

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 May 2021

Public Authority: Holme Parish Council
Address: holmeparishcouncil@gmail.com

Decision (including any steps ordered)

1. The complainant has requested information relating to outstanding audit information. Holme Parish Council¹ refused the request in reliance on the exemption at section 40(2) (personal data) of FOIA.
2. The Commissioner's decision is that the Council has correctly applied section 40(2) of FOIA to withhold the information. No steps are required.

Request and response

3. On 4 April 2020 the complainant wrote to the Council to advise that he was unable to find details of the Council's recent audits.
4. On 8 April 2020 the Council advised the complainant that the website was being updated. It provided a link to what it described as "All of the documents required by law for the FY [financial year] 2018-19". The Council further advised that some of the documents for 2019-20 were also available, but that the audit itself had been delayed because of the coronavirus pandemic.
5. On 10 April 2020 the complainant clarified that his interest was "about some of the responses and recommendations in the external audit report for the last couple of years or so". The complainant said he had followed the link provided but had been unable to find this information.

¹ For the avoidance of doubt, this decision notice relates to Holme Parish Council, Cumbria: <http://www.holme-westmorland-pc.gov.uk/>

6. On 11 April 2020 the Council advised the complainant that the information he requested, ie the external audit reports, did not exist for 2018/19. The Council said that no external audit was required because its income and expenditure was below £25,000.
7. On 13 April 2020 the complainant advised that Council that he was aware that "some extra audit work has been necessary due to objections from residents". The complainant asked the Council to advise whether this was correct, to provide a brief explanation for each year from 2015/2016 to date, and to confirm whether there were any extra costs involved.
8. On 15 April 2020 the Council asked the complainant to clarify his interest in the information, and whether he was a local resident.
9. On 17 April 2020 the complainant advised the Council that he was now making a request under FOIA for the information relating to objections.
10. On 20 April 2020 the Council clarified that it had sought to establish whether the complainant was a local elector because it believed local electors to have greater rights to access information. The Council also stated that no formal objections had been raised, therefore it could not provide him with any further information.
11. On 21 April 2020 the complainant referred the Council to information published by Smaller Authorities' Audit Appointments Ltd (SAAA) which indicated that the Council's audit report was outstanding. This information stated that audits remained open "due to ongoing investigation by the auditor into objections still outstanding from a previous year." The complainant interpreted this as indicating that objections were outstanding in the Council's case and requested an explanation.
12. The complainant sent a reminder to the Council on 1 May 2020, but received no response. He requested an internal review on 22 May 2020.
13. The Council responded to the complainant on 26 May 2020. The Council stated that it did not see the need to conduct an internal review since it did not hold the requested information.
14. On 2 June 2020 the complainant submitted a fresh, although linked, request for information:
 1. Please confirm that Holme parish council does have 'open accounts' for 2015-16.
 2. Please provide an explanation as to why these accounts are still 'open'.

3. Assuming that the 2015-16 accounts are 'open' due to objections from an elector, please provide me with for [sic] a copy of the information/details that have resulted in these council accounts still being 'open' and with the External Audit team.
15. The Council responded to the complainant on 12 June 2020. It advised that the 2015-16 accounts remained outstanding because the Covid-19 pandemic prevented the auditors from accessing their offices. The Council also reiterated that no objections had been received from members of the public, and that the reason was an "internal matter".

Scope of the case

16. The complainant contacted the Commissioner on 14 June 2020 to complain about the way his requests for information had been handled.
17. The Commissioner contacted the Council on 11 August 2020 to advise that, in her view, the Council had failed to issue a refusal notice in respect of the request of 2 June 2020 which complied with the requirements of section 17 of FOIA. The Commissioner further noted that the Council had refused to conduct an internal review of the request of 17 April 2020. Whilst accepting that there is no statutory requirement to conduct such a review, the Commissioner asked the Council to do so and issue a revised response that complied with FOIA.
18. Following the Commissioner's intervention the Council conducted an internal review and communicated the outcome to the complainant on 5 October 2020. The Council advised that it did hold some information that was relevant to the requests of 17 April 2020 and 2 June 2020. However the Council said that the information in question was personal data, and was exempt from disclosure by virtue of section 40(2) of FOIA.
19. On 6 October 2020 the complainant confirmed to the Commissioner that he remained dissatisfied with the Council's response. The complainant maintained that he wanted to know why the accounts were still open.
20. The Commissioner considers that the scope of her investigation is to determine whether the Council was entitled to rely on the exemption at section 40(2) of FOIA in respect of the withheld information falling within the scope of part 2 of the request of 2 June 2020. The Commissioner has not separately considered the request of 17 April 2020 since the information in question overlaps with that requested on 2 June 2020.

Reasons for decision

Section 40 – personal information

21. Section 40(2) of 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.
22. In this case the relevant condition is set out at section 40(3A)(a)². This applies where the disclosure of the information to a member of the public would contravene any of the principles relating to the processing of personal data (the principles), as set out in Article 5 of the General Data Protection Regulation (the GDPR).
23. The Commissioner must first determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (the DPA). If it is not personal data then section 40 of FOIA cannot apply.
24. 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 principles.

Is the information personal data?

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

“any information relating to an identified or identifiable living individual”.

26. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
27. 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.

² As amended by Schedule 19 Paragraph 58(3) DPA.

28. 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.
29. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information "relates to" one or more individuals, or data subjects, and does not relate to the complainant. The Commissioner is satisfied that this information both relates to and identifies the individual or individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
30. The fact that information is personal data does not automatically mean that it is exempt from disclosure under FOIA. The Commissioner must next determine whether disclosure would contravene any of the principles.
31. The most relevant principle in this case is principle (a).

Would disclosure contravene principle (a)?

32. 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".

33. In the case of request under FOIA, 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.
34. 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

35. 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*³.

36. 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 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.
37. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

38. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
39. Further, 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. They may be

³ 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".

compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

40. In this case the Commissioner accepts that there is a legitimate interest in disclosing the requested information. It would inform the public as to the reasons for the Council's accounts being delayed. There is a general interest in accountability and transparency in the affairs of public authorities, particularly regarding the way authorities account for public money. The complainant has confirmed that he is a local elector, which the Commissioner also considers to be a legitimate interest in pursuing the request.

Is disclosure necessary?

41. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least restrictive means of achieving the legitimate aim in question.

42. The Commissioner is also assisted by the First Tier Tribunal's comments regarding necessity:

*"A broad concept of protecting, from unfair or unjustified disclosure, the individuals whose personal data has been requested is a thread that runs through the data protection principles, including the determination of what is "necessary" for the purpose of identifying a legitimate interest. In order to qualify as being "necessary" there must be a pressing social need for it."*⁴

43. In the Commissioner's view it is reasonable to argue that disclosure of the withheld information is necessary since it would clearly meet the legitimate interest in accountability and transparency identified above.
44. The Commissioner has considered whether the legitimate interest could be met in a less intrusive manner, but concludes that this is not possible. The Commissioner accepts that disclosure of the withheld information is necessary in order to meet the legitimate interest in disclosure.

⁴ Ian McFerran v the Information Commissioner, appeal no EA/2012/0030, para 10

Confidential annex

45. In reaching this conclusion the Commissioner is mindful that she has had the benefit of inspecting the withheld information, and must be careful to avoid inadvertently disclosing any part of it in this decision notice. The Commissioner has therefore set out her more detailed analysis of the withheld information in a confidential annex which is provided to the public authority but not to the complainant. The Commissioner recognises that it is important to include as much detail of her analysis as possible in the decision notice, so as to ensure that the parties, and the wider public, are fully informed as to the reasoning behind the decision.
46. However in this case the Commissioner cannot set out her detailed analysis without describing the content of the withheld information itself. Therefore the Commissioner considers that the confidential annex is required in order to protect the confidentiality of the withheld information. The Commissioner is satisfied that the decision notice which is provided to both parties contains sufficient information to explain her decision in this case.

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

47. The third part of the assessment balances 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 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.
48. 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.

49. In the Commissioner's view, a key issue is whether the individual or 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 the personal data is held.
50. In this case the Commissioner notes that the withheld information is not currently in the public domain. For the reasons set out in the confidential annex the Commissioner is satisfied that the individual or individuals would reasonably expect that their personal data would not be disclosed into the public domain.
51. Furthermore the Commissioner finds that disclosure of the withheld information into the public domain would be very likely to cause distress to the individual or individuals, and that this would be unwarranted.
52. Consequently the Commissioner is not satisfied that the Council may rely on Article 6(1)(f) as providing a lawful basis for disclosing the third party personal data. It follows that disclosure of the withheld information under FOIA would be unlawful and would contravene principle (a). The Commissioner concludes that the Council was entitled to rely on section 40(2) of FOIA as a basis for withholding this information.

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

Sarah O’Cathain
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