

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 November 2020

Public Authority: St Albans Parish Council
Address: clerk@stalbanpc.org

Decision (including any steps ordered)

1. The complainant requested information relating to various aspects of the St Albans Parish Council's (the Council's) decisions and processes.
2. The Council disclosed information in response to the multi-part request, but withheld some information on the basis that section 40(2) (personal information) of the FOIA applied.
3. The complainant believed that the Council held more information within the scope of the request. They also disputed the redactions applied to the information provided.
4. The Commissioner's decision is that, on the balance of probabilities, the Council has disclosed to the complainant all the information it holds that falls within the scope of the request.
5. However, she found that the Council had applied section 40(2) incorrectly to some of the withheld information, namely the email addresses of Councillors.
6. The Commissioner requires the Council to take the following step to ensure compliance with the legislation:
 - disclose the withheld Councillors' email addresses.
7. The Council must take this step 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

8. On 10 December 2019, the complainant wrote to the Council and requested information in the following terms:

"Information relating to:

- *St Albans Parish Council's decisions relating to Warren Action Group ("WAG") grant applications (see Appendix items 1-5);*
- *Advertising of WAG events (see Appendix item 6);*
- *St Albans Parish Council's invitation to meet with WAG (see Appendix item 7);*
- *St Albans Parish Council's co-option process (see Appendix item 8);*
- *The holding of Parish Council meetings at private premises (see Appendix item 9);*
- *How St Albans Parish Council deals with correspondence from WAG (see Appendix items 10-13); and*
- *How and why St Albans Parish Council excludes press and public from agenda items (see Appendix item 14).*

We have attached an Appendix (referenced above) describing the information requested to assist you in narrowing down your search and minimising the amount of time in dealing with this request".

9. The Council responded on 5 January 2020. It denied holding some of the requested information. With respect to the information within the scope of the request that was held, the Council provided the requested information or provided links to the information. Redactions were applied to a small amount of the information provided, although no exemption was cited.
10. Following an internal review the Council wrote to the complainant on 3 March 2020. With the exception of the provision of one further document, it maintained its original position, clarifying that only personal data of individuals, including email addresses, was redacted.

Scope of the case

11. The complainant contacted the Commissioner on 4 March 2020 to complain about the way their request for information had been handled.

12. They were dissatisfied with the quality of the Council's response. Specifically they disputed that the Council did not hold recorded information within the scope of the majority of the multi-part request. The complainant also disputed the Council's redaction of the information that was provided.
13. With respect to the disputed redactions, the complainant told the Commissioner:

"In respect of the redactions of email addresses, some of the redactions are of Parish Councillors' official Council email accounts, which are public record and the redaction only serves to remove transparency and accountability".
14. The complainant also raised concerns that the Council may have deliberately concealed information from disclosure, which is an offence under section 77 (offence of altering etc. records with intent to prevent disclosure) of the FOIA. The ICO's Criminal Investigations Team considered this allegation and judged there to be insufficient evidence to substantiate it.
15. During the course of the Commissioner's investigation, the Council confirmed that it did not hold recorded information within the scope of the majority of the multi-part request. It also confirmed its application of section 40 to withhold a small amount of personal information.
16. The analysis below considers whether, on the civil standard of the balance of probabilities, the Council held further information within the scope of the request.
17. The analysis below also considers whether, when providing information within the scope of the request, the Council correctly applied section 40(2) of the FOIA (personal information) to withhold details of email addresses.

Reasons for decision

Section 1 general right of access

18. Section 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."

19. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities.
20. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
21. In this case, the Commissioner has sought to determine whether, on the balance of probabilities, the Council held further information within the scope of the request.
22. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, she will consider any other information or explanation offered by the public authority which is relevant to her determination.

The complainant's view

23. The complainant disputed the amount of information provided in response to their request for information. In that respect, and with reference to the terminology used by the Council, they told the Commissioner:

"Out of scope stated for the majority of requests – we had good reason to believe requested information existed as recorded information and was within the scope of the FOIA".

24. In support of that view, the complainant explained the basis on which they believed that the issues within the scope of the multi-part request had been discussed by the Council, namely an audio recording.

The Council's view

25. In its correspondence with the complainant, the Council said:

"Much of the information you requested is asking for motivation for decision making, information councillors referred to in their statements etc. It should have been made clear that said information does not exist in recorded form because it is based on

conversations people had and recalled. Information in people's memory is not subject to Freedom of Information requests and thus out of scope".

26. It also explained that the Council does not audio record telephone conversations and told the complainant:

"The council does not record its meetings by electronic means. It therefore has no audio or video files of its meetings".

27. During the course of her investigation, the Commissioner asked the Council to describe the searches it carried out for information falling within the scope of the request, and why these searches would have been likely to retrieve any relevant information.

28. She also asked other questions, as is her usual practice, relating to how the Council established whether or not it held further information within the scope of the request.

29. In a comprehensive submission to the Commissioner, the Council told her:

"In 2019 the Parish Council did not record parish council meetings, not as audio or video recordings ... The Council does not record telephone conversations".

30. The Council confirmed that:

"All councillors were asked on several occasions if they had any of the information requested in any recorded format, on paper, or as an audio or even less likely video recording.

... Councillors confirmed to me that they had searched their personal electronic devices that they use to access their council email and store council information but had not found anything that was not already listed".

31. The Council also confirmed that searches had been conducted of the Council's laptop and of text messages to the Council's mobile phone. The Council also explained that any notes relating to council meetings are destroyed once the Council has approved the minutes as a true record.

