

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 August 2023

Public Authority: Kirby Muxloe Parish Council
Address: Station Road
Kirby Muxloe
Leicester
LE9 2EN

Decision (including any steps ordered)

1. The complainant has requested information from Kirby Muxloe Parish Council (the Council), regarding its involvement with an organisation called "A.V.G Solutions and Co."
2. The Commissioner's decision is that;
 - The Council, on the balance of probabilities, does not hold the requested information for questions 1 and 5.
 - The Council, on the balance of probabilities, does not hold any further meeting minutes within the scope of the request.
 - The Council was not entitled to rely on section 41 or section 43.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the Confidentiality Extraordinaire and Data Processor Agreement. Appropriate redactions should be made to remove the signatures and mobile number on these documents, as this would be exempt under section 40(2).
4. The public authority must take these steps 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

5. On 26 August 2022, the complainant wrote to the Council and requested information in the following terms:

"1. Is Cllr '[name redacted]' one and the same person as that acting for 'AVG Solutions and Co' and signing letters as '[name redacted]', in the capacity of 'data processing consultants' to the council? I contend that everyone at KMpc must be immediately aware of this information, albeit that it may only be recorded separately in meeting minutes and in tendering or contractor records. A simple Yes or No answer would suffice.

2. Is 'AVG Solutions and Co' a bona-fide company and, as such, registered at Companies House? This should be a simple Yes or No answer. I am not suggesting that KMpc's records will replicate those at Companies House, but before KMpc makes a financial commitment to engage the services of an external contractor, some due diligence is necessary and a basic initial step would be to ascertain if the potential contract is with a proper and legal company. If Yes, what is the company's Registration number? This number, if it really exists, should be shown on Contract records and on 'AVG Solutions and Co' invoices, etc, both of which are likely to be in KMpc's records.

3. Is [redacted] listed as a Director of this company? Again, this is a Yes or No answer. This information is likely to be recorded on most, perhaps all, documents (eg, invoices, contracts, proposals, etc), as provided by 'AVG Solutions and Co' and retained in KMpc's records.

4. What information does KMpc hold that records the contractual arrangements (eg, tendering, duty, scope, deliverables, fees, etc) between KMpc and 'AVG Solutions and Co'? This specific contract (like all such contracts) should have been discussed, resolved and recorded in the council's meeting minutes, but I can't find it anywhere. Which page number(s) of the meeting minutes record the specific details of this contract?

5. What specific total fee was payable by KMpc to 'AVG Solutions and Co' for this company's work for the council, with regard to case IC-74092-L9B6 only? I ask because I cannot see where this fee is published on the council's website; it should be published, as declared expenditure. Expenditure of public money must be transparent and this money must also be properly safeguarded – to act otherwise indicates deficient Governance. Was the fee a fixed lump sum or was it calculated at an hourly rate?"

6. The Council responded on 13 February 2023. It provided some information within the scope of the request and advised the remaining information is not held.
7. The Council did not conduct an internal review in this matter.

Scope of the case

8. The complainant contacted the Commissioner on 3 May 2023 to complain about the way their request for information had been handled.
9. The Commissioner declines to consider whether the Council holds information within the scope of parts 2 and 3 of the request.
10. Some elements of these parts of the request ask the Council to apply a subjective judgement (there is no objective definition of a "bona fide" company). To the extent that the request seeks recorded information, it is information that, if it were held by the Council, would also be publicly available via Companies House. The Commissioner sees no value in investigating whether the Council holds such information. If the information exists, it is already publicly available via Companies House (and would be exempt under section 21). If information is not available via Companies House, the Council could not hold it.
11. The Commissioner notes that, were parts 2 and 3 the only parts of the request, he would likely have refused the complaint as frivolous.
12. The Commissioner considers that the scope of his investigation is to determine, on the balance of probabilities, if additional information within the scope of the request is held. The Commissioner will also consider whether the Council was entitled to rely on sections 41 and 43 to withhold information.

