

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 June 2020

Public Authority: Irby Upon Humber Parish Council
Address: clerk.irbyparish@gmail.com

Decision (including any steps ordered)

1. The complainant requested information relating to Irby Upon Humber Parish Council's ("the Council") policies, the Council clerk's job role and a previous ICO case (FS50824379).
2. The Commissioner's decision is that section 21(1) (information reasonably accessible by other means) of the FOIA is not engaged to parts 1, 2 and 4 of the request and that the Council had not issued an appropriate response to part 5 of the request which fulfils its obligations under section 10 of the FOIA.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the information withheld under section 21(1).
 - Issue a response to part 5 of the request that complies with the FOIA.
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 3 May 2019, the complainant wrote to the Council and requested information in the following terms:

"In light of the Information Commissioner's decision notice, dated 03/05/2019, pertaining to case reference number: FS50824379, I now wish to raise concerns with Irby upon Humber Parish Council in respect of the Clerk's actions and conduct following my information request dated 18/12/2018.

However, before raising those concerns I would be most grateful if the Parish Council could provide me with full and complete copies of the following information at their earliest convenience:

- 1. complaints policy and procedure;*
- 2. Standing Orders;*
- 3. Clerk's job description including terms and conditions of employment;*
- 4. Officer/Member Protocols; and*
- 5. all correspondence between the Parish Council and the ICO surrounding case reference number: FS50824379"¹*

6. The Council responded on 14 May 2019. Its response stated the following:

"The policies you have asked for are on the website My job description is attached, however, my terms of employment are personal data and so cannot be released."

7. It did not provide a website link, or otherwise specify where on the website the information sought by the complainant could be located.
8. It disclosed the clerk's job description to the complainant. It stated that the terms of employment could not be released because they were personal data but it did not explicitly cite section 40 (personal data) of the FOIA.
9. Considering each aspect of the request separately, the Council's response was as follows:
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¹ For reference, the Commissioner has numbered the bullet points in the complainant's request.

- Part 1: Policies are "on the website"
 - Part 2: Policies are "on the website"
 - Part 3: "Job description" disclosed but "terms and conditions" withheld
 - Part 4: Policies are "on the website"
 - Part 5: Not addressed
10. The complainant requested an internal review on 15 May 2019. This was on the basis that the complainant did not consider the Council had appropriately applied section 40(2) of the FOIA to withhold the clerk's terms and conditions of employment. He also raised concerns about the Council's lack of response to part 5 of his request.
11. The complainant also argued that, in the Council's response, it had failed to inform him of any internal review procedure it may have under section 17(7) of the FOIA.
12. On 30 May 2019, the Council responded to the complainant's internal review request and stated, "these items will be reviewed at the next council meeting in July".
13. On 16 August 2019, the Council wrote to the complainant and stated the following:

"I would like to inform you that following the appointment of a new Clerk, our website will be operational within the next 7 days.

*On there you will be able to find the following, which I understand you have previously requested;
Minutes of May 2019
Publications Scheme
Complaints Policy
Standing Orders*

INTERNAL REVIEW PROCEDURE

The parish council does not have an internal review procedure.

Although I understand that many of your previous requests have been answered in full or at least in part by the former clerk, I would be grateful if you could clarify which requests/responses are still outstanding and apologise again on behalf of the parish council, for the delay in providing the information requested."

