

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 8 August 2022

**Public Authority:** Marldon Parish Council

**Address:** clerk@marldonparishcouncil.gov.uk

#### **Decision (including any steps ordered)**

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1. The complainant has requested copies of emails regarding alleged wrongdoing.
2. Marldon Parish Council denied holding some information, and withheld some information on the basis of section 40(2) (personal information).
3. The Commissioner's decision is that the council has correctly applied section 40(2) to the withheld information, and that on the balance of probabilities, no further information is held. However the council breached section 17 by failing to issue an adequate refusal notice.
4. The Commissioner does not require any steps.

## Request and response

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5. On 3 June 2021 the complainant requested information from Marldon Parish Council ("the council") in the following terms:

"This request concerns one of two linked articles published yesterday:[redacted]

Please disclose the following information by way of the Freedom of Information Act, 2000:

1. Copies of invoices received by Marldon Parish Council (the Council) from any firm of solicitors between the dates 1st January, 2021 and 31st May, 2021.
  2. Copies of email correspondence between the Chairman and Clerk. Relevant dates: 1st January, 2021 and 31st May, 2021. Relevant search terms: Where either the subject line or body text contain any of the words - 'harassment', 'harassing', 'threat', 'threats', 'libel', 'libellous', 'perpetrator', 'money launderer' 'legal action', 'lawyers', 'solicitors'.
  3. Copies of correspondence between the Council and the Council's insurers relating to the Confidential Matter as referred to in the web-linked article. That is to say, relating to legal expenses cover for the Clerk, [redacted]."
6. The council responded on 8 June 2021. It denied holding any information in scope of question 1. It withheld the information in scope of questions 2 and 3 on the basis of section 40(2) (personal information), section 41 (confidential information), section 42 (legal professional privilege) and section 31(1)(a) (prejudice to the prevention or detection of crime).
7. The complainant requested an internal review on 14 June 2021, the letter stated that they:
- accepted the council's position on question 1.
  - disputed "the blanket application of four different exemptions across all of the information requested at parts 2. And 3."
8. The council provided a response to the complainant on 14 June 2021 in which it advised them to complain directly to the Information Commissioner.

## Scope of the case

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9. The complainant contacted the Commissioner on 15 June 2021 to complain about the way their request for information had been handled. Specifically, the council's refusal to carry out an internal review, and its application of the exemptions to questions 2 and 3.
10. During the course of the investigation, the council advised the Commissioner that it was withholding the information in scope of question 2 on the basis of section 40(2), and that it holds no information which is in scope of question 3.
11. The scope of this case is to determine whether the council is correct to withhold information on the basis of section 40(2) and whether, on the balance of probabilities, any information is held which is in scope of question 3. He will also consider whether it made any procedural errors in its handling of the request.

## Reasons for decision

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### Section 40 personal information

12. 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.
13. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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 UK General Data Protection Regulation ('UK GDPR').
14. 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.
15. 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.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

***Is the information personal data?***

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

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

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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.
19. 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.
20. The Commissioner has viewed the withheld information which comprises of email correspondence between the chairman and the parish clerk. The subject matter of the emails relates to allegations made by a third party about the parish clerk. Incidents involving the police regarding a harassment case and allegations that another third party has criminal convictions are also referred to. Other individuals are also named, and some contact details are included.
21. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the parish clerk, a number of council officers, members of the police and a number of third parties. She is satisfied that this information both relates to and identifies the data subjects concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
22. 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.
23. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

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

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

25. 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.
26. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.
27. In addition, if the requested data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the UK GDPR.

***Is the information criminal offence data?***

28. Information relating to criminal convictions and offences is given special status in the UK GDPR.
29. Article 10 of the UK GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:
  - (a) *The alleged commission of offences by the data subject; or*
  - (b) *Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.*
30. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include some criminal offence data. She has reached this conclusion on the basis that allegations of criminal activity for a named individual are referenced in the withheld information.
31. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.
32. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under the FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
33. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being

disclosed to the world in response to the FOIA request or that they have deliberately made this data public.

34. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.
35. The Commissioner has gone on to consider whether there is an Article 6 basis for processing the remaining withheld information.

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

36. Article 6(1) of the UK 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.
37. 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"<sup>2</sup>.*

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

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<sup>2</sup> 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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".*

- 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.

39. 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*

40. 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.
41. The complainant raises legitimate interests in transparency and accountability of the council regarding accusations against the clerk and the oversight provided by the chairman.

*Is disclosure necessary?*

42. '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.
43. Disclosure of the withheld information would provide transparency of the matters and actions, in relation to the allegations, which were considered by the council.

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

44. 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.

45. 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.
46. 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.
47. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
48. The withheld information identifies and relates to a number of individuals. The individual linked to the criminal offence data has already been considered and therefore is not discussed further here. The other key individuals are:
  - Named members of the public who are linked to the accusations and alleged defamatory emails in some way.
  - The alleged actions and police involvement relating to one of the members of the public.
  - The clerk and their discussions on the matter and references to historical incidents and alleged defamatory actions.
49. The Commissioner considers that the members of the public referenced in the emails have a strong and reasonable expectation that their alleged actions would not be disclosed publicly. Neither would their accusatory emails to the council be disclosed.
50. The information contains allegations made by a member of the public about the clerk, citing some alleged connections with criminals, which the clerk states are defamatory. The Commissioner considers that the release of the information could have a harmful effect or cause distress to both the clerk and the member of the public.



51. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
52. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

### **The Commissioner's view**

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

### **Section 1 – General right of access to information**

54. 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.
55. Section 1(1) requires that any person making a request for information to a public authority must be informed in writing by the public authority whether it holds information relevant to the request, and if so, to have that information communicated to them. This is subject to any exclusions or exemptions that may apply.
56. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
57. In other words, in order to determine such complaints, the ICO must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).

### The council's position

58. The council states that it has examined all the emails between the council and its insurers. It states that it has not identified any content that indicates that legal cover was provided, or even considered, for the clerk.
59. The council states that its position is that "legal expenses cover was not provided for the clerk by our insurers."
60. Therefore it maintains that no information is held within the scope of the request because legal expense cover was not provided.

The Commissioner's conclusion

61. The Commissioner has considered the council's position, in conjunction with the request.
62. The council has confirmed to the Commissioner that it did not provide legal expense cover for the parish clerk.
63. There is no contradictory evidence available to the Commissioner that indicates that the council's position is wrong.
64. On this basis the Commissioner has concluded that, on the balance of probabilities, the requested information is not held.

**Sections 10 and 17**

65. 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".
66. Section 10(1) of the FOIA states that a public authority must respond to a request promptly and "not later than the twentieth working day following the date of the receipt".
67. Section 17(1) of the FOIA states that: "A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information 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.”

68. The council changed its position during the course of the Commissioner’s investigation.
69. It failed to communicate the changed position to the complainant, within the time for compliance.
70. The council has therefore breached sections 10(1) and 17(1) of the FOIA.
71. The Commissioner does not require any steps as the position has been documented within this decision notice.

## **Other matters**

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### Internal Review

72. It may be the case that the council, being a relatively small public authority, does not receive many FOIA requests and has not built up the necessary experience to deal efficiently with such requests.
73. There is no statutory requirement or time limit within the FOIA for carrying out an internal review. However, the Commissioner considers that internal reviews should normally be done, if requested, and take no longer than 20 working days and never longer than 40 working days.
74. The Commissioner notes that the council refused to provide an internal review. He considers this as being poor practice.

## Right of appeal

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75. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

76. 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.
77. 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 .....**

**Janet Wyles**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**