

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 April 2014

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

Complainant: Redacted
Address: Redacted

Decision (including any steps ordered)

1. The complainant has requested from Shaftesbury Town Council ('the council') information relating to a complaint against a councillor. The council applied the exemption for prejudice to the effective conduct of public affairs at section 36 and the exemption for personal data at section 40(2) of the FOIA. The Commissioner's decision is that the council has correctly applied the exemption at section 40(2) of the FOIA. It has therefore not been necessary to consider the exemption at section 36 of the FOIA.
2. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

3. On 12 February 2013, the complainant wrote to the council and requested information in the following terms: 13 APR 2014

"I am writing formally under the above Act to ask for a copy of the notes which summarised [Cllrs name redacted] summary of his comments on my complaint against him."

4. The council responded to the request on the 11 March 2013. It refused to disclose the requested information citing the exemptions at section 36 and section 40 of the FOIA.
5. The complainant requested an internal review on 2 October 2013.
6. The council provided it's response to the internal review request on 29 October 2013 it which it maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 31 October 2013 to complain about the way his request for information had been handled. He said that when he submitted his written complaint to the council, he did so with the express permission that a copy should go to [councillor complained about] and on the full understanding, that he should receive a copy of his counter complaint. He explained that when this request was turned down in March 2013 he did not pursue it at that stage and is doing so now because [councillor complained about] has been put under sanction by the Full Council for committing a criminal act and for lying about issues. He also said he was anxious that he should have access to a set of comments directly about him and wished to be able to counter them if necessary.
8. In correspondence with the council, the Commissioner expressed his view that it is possible that some of the information requested may be personal data of the complainant because the complainant had indicated that the requested information may contain details of what was said about him in the interview. The Commissioner therefore requested that the council revisit the way the council handled this matter, treating the request as a Subject Access Request under the Data Protection Act 1998 ('DPA') if appropriate.
9. In its response to the Commissioner's enquiries, the council explained that the material sought relates only in small part to the requester, but is mainly about other individuals and therefore it does not think it would be appropriate to treat the request as one under the DPA, but to continue to treat it as a request under the FOIA. It said that from looking at the interview record, it could prove difficult to separate out anything that refers to only the complainant and not anyone else without producing something that doesn't make any sense.

10. Any personal data of the requester is not dealt with in this decision notice. A separate data protection complaint (reference RFA0533160) has been set up to deal the complainants personal data.
11. The Commissioner has considered the council's application of section 40(2) to the requested information.
12. As the Commissioner's decision is that section 40(2) applies in this case, he has not found it necessary to consider the council's application of section 36.

Reasons for decision

Section 40(2)

13. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').
14. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

""personal data" means data which relate to a living individual who can be identified –

 - (a) from those 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 intentions of the data controller or any other person in respect of the individual."
15. 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 data protection principles under the DPA. The Commissioner notes in this case that the council said that disclosure would breach the first data protection principle.

Is the withheld information personal data?

16. As explained above, the first consideration is whether the withheld information is personal data. The information is a record of an interview

with the councillor who was complained about. The council said that the information contains data relating to third parties, principally one specific third party, who are identifiable from that data. Having viewed the requested information, the Commissioner is satisfied that it is primarily the personal data of the councillor complained about and also the personal data of other third parties.

Does the disclosure of the information contravene any of the data protection principles?

17. As the Commissioner is satisfied that the withheld information is personal data, he now needs to consider whether disclosure would breach the first data protection principle, i.e. would disclosure be unfair and/or unlawful.
18. The first data protection principle states that:

“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.”
19. In deciding whether disclosure of this information would be unfair, the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subjects, the consequences of disclosure on those data subjects and balanced the rights and freedoms of the data subjects with the legitimate interests in disclosure.

Nature of the information and reasonable expectations

20. The Commissioner recognises that information relating to complaints against individuals carries a strong general expectation of privacy due to the likelihood that disclosure could cause the data subjects' distress and could also cause permanent damage to their future prospects and general reputation.
21. In his guidance on personal data¹, the Commissioner states that information relating to an internal investigation or disciplinary hearing

¹

http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of

will carry a strong general expectation of privacy. This was recognised by the Information Tribunal in the case of *Rob Waugh v Information Commissioner and Doncaster College*² when it said at paragraph 40 that:

"...there is a recognised expectation that the internal disciplinary matters of an individual will be private. Even among senior members of staff there would still be a high expectation of privacy between an employee and his employer in respect of disciplinary matters."

22. The council said that the nature of the process undertaken in relation to the complaint against the councillor was a mediation / dispute resolution process rather than a statutory disciplinary process, such as the Standards process, and that a participant in the process would have a reasonable expectation that what they say in an interview would not be disclosed, let alone made public. It said that it is an essential feature of a realistic mediation process that participants feel the confidence to respond honestly to issues raised with them and, from the interview notes, it appears that the councillor plainly did not anticipate his comments being circulated more widely due to the candid nature of some of his comments.
23. Although the Commissioner considers that the withheld information in this case relates to the councillor's public function rather than their private life, he is satisfied that the councillor would have an expectation of confidentiality and privacy in relation to the requested information.

Consequences of disclosure

24. In order to assess the impact of the consequence of disclosure on whether disclosure would be fair, it is necessary to consider whether disclosure of the withheld information would cause unwarranted damage or distress to the data subject.
25. The council said that because of the apparent complexity and contentiousness of the issues, it was concluded that there was no prospect of a satisfactory resolution and it did not therefore see the process through to a conclusion and therefore any disclosure would be entirely out of context.

[Information/Detailed specialist guides/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf](#)

² EA/2008/0038, 29 December 2008

26. The Commissioner considers that disclosure would amount to an infringement into the privacy of the councillor complained about which has the potential to cause damage and distress, particularly as he has found that disclosure of the information requested would not have been within the councillor's reasonable expectations and because the process was not concluded.

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

27. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for its own sake along with specific interests which in this case is the legitimate interest in the handling of a complaint against a councillor. He acknowledges that councillors should be open to scrutiny and accountability because they are elected members of local government.
28. The council has said that it cannot see that there could be significant public interest in disclosure in this case because the councillors comments are of a personal nature, that being his views on the merits and actions of fellow and former councillors, rather than about matters of public policy. It said that the information relates in general to personal disputes and public interest in such matters would be no more than prurient.
29. The complainant has said that he was told he would receive a copy of the councillor's interview notes and that in view of the councillor being subsequently accused of a criminal act and of distorting truths, he has a right to see the requested information so that he may verify their veracity.
30. Although the Commissioner can appreciate why the information is of particular interest to the complainant, he is mindful of the fact that the FOIA is request and motive blind and has not seen any evidence to indicate that there is sufficient wider legitimate public interest which would outweigh the rights and freedoms of the councillor in this case. The complainant's wish to access this information is a matter that the Commissioner can appreciate but it is nonetheless a personal need.

Conclusion on the analysis of fairness

31. Taking all of the above into account, the Commissioner concludes that it would be unfair to the councillor concerned to release the requested information. Disclosure would not have been within his reasonable expectations and the loss of privacy could cause unwarranted distress. He acknowledges that there is a legitimate interest in knowing that a

complaint against a councillor has been handled appropriately but does not consider that this outweighs the individual's strong expectations of, and rights to, privacy. The Commissioner has therefore decided that the council was entitled to withhold the information under section 40(2), by way of section 40(3)(a)(i).

32. As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, he has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

Right of appeal

33. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

34. 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.
35. 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 

Andrew White
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