

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

### **Decision notice**

**Date:** 26 September 2013

**Public Authority:** New Waltham Parish Council  
**Address:** c/o Woodberry Lodge  
11 Nicholson Road  
Healing  
DN41 7RT

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

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1. The complainant has requested information relating to payments made to the Clerk by 6 parish councils and associated information. New Waltham Parish Council ('the council'), on behalf of all 6 councils, provided some information, stated that some information had already been provided as a result of a previous request and that some information was available to the complainant as a Parish Councillor to the council. It also applied the personal data exemption at section 40(2) of the FOIA to some of the requested information.
2. The Commissioner's decision is that the council has correctly applied the exemptions at section 21(1) and 40(2) of the FOIA and, on the balance of probabilities, does not hold any further information. However, the Commissioner has also decided that the council did not provide an adequate response to part of the request.
3. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation:
  - In relation to the telephone costs requested at point 2 of the request, issue a fresh response under the FOIA which specifically states whether or not the information is held.
4. The public authority 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**

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5. On 15 March 2013, the complainant wrote to the council and requested information in the following terms:

"Under your adopted Freedom of Information Request Scheme and as Clerk and Proper Officer I would like you to supply the following information relating to the below Councils for the year ending 31st March 2012:

Healing, Habrough, Stallingborough, New Waltham, Humberston and Great Coates.

1. The amount of hours each Council contracted to employ the Clerk.
  2. The amount each Council paid the Clerk to cover gas, electricity, telephone and any other office costs.
  3. The amount each Council paid towards SLCC fees.
  4. The amount paid by each Council to [named individual] or any other name under which he operates.
  5. The rationale behind how "cross Council costs", such as those above are apportioned.
  6. The amount each council paid for services provided by RJ Blanchard."
6. The council responded on 25 March 2013 and provided some information within the scope of the request, stated that some information had already been provided as a result of a previous request and that some information was available to the complainant as a Parish Councillor to the council. It also applied the personal data exemption at section 40(2) of the FOIA to some of the requested information.
7. The complainant requested an internal review on 9 April 2013. After speaking to the ICO, the council issued a revised response on 10 April 2013 in which it provided further information and clarified where no recorded information was held by the council. It informed the complainant that the council does not have an internal review procedure.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 10 April 2013 to complain about the way her request for information had been handled. She stated that she had not been sent all the information she had requested.

9. The Commissioner contacted the complainant by telephone on 31 July 2013 to clarify which aspects of the request she wished to complain about. The complainant confirmed that she not believe further information did not exist in relation to the following parts of the request:

- Point 1 – in relation to Habrough and Stallinborough parish councils.
- Point 2 – in relation to Habrough, Stallinborough and Humberston parish councils only for gas and electricity. She also disputed that information regarding telephone costs had already been received in response to a previous request.
- Point 5 – in relation to all parish 6 councils.

In relation to point 4, the complainant was not satisfied that the personal data exemption applies to the information held by Healing parish council and, in relation to New Waltham parish council, was not satisfied that she already has access to this information as a Parish Councillor for New Waltham parish council.

10. The Commissioner has therefore considered the following:

- Whether information relating to the amount of hours Habrough and Stallinborough parish councils contracted to employ the Clerk is held (point 1).
- Whether information relating to the amount Habrough, Stallinborough and Humberston parish councils paid the Clerk to cover gas and electricity is held (point 2).
- Whether the council has correctly responded to the request for information relating to the amount all 6 parish council's paid the Clerk to cover telephone costs (point 2).
- Whether information relating to the rationale behind how "cross Council costs" are apportioned is held (point 5).
- Whether section 40(2) applies to the information relating to the amount paid by Healing Parish council to [named individual] or any other name under which he operates (point 4).
- Whether section 21 applies to the information relating to the amount paid by New Waltham Parish council to [named individual] or any other name under which he operates (point 4).

## Reasons for decision

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### Section 1 - Is the information held?

11. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds the information and if so, to have that information communicated to him.
12. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held, he is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
13. The complainant simply does not believe that no information exists relating to the amount of hours each parish council contracts to employ the Clerk. She also alleges that information must be held in relation to how cross council costs are apportioned in order for the Clerk to justify how money is obtained from each council.
14. The Commissioner enquired as to whether the information has ever been held, the scope, quality, thoroughness and results of the searches carried out by the council, whether information had ever been held but deleted and whether copies of information may have been made and held in other locations. He also asked the council to explain, if it wished to maintain that no recorded information exists within the scope of the request, how wages are agreed without an amount of contracted hours and how, in the absence of recorded information, the Clerk justifies costs claimed from each council.
15. In relation to point 1, the council explained that the two respective councils do not contract an amount of hours to employ the Clerk, therefore this information does not exist. The Clerk does not have a current contract for either of these employers which specifies the number of hours worked, rather a salary is set for the Clerk each year for these two councils and a monthly amount is paid. It further stated the following:

“searches of all information held by the council would be fruitless as this information does not exist; the information held regarding any employee's contract would usually be kept electronically by the council

and on paper in employee's personal files; no information in this regard has ever been held by these councils and no information on this subject has ever been destroyed or disposed of as it has not been held; if such information were held it would be held whilst the employee was employed and then kept for some time afterwards in stored/archived filing until at least the end of the following financial year to comply with any PAYE information required to be submitted."