Scope of the case

14. The complainant initially contacted the Commissioner on 1 June 2019 to complain about the Council's lack of response to his internal review request.
15. On 26 June 2019, the ICO wrote to the Council and recommended that the Council issue a response to the complainant's request for review, if it had not already done so.
16. On 28 June 2019, the Council responded to the Commissioner to state that it had provided a response to the complainant on 30 May 2019 and provided a copy of this to the ICO. This was the response quoted at paragraph 12 above.
17. On 7 August 2019, the complainant contacted the ICO again stating that he had not received a response to his internal review request. As the Council has confirmed it does not have an internal review procedure, as at paragraph 13, it was not required to carry out an internal review and so this issue is not covered further in this notice.
18. The FOIA provides an exemption (section 21) for information that is already accessible to the requester by other means. Whilst the Council did not cite section 21 of the FOIA directly, the Commissioner recognises that it sought to rely upon this provision in its initial response to the complainant.
19. The FOIA also provides an exemption (section 40(2)) for information that is the personal data of third parties (anyone other than the requester) where complying with the request would breach any of the principles of the GDPR. Whilst the Council has not specifically cited section 40(2), the Commissioner recognises that it also sought to rely upon this provision in its initial response to the complainant. However, the Council has since confirmed to the ICO that this information was disclosed to the complainant in full on 23 August 2019 following a further request he made for this information on 18 August 2019. As such, the Council's application of section 40(2) of the FOIA is not considered in this notice.
20. The scope of this case and the following analysis is the determination of whether the Council correctly applied section 21(1) of the FOIA to parts 1, 2 and 4 of the request. The Commissioner has also considered whether the Council has complied with its obligations under section 10 of the FOIA with regards to part 5 of the request.

Reasons for decision

Section 10

21. 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.

22. Section 8(1) of the FOIA states:

In this Act any reference to a "request for information" is a reference to such a request which –

(a) is in writing,

(b) states the name of the applicant and an address for correspondence, and

(c) describes the information requested.

23. The Commissioner considers that the request in question fulfilled these criteria and therefore constituted a valid request for recorded information under the FOIA.

24. If there are grounds for refusing the request, the public authority must issue a refusal notice in accordance with section 17 of the FOIA, explaining why it has refused the request. The section 17 refusal notice must also provide details of any internal review procedure that the public authority operates, together with the applicant's right to complain to the Commissioner.

25. Section 10 of the FOIA states that responses to requests made under the Act must be provided "*promptly and in any event not later than the twentieth working day following the date of receipt.*"

26. In the Council's initial response to the complainant, it did not address part 5 of the request.

27. In relation to part 5 of the request, the Council stated to the Commissioner, "*I am led to believe the applicant was sent a copy of all correspondence held by the council in 2019.*"

28. From the evidence presented to the Commissioner in this case, it is clear that the Council failed to issue a substantive response to the

complainant in relation to part 5 of the request within 20 working days and has therefore breached section 10 of the FOIA.

29. The Commissioner requires the Council to issue a substantive response to part 5 of the request, which complies with the requirements of the FOIA.

Section 21 – Information reasonably accessible to the applicant by other means

30. Section 21 of the FOIA states that:

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

31. Section 21 provides an absolute exemption. This means that if the requested information is held by the public authority, and it is reasonably accessible to the applicant by other means than through an FOIA request, it is exempt from the obligation to disclose and there is no requirement to consider the public interest test.
32. The Commissioner sought clarification from the Council in relation to its position on each part of the request as it was not clear which parts it had intended to apply section 21(1) to in its initial response to the complainant. From the Council's submissions to the ICO, we understand it to have applied section 21(1) to parts 1, 2 and 4 of the request.
33. In relation to part 1 of the request, the Council confirmed to the Commissioner that it had applied section 21(1) of the FOIA.
34. In relation to part 2 of the request, the Council provided the following link to the Commissioner: www.irbycouncil.co.uk/policies suggesting that the information at part 2 was accessible via this link under section 21(1) of the FOIA.

35. When asked to confirm its position on part 4 of the request, the Council informed the Commissioner, *"I am not entirely sure how to respond to this, I would need more time to find out this information"*. As part 4 of the request was for, *"officer/member protocols"*, the Commissioner has taken the view that this fell within the remit of the Council's initial response which stated *"the policies you have asked for are on the website"*.
36. The Commissioner acknowledges that, on 16 August 2019, the Council provided further advice to the complainant regarding parts 1 and 2 of the request, however this further response did not specify where on the Council's website the requested information could be found.
37. In order for section 21 to apply there should be another existing, clear mechanism by which the particular applicant can reasonably access the information outside of the FOIA. Furthermore, for section 21 to apply, it is necessary to consider whether the entirety of the information requested is reasonably accessible to the applicant.
38. Information is only reasonably accessible to the applicant if the public authority:
 - Knows that the applicant has already found the information; or
 - Is able to provide the applicant with precise directions to the information so that it can be found without difficulty.
39. Information is regarded as being in the public domain if it is reasonably accessible to the general public at the time of the request.
40. The Commissioner's guidance² on the subject explains that, unlike consideration of most other exemptions in the FOIA, a public authority can take the individual circumstances of the applicant into account.
41. The Commissioner sought clarification from the Council in relation to its reasons for relying on section 21 of the FOIA including asking it to explain how the requested information could be accessed by the applicant.
42. With respect to how it took the individual circumstances of the applicant into account, the Council has informed the Commissioner the following:

