redact this information respectively.
67. For completeness, the Commissioner has also given consideration to item 1. Whilst the individuals who made the social media posts are clearly identifiable, the Commissioner considers that these posts have been made on forums to which large numbers of the public have access and they are therefore in the public domain. She therefore takes the view that no further prejudice is likely to result from disclosure of item 1.

E) Procedural handling of the request

Section 10 – Timeliness

68. Section 10(1) of the FOIA states that a public authority its duty under section 1(1) of the FOIA “*promptly and in any event not later than the twentieth working day following the date of receipt.*”
69. The Council did not provide the redacted version of the report until four months after the request was first submitted – and only after the intervention of the Commissioner. It therefore breached section 10 of the FOIA in responding to the request.

Refusal Notice

70. Section 17(1) of the FOIA states that, when a public authority wishes to withhold information or to neither confirm nor deny holding information it must:

within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies.*

71. Section 17(7) of the FOIA states that:

A notice under subsection (1), (3) or (5) must—

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the*

handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.

72. As the Commissioner has noted above, the Council received this request on 11 May 2019 but did not cite any exemptions until four months afterwards. The response which the Council provided on 16 May 2019 did not cite any exemptions, nor did it provide details of the Council's internal review procedure, nor did it inform the complainant of her right to complain to the Commissioner.
73. The Commissioner therefore considers that the Council failed to issue an adequate refusal notice within 20 working days. She thus finds that the Council breached section 17 of the FOIA in responding to the request.
74. For the benefit of the complainant and the avoidance of doubt, the Confidential Annexe to this notice contains only the list of redactions the Council is required to make to protect personal data and some detailed analysis related to the Council's use of section 43(2) to withhold information. All the analysis relating to the Commissioner's use of section 40(1) and section 40(2) has been presented in this notice.

Other matters

75. Throughout the course of her investigation, the Commissioner has identified numerous procedural weaknesses in the way the Council has handled this request and these are recorded in this decision notice.
76. The Commissioner is conscious that the Council is a relatively small local authority and that the number of information requests it would expect to receive is small. Whilst the Commissioner cannot ignore breaches of the FOIA, the main purpose of this decision notice is not to chastise the Council for its failings but to identify weaknesses that the Council can address when handling future requests.
77. With that in mind, the Commissioner wishes to draw the Council's attention to some additional issues which, whilst not forming part of her formal decision, will help the Council avoid future breaches.

Recognising and dealing with information requests

78. The Commissioner's usual guidance for councillors who receive information requests is that the councillor should either forward the request to the appropriate person or team within the organisation – or

the councillor should inform the complainant of the appropriate route for making an information request.

79. In this particular case, the Council had provided the complainant with a single point of contact, to whom she had to submit all her correspondence to the Council. It is not for the Commissioner to specify the manner in which a public authority wishes to manage its correspondence – but it needs to consider how it will handle information requests via that process.
80. In this particular case, the councillor appears to have taken it upon herself to respond to the complainant without reference to the usual FOI process. Consequently, when the Commissioner contacted the staff of the Council, they were apparently unaware of the request ever having been submitted.

Internal review

81. Dissatisfied with the correspondence she had received from the councillor, the complainant replied to say that she did not consider the request to have been handled properly. This should have been the trigger for the Council to have reviewed its handling of the request but the councillor concerned does not appear to have responded to or passed on this correspondence. Consequently the Council did not review its handling of the request or issue a compliant refusal notice until 30 September 2019. The Commissioner once again considers this to be poor practice.
82. The Commissioner would normally expect an internal review to be carried out within 20 working days and the process should never take longer than 40 working days.

Guidance

83. The Commissioner publishes general guidance about the issues public authorities need to consider before refusing a request for information, as well as detailed guidance on each exemption. She would strongly advise the Council to familiarise itself with this guidance – particularly before making its submissions to her. The guidance is available here: <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/>

Right of appeal

84. 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: 0870 739 5836

Email: grc@justice.gov.uk

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

85. 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.
86. 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

**Phillip Angell
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