16. In relation to point 2, the council explained that the three councils do not have any agreement with their Clerk to pay/offset/reimburse any office costs connected with gas or electricity incurred by the Clerk as a result of working from home. It stated that this information simply does not exist as none of these three councils make any such payment. It further stated that:

"Nor is any such payment covered by any contractual or employment agreement with the Clerk, the three councils simply do not make any such payment to their Clerk in any way and have never done so. Should the ICO wish, this statement can be verified by either the Councils' own independent internal auditors or by the respective Chair of the Councils concerned."

17. In relation to point 5, the council stated that again, this information does not exist. It explained that it had previously supplied the complainant with information regarding telephone costs for the shared phone line and how they are apportioned across the parish councils (in terms of the actual amounts billed to each council). It stated that there is no recorded 'cross office rationale' but did explain that telephone costs are apportioned in an appropriate measure relating to:

"a) the size and day to day routine activities carried out by each council and

b) also take into account any special "projects" etc. or issues which may involve higher telephone usage.

Should the amount each council pays vary by a significant amount due to b) being applied this is clearly explained to the council at the time of payment."

18. In reaching a decision as to whether the requested information is held, the Commissioner also enquired whether there was any legal requirement or business need for the council to hold the information. The council did not specifically reply to this enquiry and the Commissioner is not aware of any such requirements.
19. The Commissioner also considered whether the council had any reason or motive to conceal the requested information but he has not seen any

evidence of this. Therefore he has not identified any reason or motive to conceal the requested information.

20. In the circumstances, the Commissioner does not consider that there is any evidence that would justify refusing to accept the council's position that it does not hold any further information relevant to this request. The Commissioner is therefore satisfied that on the balance of probabilities, the information is not held by the council. Accordingly, he does not consider that there was any evidence of a breach of section 1 of the FOIA.

### **Request for information relating to the amount all 6 parish council's paid the Clerk to cover telephone costs**

21. Point 2 of the request asked for the amount each council paid the Clerk to cover gas, electricity, telephone and any other office costs. The part of the request relating to gas and electricity is dealt with above. In relation to telephone costs, the council stated that this information had been provided as a result of a previous request made and complied with during 2012. The complainant stated that no such request was made and therefore such information had not previously been provided. The council supplied the Commissioner with a copy of an email thread from July/August 2012 in which information relating to how the telephone bill from BT was apportioned between the 6 parish councils. Although this information relates to the telephone costs, it does not specifically state how much each council paid the Clerk to cover telephone costs and the Commissioner notes that the council has not specifically stated that this information is not held. Therefore, by not confirming whether information relating to the amount each council paid the Clerk to cover telephone costs is held, the council has not provided an adequate response to this part of the request.

### **Section 40 – the exemption for personal data**

22. Section 40(2) provides that information is exempt from disclosure if it is the personal data of an individual aside from the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
23. Consideration of this exemption is a two-stage process; first, the information in question must constitute the personal data of an individual aside from the requester and, secondly, disclosure of that personal data must be in breach of at least one of the data protection principles.
24. In this case, the council has explained that the named individual was a registered employee of Healing parish council rather than a contractor and that the information held relates to that individual's salary. The

Commissioner is of the opinion that the information is clearly personal data.

25. The Commissioner is satisfied that disclosure of this of information would breach the first data protection principle in that it would be unfair. In reaching this opinion the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subjects, the consequences of disclosure on those data subjects and balanced the rights and freedoms of the data subjects with the legitimate interests in disclosure. He has also taken into consideration the type of work undertaken by the named employee.
26. The Commissioner has therefore decided that the council is entitled to withhold the information this information under section 40(2).

### **Section 21 – information accessible to the applicant by other means**

27. Section 21(1) of the FOIA can be applied when all the relevant requested information is reasonably accessible to the applicant. It is an absolute exemption and so there is no public interest test.
28. The purpose of the exemption is to ensure that there is no right of access to information via FOIA if it is available to the applicant by another route. The Commissioner's guidance on the subject<sup>1</sup> explains that, unlike consideration of most other exemptions in FOIA, a public authority can take the individual circumstances of the applicant into account. In order for section 21 to apply there should be another existing, clear mechanism by which the particular applicant can reasonably access the information outside of FOIA.
29. In this case, the council has explained that the complainant has access to this information as a Councillor at New Waltham parish council. It stated that all payments for goods and services/contracted works for the council are shown on "accounts for payments" lists as part of the agenda for each parish council meeting and as such any payments made should be contained on those sheets. It also explained that the council members also have access to invoices submitted to the council for payment and also to the cheque book, by which means all accounts for New Waltham parish council are settled, and could at any time check for payments to any individual or company.

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[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf](http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf)

30. Taking into consideration the above explanation from the council, the Information Commissioner has concluded that the amount paid by New Waltham parish council to the named individual is reasonably accessible to the complainant via other means and is therefore satisfied that section 21(1) is engaged.



## Right of appeal

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31. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

32. 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.
33. 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 .....**

**Andrew White**  
**Group Manager – Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**