

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 October 2020

Public Authority: Redcar and Cleveland Borough Council

Address: Kirkleatham Street

Redcar

Yorkshire

TS10 1RT

Decision (including any steps ordered)

1. The complainant submitted to Redcar and Cleveland Borough Council (the Council) an information request in five parts about tax debts to the Council for any councillor who represented a particular ward for a certain period of time. The Council withheld some of the requested information under section 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that the Council was entitled to rely on section 40(2) of the FOIA to withhold part of the requested information.
3. The Commissioner does not require any step to be taken as a result of this decision notice.

Request and response

4. On 20 October 2019, the complainant wrote to the Council and requested information in the following terms:

"I am writing to request the following information under the Freedom of Information Act 2000:

1. *Council Tax Debts to Redcar and Cleveland Borough Council for any Borough Councillor or Parish Councillor who has represented St*

Germain's Ward since May 2019. This information to cover any current debt plus historic debt from 1 January 2015.

2. *What action has been taken by the Borough Council to recover this debt?*
 3. *What sanctions have been applied against any individual Councillor by either the Borough Council or the Parish Council?*
 4. *Details of any gifts provided to the Councillors mentioned above which has been declared by them for the period between May 2019 and September 2019.*
 5. *Attendance records at Council meeting expressed as a percentage for any Councillors listed above."*
5. The Council responded on 15 November 2019. It confirmed that it held information in relation to part 1 and part 2 of the request but refused to provide it citing section 40(2) of the FOIA (third party personal data) as its basis for doing so.
 6. In relation to the remaining parts (3 – 5) of the information request, the Council stated:
 3. *There have been no sanctions applied against any individual Borough or Parish Councillor in the requested period.*
 4. *There have been no declarations of gifts/hospitality received from any of the three of Borough Councillors representing St Germain's ward in the requested period. The Council does not hold any information in relation to gifts declared by Parish Councillors.*
 5. *There have been three Borough Council meetings and the AGM from May 2019 onwards. The three Borough Councillors representing St Germain's ward were in attendance at all of those meetings. The Council does not hold any information in relation to meetings of St Germain's Parish Council."*
 7. Following the Council's response, the complainant exchanged correspondence with the Council between 15 November and 18 November 2019 in which he expressed his dissatisfaction with the Council's application of section 40(2) of the FOIA. An email message of 18 November 2019 was considered by the Council as a request for internal review.
 8. Following an internal review the Council wrote to the complainant on 6 December 2019. The Council partially upheld the request for internal review by providing a response in relation to Borough Councillors. It stated that *"No Borough Councillors representing the St Germain's Ward have incurred any Council Tax debt in the periods referred to"*. However,

the Council did not change its position in relation to the application of section 40(2) of the FOIA in relation to the information withheld about Parish Councillors.

Scope of the case

9. The complainant contacted the Commissioner on 6 December 2019 to complain about the way his request for information had been handled. His complaint was focused on the Council's decision to partially withhold information requested under part 1 and part 2 of his request.
10. The Commissioner informed the complainant that the focus of her investigation would be to determine whether the Council handled his requests in accordance with the FOIA, and specifically, whether the Council correctly applied section 40(2) of the FOIA in relation to the withheld information.

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(3A)(3B) or 40(4A) is satisfied.
12. 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 General Data Protection Regulation ('GDPR').
13. 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.

¹ As amended by Schedule 19 Paragraph 58(3) DPA

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 DP principles.

Is the information personal data?

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

“any information relating to an identified or identifiable living 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. 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.
18. 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.
19. In the circumstances of this case, having considered the submissions and arguments presented by both parties, the Commissioner is satisfied that the information is personal data. The names and information about potential debts of the data subjects is information that both relates to and identifies those concerned. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
20. However, 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.
21. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

22. 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”.

23. 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.

24. 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

25. 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”².

26. In considering the application of Article 6(1)(f) of the 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.
27. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

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) 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”.

Legitimate interests

28. In considering any legitimate interest(s) in the disclosure of the requested information under the 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.
29. 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 compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
30. The complainant referred the Council to the Upper Tribunal's (the UT) decision in *DH v Information Commissioner and another [2016] UKUT 139 (AAC)*³, in which it was held that there is a compelling legitimate interest in the public knowing whether a particular councillor has failed to pay council tax.
31. The Council stated that it was aware that there could be a legitimate public interest in disclosing information about council tax debts owed by councillors especially in view of this UT decision. However, the Council is of the opinion that the situation in the present case is different for the reasons set out in the outcome of its internal review. Those reasons were:
 - in the present request the information relates to co-opted and unpaid parish councillors as opposed to elected borough councillors;
 - a parish councillor would not be involved in approving the Council budget;
 - whilst a parish councillor is a public official with public responsibilities, non-payment of council tax is less directly and significantly relevant to those duties; and

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https://assets.publishing.service.gov.uk/media/5785141fe5274a0da9000105/GIA_4597_2014-00.pdf

- the complainant's request sought historic data, potentially from before the data subject(s) took on their roles as parish councillor (s).
32. The Commissioner accepts that there is a legitimate public interest in disclosure of information which would promote accountability and transparency. In the circumstances of this case, the Commissioner recognises that there is a legitimate interest in knowing whether parish councillors have failed to pay council tax. The Commissioner also appreciates that the complainant may have a personal interest in disclosure of the withheld information based on the submissions she has received in the course of her investigation.

Is disclosure necessary?

33. '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.
34. The complainant argued that the UT's decision in the case of *DH v Information Commissioner and another*, which ordered the public authority to disclose the name of an elected member who had received reminders for non-payment of council tax, is relevant to the circumstances of his request.
35. The complainant objected to the Council's argument that this request differs from the above-referenced case due to the fact that in *DH v Information Commissioner and another* the request was submitted by a professional journalist, whilst in the present case by a person who may have a personal interest in obtaining the information requested.
36. The Commissioner agrees with the complainant's objection to the Council's argument. What public interest there is in the requested information is unchanged by the identity or occupation of the applicant. As stated in the Commissioner's guidance on the consideration of the identity or motives of the applicant⁴:

⁴ <https://ico.org.uk/media/for-organisations/documents/1043418/consideration-of-the-identity-or-motives-of-the-applicant.pdf>

"In dealing with a Freedom of Information request there is no provision for the public authority to look at from whom the application has come, the merits of the application or the purpose for which it is to be used."

37. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified than to disclose the information requested by the complainant.

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

38. 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.

39. 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 about the disclosure;
and
- the reasonable expectations of the individual.

40. 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.

41. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

42. The Council stated that it took account of the fact that the UT in the case of *DH v Information Commissioner and another* placed weight on the fact that the councillor was an elected official with public responsibilities, to which non-payment of council tax was particularly

relevant. However, it maintained that the circumstances in the present request are different from those in the case decided by the UT.

43. The Council argued that the data subject(s) in the present case are local people who agree to be voluntarily co-opted onto the local council, *"on the basis that they will be involved in relatively minor functions such as running allotments and a village hall etc."*
44. The Council is of the opinion that *"the level of responsibility and, hence, public interest in their own financial position would be much lower than that of a Borough Councillor."*
45. The Council believes that a parish councillor, co-opted voluntarily onto a local council, would probably have no real expectation of their personal financial position or other personal circumstances being disclosed to others *"other than, perhaps, the need to disclose certain personal interests when involved in making some decisions."*
46. The Council considers that it would be reasonable for a co-opted and unpaid Parish Councillor to expect that personal data relating to their private life would be kept confidential.
47. The Council told the Commissioner that it did not ask the individual(s) whose personal information was withheld whether they would consent about a potential disclosure of the information requested because, due to circumstances of the case, it believed doing so could lead to the identification of the complainant.
48. The complainant argued that the UT's decision in the case referenced above does not make any distinction between borough and parish councillors.
49. The Commissioner is mindful of the UT's reasoning in its decision in the case of *DH v Information Commissioner and another*. She agrees that the UT did not explicitly make a distinction between councillors of different tiers of local government. However, the focus of the reasoning in the UT's decision was the level of the responsibilities that specific councillors held.
50. In this respect, the Commissioner considers that in order to conclude whether the UT's findings would apply in a case where the councillors' council tax information was requested under the FOIA, the specific circumstances of each case should be taken into account. This approach

was taken in the Commissioner's decision notice in case FS50649626⁵⁵, in which the information requested was the identity of a former councillor who had been in arrears. In that case the Commissioner concluded that due to the fact that a former councillor was no longer part of the decision making process within his former council, the disclosure of his identity would be unfair.

51. The Commissioner notes that one of the main reasons for disclosing the councillors' identity presented by the UT in its decision in the case of *DH v Information Commissioner and another* was related to their ability to perform their key functions and in terms of public confidence and accountability. The UT noted that:

"A councillor is a public official with public responsibilities to which non-payment of council tax is directly and significantly relevant. A number of specific features of this were advanced in submissions to the First-tier Tribunal. In particular, section 106 of the Local Government Finance Act 1992 bars a councillor from voting on the Council's budget if he or she has an outstanding council tax debt of over two months. If a councillor is present at any meeting at which relevant matters are discussed, he or she must disclose that section 106 applies and may not vote."

52. In paragraph 53 of the above decision it is stated:

"As well as the impact of section 106, non-payment of council tax puts the councillor in conflict with the obligations of his office including to protect the council's resources, to act in accordance with the law, and to act in accordance with the trust which the public has placed in him."

53. In the present case, the Commissioner notes that the individual(s) whose personal data was requested to be disclosed were not part of that level of decision making. The Council confirmed that parish councillors would not be involved in approving the Council Budget and therefore section 106 of the Local Government Finance Act 1992 would not apply.
54. 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.

⁵⁵ <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2013847/fs50649626.pdf>

55. Given the above conclusion that disclosure would be unlawful, disclosure of the requested information would contravene principle (a) and the Commissioner does not need to go on to separately consider whether disclosure would be fair or transparent.
56. In conclusion, the Commissioner finds that the Council was entitled to rely on section 40(2) of the FOIA to withhold part of the information requested by the complainant.

Right of appeal

57. 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

58. 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.
59. 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

Ben Tomes
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF