

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 14 March 2019

**Public Authority:** Newry, Mourne and Down District Council  
**Address:** O'Hagan House  
Monaghan Row  
Newry BT35 8DJ

#### Decision (including any steps ordered)

---

1. The complainant requested information relating to correspondence between councillors and a named individual. Newry, Mourne and Down District Council (the Council) disclosed the majority of the information within the scope of the request, but withheld a small amount, citing section 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that the Council has properly applied section 40(2) in relation to the disputed information.
3. The Commissioner requires no steps to be taken as a result of this decision.

#### Request and response

---

4. The complainant wrote to the Council on 16 December 2017 and requested information in the following terms:  
  
*"1. All correspondence between [name redacted] and Newry, Mourne and Down councillors within the following date range 01/01/2016 - 10/12/2017*  
  
*2. All internal correspondence between Newry, Mourne and Down councillors including the keyword [name redacted] within the following date range 01/01/2016 - 10/12/2017".*
5. The Council responded on 22 March 2018, apologising for the delay in responding to the request. It provided some information within the

scope of part (1) of the request but refused to provide the remainder, citing section 40(2) (personal information) as its basis for doing so. It denied holding the information requested at part (2) of the request.

6. The complainant requested an internal review on 22 October 2018. Specifically, he wanted to know why some of the information disclosed to him in the Council's response – namely a sentence within each of three emails - had been redacted.
7. Following an internal review the Council wrote to the complainant on 22 November 2018. It upheld its original position.

### **Scope of the case**

---

8. Following earlier correspondence, the complainant provided the Commissioner with the relevant documentation, on 8 January 2019, to support his complaint about the way part (1) of his request for information had been handled.
9. During the course of the Commissioner's investigation, the Council confirmed its application of section 40(2) in this case. It also provided the Commissioner with a copy of the withheld information.
10. The analysis below considers the Council's application of section 40(2) of the FOIA to the disputed information, namely a sentence withheld from each of three emails.

### **Reasons for decision**

---

#### *Section 40 personal information*

11. 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(3) or 40(4) is satisfied.
12. In this case the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (DPA).
13. 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 cannot apply.

14. 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 data protection principles under the DPA.

*Is the information personal data?*

15. The definition of personal data is set out in section 1 of the DPA, the legislation in force at the time of this request. Section 1 defines personal data as:

*"...data which relate to a living individual who can be identified*

*a) from these data, or*

*b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."*

16. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable.
17. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
18. In correspondence with the complainant, the Council told him it was satisfied that a living individual "*can be easily identified*" from the withheld information.
19. From the evidence she has seen, the Commissioner is satisfied that the withheld information relates to an identifiable individual.
20. Having accepted that the information requested constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles.
21. The Commissioner notes that the Council considers that disclosure would breach the first data protection principle.
22. The Commissioner agrees that the first data protection principle is most relevant in this case.

*Would disclosure contravene the first data protection principle?*

23. The first data protection principle states:

*"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless*

*(a) at least one of the conditions in Schedule 2 is met, and*

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."*

24. 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 fair, lawful and would meet one of the DPA Schedule 2 conditions (and one of the Schedule 3 conditions if relevant). If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

*Would disclosure be fair?*

25. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.
26. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
- the data subject(s) reasonable expectations of what would happen to their information;
  - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual(s) concerned); and
  - the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

*Reasonable expectations*

27. In the Commissioner's view, a key issue to consider in assessing fairness is whether the individual(s) 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 and also the purpose for which they provided their personal data.
28. In correspondence with the complainant, the Council told him:
- "The individual referred to is not the sender or a recipient of the redacted emails and therefore it is not known to Council whether the individual is aware that this information is held by Council".*
29. The Council also confirmed that the redacted information relates to the individual's private life and not their professional life.

30. Accordingly, it argued that, in the circumstances, the individual would not have a reasonable expectation that the Council would disclose the information to the public at large.
31. The Council reiterated those arguments in its submission to Commissioner.
32. Having viewed the information under consideration, the Commissioner is satisfied that the individual would have had a reasonable expectation that the withheld information, which constitutes their personal data, would not be disclosed to the public at large.

*Consequences of disclosure*

33. As to the consequences of disclosure upon the data subject, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
34. In this case, the Council told the complainant that, due to the nature of the withheld information, and mindful that it related to the individual's private life, it was satisfied that disclosure:

*"... could potentially cause significant distress to the individual and damage".*

35. In its submission to the Commissioner, the Council said:

*"Council is satisfied in these circumstances that the individual would have reasonable expectation that Council would not disclose this information to the public at large.*

*In considering whether this is applicable Council referred to ICO Guidance and in particular the need for Council to consider the nature of the information and weigh up the level of distress and/or damage likely to be caused, as the higher this is, the more likely that the disclosure would be unfair".*

36. The Commissioner considers that disclosure in this case has the potential to cause damage and distress, particularly as she has found that disclosure of the information would not have been within the reasonable expectations of the individual concerned.

*Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure*

*The legitimate public interest*

37. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to provide the information if there is an overriding legitimate interest in

disclosure to the public. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public and the private interests of the requester.

38. From the evidence she has seen in this case, the requester did not put forward any private interest reasons to be taken into account when considering disclosure.
39. Examples of a legitimate public interest in disclosure include the general public interest in transparency, public interest in the issue the information relates to and any public interest in disclosing the specific information. In balancing these legitimate interests with the rights of the data subject, the Commissioner recognises that it is also important to consider a proportionate approach.
40. Recognising the need to balance the individual's rights and freedoms against the legitimate interest in disclosure, the Council confirmed in its submission to the Commissioner that it had disclosed "*the majority of the information requested un-redacted*".
41. It argued that this:

*"... goes a substantial way to satisfying any wider public interest"*.
42. While acknowledging that there is a legitimate interest in the subject matter of the emails, the Council did not consider that there were wider legitimate public interests in this case that would support further disclosure.
43. In that respect it told the Commissioner:

*"Council believes that by adopting a proportionate approach it has met the legitimate interest in disclosure by releasing the majority of the requested information whilst balancing and protecting the individual's rights and freedoms"*.
44. In reaching a decision in this case, the Commissioner is mindful of her role both as regulator of the FOIA and of the DPA. She recognises that as the independent regulator of the FOIA, her role is to ensure people have easy access to records they are entitled to see. However, as regulator of the DPA, she recognises the rights of individuals to confidentiality.
45. Acknowledging the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) of the FOIA has been cited is in favour of protecting the privacy of the

individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling and legitimate interest in disclosure and that disclosure is necessary to serve that interest.

46. Having considered all the arguments, the Commissioner's decision is that the Council was entitled to rely on section 40(2) to refuse to disclose the withheld sentences.
47. She is satisfied that disclosure of that information would not be within the data subject's reasonable expectations, that it would be likely to have detrimental consequences for them and that the legitimate interests that would be served by disclosure are not capable of outweighing the data subject's expectation of, and right to, privacy. The Commissioner therefore accepts that it would be unfair to the data subject to disclose the requested information and that to do so would breach the first data protection principle.
48. As the Commissioner has determined that it would be unfair to disclose the requested personal data, it is not necessary for her to go on to consider whether disclosure would be lawful or whether one of the conditions in Schedule 2 of the DPA would be met.

#### *Conclusion*

49. The Commissioner is satisfied that the Council was entitled to withhold the information under section 40(2) by way of section 40(3)(a)(i).

## Right of appeal

---

50. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

51. 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.

52. 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 .....**

**Pamela Clements  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**