

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 May 2020

Public Authority: South Kesteven District Council
Address: St Peter's Hill
Grantham
Lincs NG31 6PZ

Decision (including any steps ordered)

1. The complainant requested information from South Kesteven District Council about legal opinions and other legal documents and related correspondence, internal and external, that the Council had in its possession in mid-2017 regarding its opinion on its attitude to public safety in Non-Hazardous Developments. He also asked for information relating to the termination of the employment of three former senior officers of South Kesteven District Council.
2. The Commissioner's decision is that South Kesteven District Council has complied with FOIA in relying on the section 40(2) (personal information) FOIA exemption to withhold some information and with section 1(1) FOIA in saying that it holds no further undisclosed information. She does not require South Kesteven District Council to take any steps.

Request and response

3. The information request arose from a dispute concerning a South Kesteven District Council (SKDC) grant of planning permission that the complainant disagreed with. Following this, the complainant applied to the courts for permission to bring a Judicial Review. SKDC says that application was considered by the High Court which found it to be '*totally without merit*'; as a result, the complainant was not granted

leave to bring a Judicial Review. However, despite the Court's decision, the complainant asked SKDC to look further into related issues, which it did in 2018 and again in 2019.

4. On 12 August 2019, the complainant wrote to SKDC and requested information about legal opinions, other legal documents and related correspondence, internal and external, that the Council had in its possession in mid-2017 regarding its opinion on its attitude to aspects of public safety.
5. The complainant also asked for information relating to the termination of the employments of three former senior officers of SKDC. The information request is set out in full in the annex to this Notice.
6. SKDC responded on 24 September 2019, saying its planning, health and safety, and legal systems had been searched for relevant information. SKDC said that much of the information requested was not held. Legal advice was being withheld relying on the section 42 FOIA (legal professional privilege) exemption, while the personal information that SKDC held was being withheld relying on the section 40 FOIA (personal information) exemption.

Scope of the case

7. The complainant contacted the Commissioner on 2 December 2019 to complain about the way his request for information had been handled. He said that he believed SKDC held more information than it had so far declared and disputed SKDC's refusal to provide the information it was withholding.
8. On 14 October 2019, after further correspondence and some information disclosures, the complainant told SKDC that only two elements of his 12 August 2019 information request remained outstanding - items (ii) and (iii) of point 3 of the request. Accordingly, the Commissioner has only considered those parts of the matter.
9. During her investigation, the Commissioner gave careful consideration to detailed representations from the parties. She has also reviewed the information that SKDC are withholding.
10. SKDC assured the Commissioner that it held no further as yet undisclosed information. In her investigation, she considered the extent of the information that was in fact held by SKDC. She also considered the application by SKDC of the section 40(2) FOIA (personal information) exemption.

11. During the course of the Commissioner's investigation, SKDC told her that it no longer relied on the section 42(1) FOIA exemption and she did not consider it.
12. The complainant has emphasised his deeply held concerns about matters of effectiveness, efficiency and propriety in SKDC and also matters of public safety arising from the disputed SKDC planning consent. For the avoidance of doubt, the Commissioner makes plain that she has no powers to consider any of these matters and has not done so.

Reasons for decision

Point 3, item (ii) of the request, the ending of employment of three former senior officers of SKDC

13. SKDC confirmed that it held information falling within the scope of the request but exempted it from disclosure relying on the section 40(2) FOIA exemption.
14. SKDC has shown the withheld information to the Commissioner. She reviewed it in confidence for the purposes of her investigation. She noted that there was, within the information recorded in the withheld documents, no reference to the relevant Officers having left SKDC in relation to either the planning application or to the health and safety concerns that the complainant had raised. She saw no evidence of any activity within the withheld information that could reasonably be described as 'criminal'.
15. The Commissioner considers that the reasons for the departure of the former senior officers of SKDC are matters for them and for SKDC officers and Council Members. It is for them to decide what to put in the public domain. The Commissioner does, however, expect that where, as here, significant public funding has been applied, the amounts of the relevant payments will be made known to the tax payers, which SKDC has done.
16. In withholding the information, SKDC relied on the section 40(2) FOIA exemption.