32. Re-iterating what it had told the complainant, the Council told the Commissioner:

"Much of the information requested refers to individual's thoughts, emotions or knowledge, none of which is available in a format within the scope of the Freedom of Information Act".

33. With respect to the searches it had conducted for the requested information, the Council explained to the Commissioner:

"Much of the information requested was deemed to be out of the scope of the Freedom of Information Act. The requests asked about motivations, reasons, background information. It asks for "copies of information". Much of the information requested would only ever have been oral, exchanged over the phone or in personal conversation face to face. As the council does not record phone conversations, there never has been a record of that information that could be shared. Personal conversations are also not audio or video recorded".

34. It explained that the Council serves a small community, and that while individual members of the Council may have information as a result of private conversations:

".. it is not information "the Council" has...".

The Commissioner's view

35. The Commissioner acknowledges that the requested information is clearly of interest to the complainant. The Commissioner also acknowledges that the complainant explained why they consider that the Council would hold further information within the scope of the request and that they provided evidence of their belief that the Council held further information within the scope of its request.
36. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of the FOIA.
37. Having considered the Council's response, and on the basis of the evidence provided to her, the Commissioner is satisfied that the Council carried out necessary searches to identify the requested information that was held at the time of the request.
38. The Commissioner has also taken into account the outcome of the investigation by her Criminal Investigation Team into the complainant's concerns that the Council may have deliberately concealed information from disclosure.
39. On the balance of probabilities, the Commissioner is satisfied that the Council did not hold further information within the scope of the request.
40. The Commissioner therefore considers that the Council complied with its obligation under section 1(1) of the FOIA.

41. The Commissioner has next considered the Council's application of section 40 to the small amount of information that was withheld.

Section 40 personal information

42. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
43. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
44. 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 it is not personal data then section 40 of the FOIA cannot apply.
45. 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?

46. Section 3(2) of the DPA defines personal data as:

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

47. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
48. An identifiable living individual is one who can be identified, 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.
49. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

50. The Commissioner acknowledges that the complainant disputes that the withheld email addresses are personal information. In that respect, the complainant told the Commissioner:

"Information which is not personal data (e.g. names and email address of elected members of the Council) was redacted, preventing the identification of Councillors – obstructing accountability for actions as elected representatives..."

51. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to individuals, some of whom are Councillors. 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) of the DPA.
52. As set out above, information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus. In this case, each email address is either personal or, in the case of email addresses for elected members of the Council, specific to the individual in the post rather than the post itself. The details therefore relate to them and have them as the main focus.
53. The Commissioner is satisfied that the individuals could be identified from their email addresses and that, consequently, the requested information is personal data.
54. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
55. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

56. 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"

57. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
58. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

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

59. The Commissioner considers that the lawful basis most applicable 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.

60. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary 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 interest(s) or fundamental rights and freedoms of the data subject.

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

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".

Legitimate interests

62. In considering any legitimate interest(s) 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 interest(s) 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.
63. The Commissioner acknowledges that the complainant considers that there is a legitimate interest in disclosure of the names and email address of elected members of the Council, namely accountability and transparency. The Commissioner accepts that there is a legitimate interest in the public having confidence in the accountability and transparency of public authorities.
64. The complainant did not identify any legitimate interest in disclosure of the names and email addresses of other individuals. In the absence of any legitimate interest in the disclosure of that information, the Commissioner finds that information was correctly withheld. She will go on to consider whether disclosure of the councillors' personal data is necessary.

Is disclosure necessary?

65. '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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
66. The Commissioner accepts that the content of the documentation has been disclosed. However, she is prepared to accept that disclosure of the small amount of withheld information is necessary to meet the interests identified above, namely accountability and transparency.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

67. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the

information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

68. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;
- whether the information is already in the public domain;
- whether the information is already known to some individuals;
- whether the individual expressed concern to the disclosure; and
- the reasonable expectations of the individual.

69. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

70. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

71. The Commissioner acknowledges that, in support of its decision to redact the email addresses of Councillors, the Council explained:

*"Removing the **who** did not diminish the answer to the question whilst protecting the individual's personal data".*

72. The Commissioner recognises that details of the elected councillors are available from the Council website at <https://stalbanpc.org/councillors/> and that the website includes details of the Parish Councillors' official Council email addresses. While she accepts that Councillors may change over time, the Commissioner is therefore satisfied that the email addresses of Councillors for this Council are known, and that their roles are public facing roles. She therefore considers that Councillors would reasonably expect that their email address would be disclosed in response to an FOI request.

73. The Commissioner has considered the wording of the request. She has also had the benefit of viewing the four pages of appendix, referred to in the request, which describe, in great detail, the specific information requested.

74. The Commissioner considers that the multi-part request in this case, which covers information relating to a number of topics, seeks to establish, for example, reasons for decisions taken by the Council, other

issues that were considered, and information that was relied on to make various statements.

75. In the absence of any arguments from the Council about the expectations of the individuals concerned, or about any specific harm or distress that disclosure may cause, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of the information would be lawful.

Fairness and transparency

76. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
77. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
78. The requirement for transparency is met because as a public authority, the Council is subject to the FOIA.
79. In this instance, the Commissioner has decided that the Council has failed to demonstrate that the exemption at section 40(2) is engaged.

Right of appeal

80. 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

81. 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.

82. 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

**Laura Tomkinson
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