² <https://ico.org.uk/media/for-organisations/documents/1203/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf>

"The council have always considered the particular circumstances of the applicant and confidently assumed their ability to access and search a website. The applicant has, on occasions, quoted information directly from our website. Therefore, this is why the decision to apply section 21 was made, as the information was easily accessed in the public domain/council website."

43. The Council has also stated:

"In relation to information on the website being easily accessed by the resident (section 21), due to the level of emails, letters and paraphrasing within those documents, it was considered reasonable to assume that given the link to the website, he would have the technical knowledge to access the information on the council website. (www.irbycouncil.co.uk)."

44. The Commissioner has considered the information available on the Council's website. Under <http://www.irbycouncil.co.uk/policies/> various Council documents have been made publicly available. However, the Council have not confirmed whether any of this information directly correlates to the information requested, or was available on the website at the time of the request.
45. The Council has stated to the Commissioner, *"I am led to believe that all the information was available on the website on the 3rd May 2019 but it was before my employment"*.
46. In addition, it is unclear whether the requested standing orders are available on the website. This is because the documents published at <http://www.irbycouncil.co.uk/finance-information/> are illegible.
47. In order for the Council to be able to rely on the exemption it needed to be able to precisely direct the applicant to the requested information. The Commissioner therefore considered whether the Council gave the applicant sufficiently clear directions so that the requested information could be found without difficulty and not hidden within a mass of other information.
48. An assessment of whether the section 21 exemption can be successfully applied will be dependent on whether or not requested information is reasonably accessible to the particular applicant who requested it. Of particular relevance in this case is that a public authority wishing to rely on section 21 must make it clear how the applicant can access the specific information he or she requested.

49. The Commissioner acknowledges that the requested information may have been available to the complainant through the Council's website. However, in the Council's initial correspondence with the complainant regarding this request, and in its further correspondence with the complainant and the Commissioner, the Council did not specify which page or pages of the website contained any of the information falling within the scope of this request.
50. Having considered the matter, and the submissions provided by the Council, the Commissioner has determined that section 21(1) of the FOIA is not engaged. This is because the Commissioner does not consider this information to be reasonably accessible to the applicant as the Council did not precisely direct the applicant to the information requested. At paragraph 3 above the Council is now required to disclose the information withheld under section 21(1) to the complainant.

Other matters

51. In the Council's submission to the Commissioner's investigation, it referred to one occasion where it provided the complainant with a link to its website. The Council provided the Commissioner with a copy of the complainant's request for an internal review of 11 May 2019, within which the complainant acknowledged that the Council had provided a link to its new website on 26 April 2019. However, this Council response would predate the FOI request considered in this notice and therefore relates to an earlier request. The Commissioner reminds the Council that it is not sufficient to rely on a response to a previous request once a new request has been submitted. In this case, should the Council have wished to rely on the same website link, it should have provided this in its response to the request of 3 May 2019.
52. In the complainant's internal review request, he raised concerns about the Council's obligation under section 17(7) of the FOIA to notify an applicant of any internal review procedure and inform the applicant of their right to complain to the ICO under section 50 of the FOIA. Under the FOIA, there is no obligation for an authority to provide an internal review process. However, we would remind the Council that it is good practice, under the section 45 code of practice, to do so.

Right of Appeal

53. 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

54. 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.
55. 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

**Ben Tomes
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