

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 May 2022

Public Authority: Wigan Council
Address: New Town Hall
Library Street
Wigan
WN1 1YN

Decision (including any steps ordered)

1. The complainant has requested information with regards to a councillor. Wigan council (the council) provided some information but withheld the remainder relying on section 40(2) of the FOIA – third party personal data.
2. The Commissioner's decision is that the council was entitled to withhold the information under section 40(2) of the FOIA.
3. The Commissioner does not require any steps.

Request and response

4. On 12 July 2021 the complainant made the following information request to the council:

"On the 7th July 2021 Councillor [name redacted] has made the following public announcement:-

"...unfortunately after weeks of consideration I have stepped down as your councillor with immediate effect..."

On the 9th July 2021 Councillor [name redacted] made a further public announcement explaining his reasons for stepping down.

On the 12 July 2021 Councillor [name redacted] made a further public announcement confirming he will be carrying on as a Councillor from Bryn ward and made the following announcement:-

"...I would like to say a massive thank you to Alison McKenzie Folan chief executive of Wigan Council for giving me the time to reflect and see clearly what is best for Bryn."

Can you please send me a copy of all communications between Councillor [name redacted] and Alison Mckenzie Folan, the Returning Officer for the Metropolitan Borough of Wigan in relation to Councillor [name redacted] recent resignation as a Councillor?

Can you please include and send me a copy of Councillor [name redacted] resignation communication to the Returning Officer and Wigan Council?"

5. The council responded on 3 August 2021 refusing to provide the information relying on section 40(2) of the FOIA – third party personal data, and section 41 of the FOIA – information provided in confidence.
6. The complainant requested an internal review on same day as the council's response.
7. The council provided its internal review response on 27 August 2021 upholding its initial refusal.

Scope of the case

8. The complainant contacted the Commissioner on 3 August 2021 to complain about the way his request for information had been handled.
9. On 29 September 2021 the council advised both the Commissioner and the complainant that it was no longer seeking to rely on section 41 of the FOIA.
10. It also provided the complainant with a copy of an email dated 7 July 2021 from the councillor to the chief executive, which was a brief email stating his resignation. The council maintained its application of section 40(2) of the FOIA to the remaining information.
11. The scope of the case is for the Commissioner to determine whether the council is correct to withhold the remaining information under section 40(2) of the FOIA.

Reasons for decision

Section 40(2) of the FOIA – Third party personal data

12. 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.
13. 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').
14. 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.

15. 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?

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

“any information relating to an identified or identifiable living individual”.

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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.
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. The information being withheld in this case are emails from or too the named councillor discussing his resignation and the subsequent withdrawal of his resignation.
21. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the named councillor. He is satisfied that this information both relates to and identifies the councillor concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
22. 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.
23. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

24. 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".

25. 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.

26. 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

27. 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.

28. 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:-

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".

- 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.
29. 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

30. 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.
31. The complainant has stated he wants the information in order to see whether the council has acted lawfully in handling this scenario of the withdrawn resignation of the councillor.
32. The council has stated that it accepts that there is always a public interest in demonstrating transparency and accountability in public decision making.
33. The Commissioner also sees that for the public to have access to the full email correspondence would increase the transparency and accountability around the resignation and the withdrawal of that resignation by the named councillor.

Is disclosure necessary?

34. '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.

35. The Commissioner has considered whether disclosure of the withheld information is necessary to meet the requester's specific legitimate interest and the wider legitimate interest in openness and transparency by public authorities.
36. It is important to make clear at this point that disclosure under the FOIA is disclosure into the public domain, not just specifically to the requester. The Commissioner has therefore considered whether disclosure of the named councillor's personal data to the world at large is necessary to meet the legitimate interests identified above.
37. The Commissioner considers that the disclosure of the withheld information is necessary to meet the legitimate interests identified above.

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 to 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 complainant has stated that proper process with regards to the councillor's resignation and the subsequent withdrawal of this was not

followed, stating that the council have a recent record of not complying with the Local Government Act 1972.

43. He is of the view that releasing the withheld information would provide transparency and reassure the public that the council has acted lawfully.
44. The council has responded to this by stating that the council and its officers operate within a governance framework of internal checks and balances designed to ensure that processes and decision making are lawful and informed by objective advice.
45. The council is also of the view that even though the councillor is an elected member, who serves a public role, releasing the withheld information would cause him distress as he had no expectation that this information would be made public. He has also declined to give consent to it being disclosed.
46. The Commissioner has reviewed the withheld emails and accepts that this type of information would carry an expectation of privacy.
47. The Commissioner is aware, as referenced in the complainant's request, that a public statement was given about the resignation and withdrawal.
48. An internet search shows it is discussed in several newspaper articles. These articles also reveal that since the request was made, there was a legal challenge, from a third party, in relation to the acceptance of the withdrawal of the resignation.
49. The Commissioner understands from these articles, that due to the council not wanting to incur costs from a legal challenge, the withdrawn resignation has since been reversed by the council and the resignation of the councillor was implemented.
50. It is not in the Commissioner's remit to determine whether the process of the resignation and subsequent withdrawal was correctly carried out, and although there was the threat of legal action about the resignation, the Commissioner is not aware of any evidence that demonstrates the withheld information would reveal any wrongdoing.
51. The Commissioner is also of the view that even though a public statement has been made about the resignation and subsequent withdrawal, this does not mean that the councillor's correspondence with the council would no longer be subject to a legitimate expectation of privacy.
52. The public statement does go some way to aid transparency and decision making of the council and the Commissioner is of the view that

any discussions the councillor had with the council about his position would still carry an expectation of privacy.

53. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's 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.

The Commissioner's decision

54. 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).

Right of appeal

55. 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

56. 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.
57. 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
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