

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 May 2024

Public Authority: Newlands Parish Council
Address: Newlands Community Hall
Newlands Avenue
Waterlooville
Hampshire
PO7 3BX

Decision (including any steps ordered)

1. The complainant requested a copy of an email sent by a particular councillor, which was referred to at a meeting of Newlands Parish Council (the Council). The Council withheld the information requested under section 40(2) (personal information) of the FOIA. The Commissioner's decision is that the Council has correctly applied section 40(2) to the request. He does not require any steps to be taken.

Request and response

2. On 16 December 2023 the complainant wrote to the Council and referred to discussions at a meeting of the Amenities Committee on 14 December 2023 and requested information in the following terms:

"I was one of the attendees of that meeting that evening to see what was being discussed and raised.

I recall [name of cllr redacted] mentioning sending an email. Which have seemed to caused an offence of other councillors.

Please can I request a copy of the email?

As I believe I am allowed to see this email under the Freedom of information act”.

3. The Council responded on 21 December 2023 and confirmed it held the email but as the email referred to voting intentions it was exempt under the FOIA. However, the Council did not specify any FOIA exemptions.
4. On 4 January 2024 the complainant wrote back to the Council expressing dissatisfaction with its refusal to provide the information requested. They also suggested that the part of the email which concerned voting could be redacted and the remaining information could be disclosed.
5. The Council provided the outcome of its internal review on 30 January 2024 and stated that the information requested was exempt under section 40(2) of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 4 January 2024 to complain about the way their request for information had been handled.
7. The scope of the Commissioner’s investigation is to determine whether the Council correctly applied section 40(2) to the request.

Reasons for decision

Section 40 - personal information

8. 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.
9. 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 UK General Data Protection Regulation (‘UK GDPR’).

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

10. 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.
11. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. 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.
15. 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.
16. The withheld information in this case comprises an email which a particular councillor sent to the Council and other councillors. The email contains the councillor's views on a particular matter which was discussed at the meeting on 14 December 2023. The Commissioner is satisfied that the information both relates to and identifies the councillor concerned. The information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
17. 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. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

18. Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

19. 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.
20. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

21. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.
22. 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.

23. In considering the application of Article 6(1)(f) of the UK 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;

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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".

- 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.
24. 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

25. 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.
26. Whilst the complainant has not submitted any specific representations as to why they think the information should be disclosed, they explained that the email concerned was mentioned at the meeting in question. They also suggested that the email in question appeared to have caused offence to other councillors.
27. The Council does not consider there is any wider legitimate interest in the contents of the email being disclosed. It also confirmed that no one else who was present at the meeting has requested a copy of the email in question.
28. The Commissioner accepts that, as the email was sent by an elected member of the Council in direct response to an agenda item that was to be discussed at a forthcoming public meeting, the public has a legitimate interest in knowing more about the councillor's response to the matter concerned.

Is disclosure necessary?

29. '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.

30. As reference to the email was discussed in a public meeting of the Council, the author of the email is therefore known to a number of individuals. In view of this, redaction of the name of the author would not be viable in this case. The Commissioner is therefore satisfied that there are no less intrusive means of fully achieving the legitimate aims identified.

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

31. 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.
32. 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 to the disclosure; and
 - the reasonable expectations of the individual.
33. 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.
34. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
35. In correspondence with the Commissioner, the Council acknowledged that the email relates to the public office of the councillor concerned. However, it contends that the councillor concerned would have had a reasonable expectation that the contents of the email would remain confidential within the Council. The Council also confirmed that the councillor had been consulted regarding disclosure of the email and had not consented to disclosure.

36. The Council advised the Commissioner that there have been a number of exchanges on social media platforms between the councillor concerned, the complainant and other members of the Newlands Community Group, which the complainant is a member of. The Council is of the opinion that disclosure of the email has the potential to cause damage and distress to the councillor concerned.
37. Having viewed the withheld information, although the Commissioner notes that it was sent from a personal email address, it is clear that it was sent by the individual concerned in their capacity as a councillor, rather than in a personal capacity. The Council itself also confirmed this to the Commissioner, as set out in paragraph 35 above. As such, it could be argued that the data subject should have some expectation of the possibility of disclosure, and this would in turn reduce the distress of unexpected disclosure.
38. However, even though the email was sent in their capacity as a councillor, the Commissioner notes that, whilst an elected official, parish councillors are at the lowest end of the scale of elected officials with very limited powers. They are not equivalent, for example, to an elected councillor at a larger county or district council. In addition, the Commissioner has had sight of representations from the data subject regarding this matter and is aware of significant concerns they have about disclosure of the withheld information, and indicated that disclosure would be distressing to them. Given the content of the email, the Commissioner accepts that disclosure, essentially into the public domain would be damaging to the data subject.
39. Taking all the circumstances into account, whilst the Commissioner accepts that there is a legitimate interest in disclosure of communications an individual has written in their capacity as a parish councillor, he does not consider it tips the balance in favour of disclosure in this case.
40. As the Commissioner is satisfied that the legitimate interest in disclosure is not sufficient to outweigh those of the data subject and their fundamental rights and freedoms there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
41. Given the above conclusion that disclosure would be unlawful, the Commissioner doesn't need to go on to consider separately whether disclosure would be fair or transparent.
42. The Commissioner's decision is that the Council is entitled to withhold the information under section 40(2) of the FOIA.

Right of appeal

43. 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

44. 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.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Joanne Edwards
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