Reasons for decision

Section 1 – General right of access

13. Section 1 of FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and, if so, to have that information communicated to them.
14. In this case, the complainant suspects that the Council holds information from which it could answer the request. The Council's position is that it does not.
15. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
16. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether the information is 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 is held, he is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities. The
17. In response to question 1, the Council clarified to both the complainant and the Commissioner, that the individual in question, was not a Councillor at the Council. It confirmed that as the individual was not a Councillor, it also did not hold any information within the scope of the request.
18. The Council explained that the individual in question was a part of A.V.G solutions & co (AVG) and acted only as a data processing consultant. It advised the Commissioner that any letters sent by the individual was signed "for and behalf of AVG solutions," demonstrating that the individual was not a Councillor.
19. The Council advised it did conduct searches on both its electronic systems and paper files, however no information within the scope of the request was identified. The Council confirmed that it had searched for

the individual's name along with search terms such as "AVG Solutions" and "data processing."

20. The Council concluded that any information on PCs, laptops and emails would have been identified using these search terms, but no information was located. Searching the paper invoice records did not identify any information within the scope of the request either.
21. In response to question 5, the Council explained that invoices were not held on a case specific basis, but rather in accordance with hours undertaken. It therefore concluded that the requested information was not held.
22. The Council conducted searches in emails using terms such as "IC-74092-L986, AVG Solutions and data processing". The Council confirmed that the requested information was not located and therefore not held by the Council.
23. In response to part of question 4, the Council provided the complainant with relevant meeting minutes which highlighted that a "Consultancy Agreement" was proposed and approved by the Council.
24. The complainant argued that these meeting minutes did not reference AVG specifically and therefore did not answer the request.

The Commissioners decision

25. The Commissioner is satisfied, on the balance of probabilities, that the Council does not hold the requested information for questions 1 and 5 nor does it hold any additional meeting minutes for question 4.
26. In relation to question one, the Council has clearly confirmed that the individual is not a Councillor and therefore it would not hold information regarding this individual being a Councillor. The Commissioner notes that the Council is only obliged to provide information it holds in recorded form: FOIA does not cover information in someone's head. Whilst individuals within the Council may know the identity of the individual in question, if this information is not held by the Council in recorded form, the Council does not hold the information for the purposes of FOIA.
27. Having reviewed the meeting minutes provided to the complainant for question 4, the Commissioner is satisfied that the information provided is what was requested by the complainant. Although the complainant may believe additional detail should be included in these minutes, this does not mean further information is held. It is not the Commissioner's role to determine whether the Council's minutes are adequate.

28. In relation to question 5, the Commissioner is satisfied that on the balance of probabilities, the Council does not hold information regarding the cost of AVG working on each individual case. In order to work out how much time was spent on the complaint specified in the request, the Council would need to know, not only the number of hours AVG Solutions and Co billed it for, but also how many of these hours were spent on the complaint in question (bearing in mind that the organisation may have been working on more than one complaint at that time).
29. There is no indication that the Council holds such information and therefore it would not be able to disaggregate the costs relating to the complaint specified in the request.
30. The Commissioner will now go on to consider the application of sections 41 and 43 in regard to withholding the information requested in question 4.

Section 41 – information provided in confidence

31. Section 41(1) of FOIA states that:

'(1) Information is exempt information if—

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'

32. Therefore, for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party and the disclosure of that information has to constitute an actionable breach of confidence.
33. The Council provided two documents to the Commissioner which it believed would be exempt under section 41. One document was a Data Processor Agreement and the other was a "Confidentiality Extraordinaire."
34. The Council advised the Commissioner that these documents were provided in confidence by AVG, and it had not consent to the documents being disclosed under FOIA. The Council concluded that disclosing the information would constitute an actionable breach of confidence and may cause detriment to the parties concerned, therefore invoking section 41.

