

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 April 2022

Public Authority: Chrishall Parish Council
Address: chrishallclerk@gmail.com

Decision (including any steps ordered)

1. The complainant has requested from Chrishall Parish Council ("the Council") the audio and video recordings of a Council meeting. The Council withheld the requested information under section 40 (personal information) of the Freedom of Information Act ("the FOIA").
2. The Commissioner's decision is that the Council was entitled to withhold the requested information under section 40(1) (personal data of the applicant) and section 40(2) (personal data of third parties) of the FOIA.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 22 June 2021, the complainant wrote to the Council and requested information in the following terms:

"I request under GDPR and also FOIA a copy of the audio and video recording made by the parish councillors of tonight's meeting."

5. The Council responded on 14 July 2021. It stated that the information was withheld under the exemption provided by section 40 (personal information) of the FOIA.
6. Following an internal review, the Council wrote to the complainant on 20 July 2021. It maintained its earlier response.

Scope of the case

7. The complainant initially contacted the Commissioner on 14 July 2021 to complain about the way their request for information had been handled.
8. The Commissioner understands that the requested information represents separate audio and video recordings of a Council meeting held on 22 June 2021. The Commissioner further understands that these recordings contain the complainant's own personal data, in addition to the personal data of third parties. On this basis, the Commissioner has separately considered the complainant's rights in a related case under the Data Protection Act 2018 ("the DPA"), as part of which the Council elected to disclose the audio recording to the complainant on 29 September 2021. The Commissioner has since provided the complainant with a determination on that case under the DPA (under the Reference IC-125180-X3L5).
9. The Commissioner is responsible as regulator for both the FOIA and DPA. Therefore, whilst this decision notice considers the request under the terms of the FOIA, it is appropriate for the Commissioner to have regard to the related determination they have made under the DPA.
10. The scope of this case and of the following analysis is whether the Council was entitled to rely upon section 40(1) and section 40(2) of the FOIA to withhold the requested information.

Reasons for decision

Section 40(1) – Personal data of the applicant

11. Section 40(1) of the FOIA states that:

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

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

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

13. In this particular case, the Commissioner has identified (in the related determination under the DPA) that the requested information contains the requestor's own personal data. As such, the Commissioner must find that this information is exempt under section 40(1).

14. Section 40(1) is an absolute exemption and there is no requirement for the Commissioner to consider the balance of public interest.

Section 40(2) - Personal data of third parties

15. 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 requestor and where one of the conditions listed in section 40(3A), (3B) or 40(4A) is satisfied.
16. 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 UK General Data Protection Regulation ("the UK GDPR").
17. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data, then section 40 of the FOIA cannot apply.
18. 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?

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

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

20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. 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.
22. 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 2018.

23. In the circumstances of this case, the Commissioner has considered the information in the related determination under the DPA and has found that it represents the personal data of third parties. The Commissioner is also satisfied that this information both relates to and identifies the third parties concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
24. 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.
25. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

26. 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".

27. 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.
28. 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.

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

29. 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.
30. 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 child².

31. 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:-
- 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.
32. 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

33. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requestor'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 requestor is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to

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 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".

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

34. In the circumstances of this case, the Commissioner is aware that the information has been requested in relation to concerns held by the complainant about matters discussed in a Council meeting.

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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
36. In the circumstances of this case, the Commissioner has considered the information in a related determination under the DPA, as part of which the Council elected to disclose the audio recording to the complainant under the terms of the DPA. It is reasonable for the Commissioner to consider that the prior disclosure of the audio recording to the complainant means that the legitimate aim under the FOIA has seemingly already been addressed. As such, it is also reasonable for the Commissioner to consider that the test of necessity is not met, as an alternative measure (the disclosure of the audio recording under the terms of the DPA) means that the public disclosure of both the audio and video recordings under the terms of the FOIA is not necessary.
37. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing, and it is unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's view

38. 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).

Right of appeal

39. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

40. 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.
41. 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

Daniel Perry
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