Section 40 – personal information

17. Section 40(2) FOIA provides that information is exempt from disclosure if it is the personal data of a living individual other than the requester himself and where one of the conditions listed in section 40(3A)(3B) or 40(4A) FOIA is satisfied.

18. In this case the relevant condition is contained in section 40(3A)(a)¹ FOIA. This applies where disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the data protection (DP) principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
19. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If the information is not personal data then section 40 FOIA cannot apply.
20. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

21. Section 3(2) DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

22. The two main elements of personal data then are that the information must relate to a living person and that person must be identified or identifiable.
23. An identifiable living individual is one who can be recognised, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
24. Information will relate to a person if it is about them, is linked to them, has biographical significance for them, is used to inform decisions affecting them, or has them as its main focus.
25. In the circumstances of this case, and having reviewed the withheld information, the Commissioner is satisfied that the information relates to persons who have recently been senior officers of SKDC. She is satisfied that this information both relates to, and identifies, the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) DPA.

¹ As amended by Schedule 19 Paragraph 58(3) Data Protection Act 2018 ('the DPA').

26. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

27. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

28. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

29. In the case of a FOIA request, personal data is processed if it is disclosed in response to a request. This means that the information can only be disclosed if disclosure would be lawful, fair and transparent.

Lawful processing: Article 6(1)(f) of the GDPR

30. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the ..."* lawful bases for processing listed in the Article applies.

31. The Commissioner considers that the lawful basis most applicable in this context is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child" ².

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted"*.

32. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary for the Commissioner to consider the following three-part test:

i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

iii) **Balancing test:** Whether the above interests override the legitimate interests or fundamental rights and freedoms of the data subjects.

33. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interest test

34. In considering any legitimate interests in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern, unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

Is disclosure necessary?

35. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

36. In his representations to the Commissioner, the complainant noted that the three former senior officers of SKDC had departed with the benefit of substantial payments covered by Non-Disclosure Agreements. He said that earlier, while they were still employed by SKDC, he had been led to believe that SKDC had no legal obligation to comply with safety legislation. He was concerned that statements by SKDC about the reasons for their departures, could not be verified due to the existence of the Non-Disclosure Agreements. However, he later accepted the

Commissioner's finding following her inspection of the withheld information, that their departures had not related to placing life at risk.

37. SKDC told the Commissioner that it was not obliged to provide information which is the personal data of someone else if disclosure would contravene the DP principles.
38. SKDC added that it did hold information in respect of the departures of the three former senior officers. It confirmed to the Commissioner that no officer had left in relation to the relevant disputed grant of planning permission or to the health and public safety concerns that the complainant had raised.
39. SKDC said it recognised that a necessary balance was required between the rights and freedoms of individuals with any legitimate public interest in disclosure. SKDC had taken the view that the wider public interest was served by the publication in its accounts of exit packages and termination agreements. SKDC believed this represented the appropriate level of transparency.
40. The Commissioner has seen that SKDC has made public information about the quantum of the monies paid to the former senior SKDC officers from the public purse but that the detailed reasons for their departures had been withheld, as they were subject to non-disclosure agreements.
41. The Commissioner saw too that the complainant had sought to bring Judicial Review proceedings arising from his concerns about SKDC's approval of the disputed planning matter and his concerns about public safety that arose from its approval by SKDC. However, the application for Judicial Review, which effectively formed an independent review of these matters, had been dismissed decisively by the Court.
42. The Commissioner noted that SKDC had therefore already made public relevant information about the cost to the public purse of the departures of its three former senior officers. She noted too that the complainant's other concerns have been the subject of independent scrutiny by the Court. Further disclosures are therefore not necessary to address the public interest in understanding any public concern about cost and independent scrutiny.
43. The Commissioner has reviewed the withheld information and saw from her inspection of it that there is within it no recorded information to connect the departure of the former officers to either the disputed planning approval or to the health and public safety concerns raised by the complainant. She has also not seen any suggestion within the withheld information of any activity that might reasonably be described

as 'criminal'. Beyond those issues, the Commissioner regards the reasons for the departure of the three former senior officers of SKDC as matters for them and for the officers and Members of SKDC.