35. The Commissioner refers to the decision made in Department of Health v ICO (EA/2008/0018, 18 November 2008)¹ to support him when making his final decision in this matter. In the circumstances of this case the requester had asked for a copy of a contract between the Department of Health (the DOH) and a company called Methods Consulting Limited. The DOH refused this information under sections 41 and 43 of the FOIA. The requester subsequently raised a complaint with the Commissioner, who ruled that the section 41 was not engaged because the information in the contract was not obtained from another party. The Tribunal agreed that the contract didn't fulfil the requirements of section 41(a), stating; 'If the Contract signifies one party stating: "these are the terms upon which we are prepared to enter into a Contract with you" by the acceptance of that Contract the other party is simultaneously stating "and these are the terms upon which we are prepared to enter into a Contract with you". Consequently, the Contract terms were mutually agreed and therefore not obtained by either party' (Para 34).

The Commissioner's decision

36. The Commissioner is satisfied that the Data Processor Agreement cannot, by definition, be exempt under section 41. This document is an agreement between the Council and AVG. It represents the terms on which the Council has agreed to do business with AVG, rather than information provided in confidence by AVG.
37. Having reviewed the Confidentiality Extraordinaire document, the Commissioner is satisfied that this information was not provided by AVG in confidence either. This document also appears to signify the terms and costs for which AVG will be prepared to enter into a contract with Council and provide services. The fact that this information falls within the scope of this request suggests that they are, once again, terms on which the Council has agreed to do business with AVG.
38. Despite the Commissioner giving the Council ample opportunities to explain how the Confidentiality Extraordinaire would be exempt under section 41, it failed to demonstrate this.
39. Based on the above, the Commissioner has concluded that section 41 does not apply and will now consider the application of section 43.

¹ [H- -V1 \(tribunals.gov.uk\)](https://tribunals.gov.uk)

Section 43(2): commercial interests

40. Section 43(2) of FOIA provides that information is exempt where disclosure “would, or would be likely, to prejudice the commercial interests of any person (including the public authority holding it)”.
41. In order for a prejudice based exemption such as section 43(2) to be engaged, the Commissioner considers that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely to occur if the withheld information were disclosed, has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e. disclosure ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be a real and significant risk. With regard to the higher threshold, in the Commissioner’s view, this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
42. The Commissioner’s published guidance² on section 43(2) expands on the level of detail required by the public authority:
- “It is not sufficient for you to simply argue that because information is commercially sensitive, its disclosure would, or would be likely to, prejudice commercial interests. You must be able to demonstrate a causal relationship between the disclosure of the information in question and the prejudice you envisage.”
43. The Council advised that it sought to rely on section 43(2) on the basis that disclosure would prejudice the commercial interests of AVG. It further advised that AVG also “verbally expressed concern” with this information being disclosed. It did not provide any written evidence of

² <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

its apparent conversation, nor did it explain what AVG's specific concerns were.

The Commissioner's decision

44. As noted in the Commissioner's guidance above, it is not sufficient to simply state that information is commercially sensitive. The public authority must establish a causal link between disclosure and the specific prejudice it anticipates.
45. Despite multiple opportunities provided by the Commissioner, the Council failed to demonstrate any relationship between the disclosure of the information in question and the prejudice it envisages would take place.
46. As the Commissioner has determined neither section 41 nor section 43 applies, he requires the Council to disclose the requested information, subject to the redaction of a minimal amount of personal data (which would be exempt under section 40(2) of FOIA). Signatures and contact details should be redacted, but the names of the persons who signed on behalf of their respective organisations should not.

Other matters

47. The Commissioner would like to take this time to remind the Council that his website has detailed guidance and relevant decision notices, which can support it in its responses and submissions. He also expects public authorities to answer the questions he has asked, rather than simply assert that their position is correct. The submissions provided by the Council for this case, were not to the standard expected by the Commissioner.
48. The Commissioner would also like to remind the Council that it is good practice to keep records showing how requests for information have been responded to and why. This would include making notes of the reasons why any exemptions have been applied or the searches that have been undertaken to identify relevant information – unless these have already been recorded in the Council's response. These records will support the Council when approached by the Commission for detailed submissions.
49. Finally, the Commissioner would also like to advise that while an Internal Review is not required under FOIA, it is still considered to be good practice. The Council did not provide the complainant with an internal review on this matter and therefore has not demonstrated good practice.

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF