

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 March 2021

Public Authority: Shaftesbury Town Council
Address: Town Hall
Shaftesbury
Dorset
SP7 8LY

Decision (including any steps ordered)

1. The complainant has requested from Shaftesbury Town Council (the council) information about salary increases paid to all staff over a three year period. The council initially referred the complainant to information it said was in the public domain and it refused the request under section 21 (Information accessible to applicant by other means) of the FOIA. It subsequently withdrew its reliance on section 21 and substituted section 40(2) (Personal information) of the FOIA instead.
2. The Commissioner's decision is that the council was entitled to rely on section 40(2) of the FOIA to refuse the request.
3. The Commissioner requires no steps as a result of this decision.

Request and response

4. On 29 January 2020, the complainant wrote to the council and requested information in the following terms:

"I am writing to you ... under the Freedom of Information Act 2000 to request the following information from Shaftesbury Town Council Office Staff – all staff SCP [Spinal Column Point] increments from November 2016 to date.

(If the increments in SCP have not been ratified by Full Council, please will you indicate this on the table provided.)

In 2017 the Payroll costs for Shaftesbury Town Council increased £53,000 and there appears to be no record of who or when this increase has been attributed to and why there are such unexplained significant increments in the Payroll Budget Line:-

1. SCP increments

Job Title	Number of SCP increments	Reason	Date agreed by HR	Date Ratified by Full Council
<i>Example</i>				
<i>Town Clerk</i>	<i>5</i>	<i>Promotion</i>	<i>10/5/2017</i>	<i>15/10/2017</i>

SCP increments is calculated as if someone has a SCP of 25 and they are given a pay increase up to 26 then the increment = 1

Please provide the information in the form of email or scanned documentation."

5. The council responded on 27 February 2020. It said that the requested information was exempt from disclosure under section 21 of the FOIA. It said the information was published in meeting minutes and it provided a link to the 'Committees' section of its website.
6. On 19 May 2020, the complainant wrote again to the council, reiterating their wish to be provided with a copy of the information. They heard nothing further and so they wrote again, on 6 September 2020, stipulating that the council should conduct an internal review of its decision to apply section 21. The complainant referred the council to the ICO's advice that it was not reasonable to expect an applicant to search through large amounts of information in order to locate the precise information that had been requested.
7. The council responded on 22 September 2020. It upheld its decision to apply section 21, stating:

"I have examined the Council's website and find all Minutes of STC's Personnel Committee to be readily available and accessible by any member of the public using any of the browsers available e.g., Internet Explorer and Chrome."

8. The council also commented that information about individual salaries was protected by data protection legislation.

Scope of the case

9. The complainant contacted the Commissioner on 4 August 2020 to complain about the way the request for information had been handled. They argued that the information they had requested was not reasonably accessible to them and therefore that section 21 of the FOIA did not apply.
10. During the Commissioner's investigation, in which the Commissioner expressed the view that the information was not reasonably accessible to the complainant, the council withdrew its reliance on section 21 and it applied section 40(2) (Personal information) of the FOIA to withhold the requested information. This late revision has not been put to the complainant in order to forego any further delay in the investigation; the Commissioner does not consider that they have been disadvantaged by this approach.
11. Following the combined cases of the *Home Office v Information Commissioner* (GIA/2098/2010) and *DEFRA v Information Commissioner* (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exemption or exception either before the Commissioner or the First-tier Tribunal and both must consider any such new claims.
12. The analysis below considers whether the council was entitled to rely on section 40(2) of the FOIA to refuse to disclose the requested information.

Reasons for decision

Section 40 personal information

13. 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.
14. 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

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

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').

15. 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.
16. 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?

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

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

18. The two main elements of personal data are that the information must *relate* to a living person and that the person must be *identifiable*.
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. An identifiable living individual is someone 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.
21. The withheld information in this case is, for each of nine post holders, the number of SCP by which their pay increased during the period 1 November 2016 – 29 January 2020, the reason for any increase and the date any increase was agreed/ratified.
22. The Commissioner is satisfied that information about an individual's pay is undoubtedly information which relates to them.

23. The second part of the test is whether an individual can be identified from the withheld information. On that point, the Commissioner's guidance on section 40² states:

"The DPA defines personal data as any information relating to an identified or identifiable living individual. If an individual cannot be directly identified from the information, it may still be possible to identify them".

24. The request does not ask for, or state, the names of individual post holders. The Commissioner has considered whether it would nevertheless be possible for any member of the public to identify individual post holders by cross referencing the withheld information with other information which may be in the public domain, or which may otherwise be likely to come into their possession. On that point, the ICO's Code of Practice on Anonymisation³ notes that:

"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".

25. The request asks to know information about the salary increases attached to particular posts. The council told the Commissioner that it employs nine post holders:

- 3 Groundsmen
- 1 Senior Groundsman
- 1 Pool Manager
- 1 Reception / Admin / PA
- 1 Finance/Services Officer
- 1 Business Manager
- 1 Town Clerk

² <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-regulation-13.pdf>

³ <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>

26. Different members of the public may have different degrees of access to the 'other information' needed for re-identification to take place.
27. A test used by both the Commissioner and the First-tier Tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if they were intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of re-identification of an individual from information which, on the face of it, appears truly anonymised.
28. In this case, the names of eight of the post holders are listed on the council's website. The Commissioner was able to find the name of the ninth post holder with a cursory internet search. The Commissioner therefore considers that a motivated intruder would be able to identify the post holders fairly easily.
29. Furthermore, the post holders will all be identifiable to each other. The Commissioner also notes that as the complainant is a councillor, they are also likely to be able to identify particular individuals from their job titles.
30. Taking all the above into account, the Commissioner is satisfied that the post holders would be reasonably likely to be both identifiable and identified, from a combination of the requested information and other information which is likely to be in, or come into, the possession of others.
31. The Commissioner is therefore satisfied that the withheld information both relates to and identifies the nine individual post holders. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
32. 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.
33. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

34. 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".

35. 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.
36. 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

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"⁴.

38. 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.

⁴ 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".

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, an elected councillor, has explained that they wish to understand why the council's pay bill increased during the period covered by the request:

"...the Payroll figures for the Town Council has leaped up dramatically and there has been no increase in head count...

There is an unexplained increase to salaries of £53,000 in 2017 and no increase in staff numbers. The Salary Precept is now 55% of the Precept and [name redacted] is blocking me from analyzing the Salary figures. This is now part of a litigation dispute because I am an elected Councillor. However, I have not received the data. This complaint has gone to the Internal Auditor, who has ignored it and it will now go to the External Auditor as well as yourselves. Only 5 councillors on a Town Council of 12 members are currently allowed to see the breakdown of salary details. [Name redacted] has blocked the rest of the council from analyzing Salary financial data...

What I've determined by conducting my own investigation after receiving a substantial number of complaints from the electorate, is that there is no Council paper on employee promotions and justifications on year on year cost increases for personnel with no increases in head-count."

42. There is an inherent interest in bodies which are funded by taxpayers being held accountable for the way they spend their money. Effective scrutiny helps secure the efficient delivery of public services and drives improvements within the authority itself. The Commissioner therefore accepts that there is a legitimate interest in transparency regarding the council's spending of public money on its pay bill.

Is disclosure necessary?

43. '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.
44. In this particular case, the Commissioner does not consider that disclosure of the withheld information under the FOIA is necessary to achieve the legitimate interests she has identified.
45. The complainant considers that their attempts to access the information in their capacity as a councillor are being frustrated. The Commissioner notes that, as disclosure under the FOIA is disclosure to the world at large, she is only able to consider whether there is a legitimate interest in disclosure to the world at large rather than to any particular individual.
46. Therefore, when considering the question of necessity, the Commissioner must consider whether there is a pressing societal need for the disclosure of the information to serve the legitimate interests she has identified.
47. Local authorities are required to publish certain information about the salaries of senior employees⁵. These obligations relate to salaries which exceed £50,000. The Commissioner is satisfied that none of the salaries in this case are subject to those requirements.
48. The council has confirmed that it is not the expectation of any of the post holders that information about their salary, including whether or not it had increased during the period covered by the request, would be disclosed into the public domain and that they have not consented to such information being disclosed.
49. The Commissioner notes that the financial regulations governing the conduct of financial management by the council⁶ give a clear indication that information about salaries is regarded as confidential, and only accessible in certain circumstances:

⁵https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/408386/150227_PUBLICATION_Final_LGTC_2015.pdf

⁶ <https://www.shaftesbury-tc.gov.uk/wp-content/uploads/2020/12/Financial-Regulations-2020-11-03.pdf>

"7.4. Each and every payment to employees of net salary and to the appropriate creditor of the statutory and discretionary deductions shall be recorded in a separate confidential record (confidential cash book). This confidential record is not open to inspection or review (under the Freedom of Information Act 2000 or otherwise) other than:

- a) by any councillor who can demonstrate a need to know;*
- b) by the internal auditor;*
- c) by the external auditor; or*
- d) by any person authorised under Audit Commission Act 1998, or any superseding legislation."*

50. The council says that the standard pay scales for posts and the associated salaries for those scales are publicly accessible. However, for reasons of confidentiality, information about the precise salary of individual post holders, including details of any increases, is divulged only to the Town Clerk and members of the Human Resources Committee.

"The Human Resources Committee is delegated by Full Council to monitor the salaries budget within the parameters of the top and bottom salary grades agreed by Full Council. The Human Resources Committee consists of five members of the twelve sitting Councillors. This represents 41% of the Council to provide sufficient scrutiny of the salaries."

51. At first glance it may seem that what is being requested – the number of SCPs by which a salary has increased (if it has at all), together with the reasons for any increase and the date agreed – is not especially sensitive. However, this is information about each individual post holder's personal income. It may reveal that someone's salary has increased significantly, a little, or that it has not increased at all.
52. The Commissioner considers that the disclosure of such information, without the consent of the post holders, would be intrusive; it would allow people who are known to each other to draw conclusions about their colleagues' salaries, and also, by extension, about how well their colleagues may have been assessed to have performed their job (eg if a salary has not increased over the period covered by the request, is this because the post holder was judged to have performed poorly?). It would also reveal to the wider public whether a particular individual had received a pay rise. Most of the individuals covered by the request occupy very junior positions and would have a reasonable expectation that information about their pay would not be disclosed outside of the council and, even then, only to those who need to know.

53. Five elected councillors have access to the salary information. The council is also subject to an annual audit by external auditors. Allegations of financial irregularities may be reported to the external auditor, who can decide whether to investigate them. The complainant has indicated to the Commissioner that they intend to do this.
54. The Commissioner is therefore satisfied both that there is scrutiny of the council's spending on salaries, in the form of the five elected councillors who sit on the Human Resources Committee, and that there is a proper, formal channel through which the concerns the complainant has expressed about the council's pay bill may be scrutinised by the external auditor. She considers this to be a route to achieving the complainant's stated aim (proper scrutiny and oversight of the council's spending on salaries) which is much more discreet and considerate to the privacy of the post holders than disclosing information about them to the world at large, under the FOIA.
55. 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 decision

56. 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) of the FOIA.

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

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