44. The Commissioner needs to strike a necessary balance between the rights and freedoms of individuals and the legitimate interest in disclosure of personal information. The Commissioner's default position is in favour of protecting the privacy of individuals and she has taken the view here, along lines which the courts have endorsed in other cases, that the wider public interest in transparency has been served by publication, in the relevant SKDC financial accounts, of exit packages and termination agreements.
45. The Commissioner therefore decided that no further disclosures were necessary to satisfy the legitimate interest of the public. This means that disclosure of the withheld information would not meet the requirements of DP principle (a) and would therefore be unlawful.
46. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she did not go on to conduct a balancing test.

The Commissioner's decision

47. The Commissioner therefore decided that SKDC was entitled to withhold the information under section 40(2) FOIA, by way of section 40(3A)(a) FOIA.

Point 3, item (iii) of the request, the external authorities cited by the complainant

48. SKDC told the Commissioner that it held no recorded information to suggest that any of the persons and bodies listed by the complainant in his request had been contacted by SKDC and assured her that it held no record of any relevant communications with them. The complainant was reluctant to accept this assurance given the gravity with which he viewed the issues raised by him.
49. The Commissioner noted that the SKDC external auditors were aware of the complainant's concerns but did not correspond with SKDC about them. The Commissioner has noted the other bodies listed by the complainant in his request (and listed in the annex to this Decision Notice). However, she believes that any decision about whether or not to respond to his concerns is a matter for those bodies to decide for themselves.
50. In further correspondence, the complainant said that political and social ramifications could result from the decisions and actions of SKDC in its

approach to safety legislation which, if replicated by other local authorities, might have a significant impact on the Right to Life of UK citizens. He therefore asked the Commissioner to proceed to a formal decision, which she has done.

Section 1 – general right of access to information held by public authorities

51. Section 1(1) 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 or her."

52. In cases where, as here, there is a dispute over whether or not certain information is held, the Commissioner applies the civil test of the balance of probabilities in making her determination. This test is in line with the approach taken by the First-tier Tribunal (Information Rights) in matters which it has considered in the past.
53. The Commissioner has considered the complainant's evidence and arguments. She also considered representations from SKDC about the measures it took to be sure about whether or not relevant information was held. She also considered if there was any reason for it to be inherently likely or unlikely that other undeclared information was held by SKDC, but she has seen none.
54. The complainant's reasons for believing that SKDC hold further, as yet undisclosed, information rely on his assumptions about how SKDC and other persons would, or should in his view, respond to the situation that arose from the grant of the disputed planning approval. He has not provided the Commissioner with any objective evidence supporting his belief.
55. SKDC said that the information requested related directly to the disputed planning approval. SKDC added that, when searching for relevant information, it had searched its planning system, legal system and email archive. SKDC had made electronic searches of its records using appropriate search terms but no further information had been located.
56. The Commissioner is satisfied that the searches carried out by SKDC would have been likely to retrieve relevant information if any were held.

She has therefore determined that, on the balance of probabilities, SKDC was correct to say that it did not hold further relevant information

Right of appeal

57. 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

58. 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.
59. 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

**Dr R Wernham
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Annex

Information Request

On 12 August 2019 the complainant made the following request for information from South Kesteven District Council (SKDC) via an entry on the WhatDoTheyKnow website:

I formally ask under the Freedom of Information Act that the information detailed below be provided: -

1. Copy of the legal opinions, case law decisions and other legal documents SKDC had in its possession in mid-2017 which supported SKDC opinion on the following attitude to public safety in Non-Hazardous Developments: -

- The Health and Safety at Work Act is not a legal and/or mandatory requirement on a Local Government Authority when undertaking their duties.*
- The identification of hazards and elimination of risk by risk assessment analysis to ensure the safety of the public is not placed at unnecessary risk is not a legal and/or mandatory requirement on a Local Government Authority when undertaking their duties.*
- The citizens of the UK have no redress under UK legislation to protect themselves or their families if a decision by a Local Government Authority when determining Non-Hazardous Developments places their health, safety and wellbeing at risk.*

2. Copy of all communications including notifications, forms, letters, emails, minutes of meeting, date of telephone calls, note of telephone calls, file notes, diary notes, in which the Councillors of SKDC have requested details and/or an explanation and/or copies of the legal opinions, case law decisions and other legal documents SKDC had in its possession in mid-2017 which supported SKDC opinion as expressed in Item 1 above.

3. Copy of all communications including notifications, forms, letters, emails, minutes of meeting, date of telephone calls, note of telephone calls, file notes, diary notes, in respect to any External Authority who have requested details and/or information regarding the events surrounding the following three issues (i) an explanation and/or copies of the legal opinions, case law decisions and other legal documents SKDC had in its possession in mid-2017 which supported SKDC opinion as expressed in Item 1 above, (ii) the termination of employment of the three senior SKDC Officers ([role titles redacted]) with substantial payoffs which have been covered by Non-Disclosure Agreements who made statements to the effect that a Local Authority has no duty of care or statutory obligation to consider the health, safety and welfare of the citizens of the UK when determining Non-Hazardous Developments and (iii) how the opinions of SKDC on safety legislation were establish [sic] and how they came to be placed in the public

domain as mandatory requirements without first seeking clarification or amendment to the legislation from the relevant Government Department. The External Authorities to include but not limited to the following named persons and/or any representative from their office/department/organisation: -

- *Sir John Hayes MP*
- *Nick Boles MP*
- *[name redacted] and/or [name redacted] (High Court Judges)*
- *The Lord Chief Justice*
- *The Minister of State for Justice*
- *The Attorney General*
- *Chairman Grenfell Inquiry*
- *The Chief Constable of Lincolnshire Police*
- *London Metropolitan Police*
- *Chief Executive Health and Safety Executive*
- *SKDC External Auditors (Grant Thornton)*
- *Chairman Conservative Party*
- *South Holland and The Deepings Conservative Association*
- *Grantham and Stamford Conservative Association*
- *Chief Executive, Parliamentary and Secretariat Office HSE*
- *The Minister for Disabled People, Health and Work*
- *The Prime Minister*

The following correspondence relates to the above request for information

- *Letter dated 4 November 2016 from the [role title redacted] – Corporate Focus in which he states as part of a Stage 3 Complaint response "As a general rule factors covered by other legislation e.g. the Health & Safety at Work Act, are not material planning considerations."*
- *Letter dated 12 November 2016 to the [role title redacted] which confirms that in response to issues raised with the [role title redacted] he found it difficult to respond to the specific issues I had raised on the responsibilities of SKDC and concluded the debate by stating "There is a fundamental difference in views between SKDC and myself on how a duty of care and statutory obligation apply to an LPA It is SKDC view that there is no requirement of a duty of care or statutory obligations in respect to public safety on an LPA when determining a planning application"*
- *Email dated 26 April 2017 to the [role title redacted] in which the request was made following comments from Councillors that despite my extensive and unique position in the management of Major Hazard Developments my understanding on safety legislation was out of date and has been superseded in recent years and in support of this claim SKDC has in its possession legal opinions, case law decisions and other legal documents that supports the opinion of SKDC that in terms of public safety the Health and Safety at Work Act and the identification of hazards and elimination of risk by risk assessment analysis are not legal or mandatory requirements when*

Reference: FS50894930

determining a planning application by a Local Planning (Non-Hazardous Developments).

I would prefer to receive the information electronically.