

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 February 2024

Public Authority: North Tawton Town Council
Address: 14A The Square
North Tawton
EX20 2EP

Decision (including any steps ordered)

1. The complainant requested an audio recording of a Council meeting from North Tawton Town Council ("the Council"). The Council refused to provide the requested information, citing section 36 of FOIA (prejudice to effective conduct of public affairs) as its basis for doing so.
2. The Commissioner has determined that some of the information within the recording is the complainant's own personal data and is therefore exempt from disclosure under section 40(1) of FOIA. The Commissioner's decision is that the Council is not entitled to withhold the remainder of the information in the recording (that which is not the complainant's own personal data) under section 36 of FOIA, as although the exemption is engaged, the public interest in disclosure outweighs that in maintaining the exemption.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the parts of the recording which are not the complainant's personal data.
4. The Council 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 6 September 2023, the complainant wrote to the Council and requested information in the following terms:

“the audio of last night’s full Council meeting (5th September 2023)”.

6. The Council responded on 21 September 2023 and refused to provide the requested information citing the information intended for future publication exemption (section 22 of FOIA) as its basis for doing so. It stated that the audio recording was made for the purpose of producing minutes and that the Council intended to publish the approved minutes of the meeting in line with the Council’s publication scheme.
7. The complainant requested an internal review on the same day. They stated that the approved minutes had now been published and that the minutes are not a verbatim record of what was discussed or debated at the meeting and that therefore not all of the information within the audio recording had been published.
8. Following an internal review the Council wrote to the complainant on 25 September 2023. It revised its position to rely on the exemption at section 36(2)(b) of FOIA (prejudice to effective conduct of public affairs) to refuse to provide the requested information.

Scope of the case

9. The Commissioner has determined that some of the information within the recording is the complainant’s own personal data. He has therefore proactively applied the exemption at section 40(1) of FOIA to this information. He has addressed the Council’s obligations with respect to this information under the Data Protection Act 2018 (DPA) in the other matters section of this notice.
10. The Commissioner has gone on to consider whether the Council is entitled to rely on section 36 of FOIA to withhold the information in the recording which is not the complainant’s personal data.

Reasons for decision

Section 40(1) - personal data of which the applicant is the data subject

11. Section 40(1) of the FOIA provides that any information to which a request for information relates is exempt information if it constitutes personal data of which the requester is the data subject.
12. The Commissioner's guidance¹ is clear that a requestor's own personal data should not be disclosed under FOIA or the EIR, instead public authorities should handle this aspect of the request as a subject access request (SAR) under the UK GDPR or the DPA, as applicable.
13. As the Commissioner's guidance is clear that a requestor's own personal data should not be disclosed under FOIA or the EIR, he has proactively applied this exemption to the parts of the recording which contain the complainant's personal data.
14. This reasoning covers how the Commissioner has determined that some of the requested information is the complainant's personal data and therefore, exempt from disclosure under section 40(1) (personal information) of the FOIA.
15. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual."
16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. In this case the complainant has requested an audio recording of a Council meeting. At various points in the meeting comments were made that both identified and related to the complainant, who is a councillor. The Commissioner is satisfied that these sections of the recording are the personal data of the complainant.
18. The Commissioner's decision is therefore that the Council is entitled to rely on section 40(1) of the FOIA to refuse to provide the parts of the recording which identify and relate to the complainant under FOIA. He

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/section-40-and-regulation-13-personal-information/part-one-is-the-request-for-personal-data/#own>

has addressed the Council's obligations with respect to this information under UK GDPR and the DPA in the other matters section of this notice.

19. He has gone on to consider the Council's application of section 36 to the parts of the recording which do not identify and relate to the complainant.

Section 36(2) FOIA: prejudice to effective conduct of public affairs

20. Section 36(2) of FOIA states that information requested from a public authority is exempt where, in the reasonable opinion of the qualified person, disclosure:

- b) would, or would be likely to, inhibit—

- (i) the free and frank provision of advice, or

- (ii) the free and frank exchange of views for the purposes of deliberation, or

- c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

21. The above subsections provide qualified exemptions, and so, if engaged, the public interest test must also be carried out.

22. In order to engage any of the limbs of section 36(2), it is necessary for a public authority to obtain the opinion of its qualified person ("QP") as to whether the inhibition or prejudice relevant to the subsection cited would be at least likely to occur, as a result of disclosure of the information in question.

23. The Council has confirmed that the QP for the purposes of considering the request was the Chair of the Council, Cllr Colin Lee.

24. In his opinion, the exemptions at sections 36(2)(b)(i) and 36(2)(b)(ii) were engaged with regard to the recording: he considered that disclosure of the audio recording would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation at future meetings.

25. In order to make a finding as to whether any of the subsections of section 36(2) are engaged, the Commissioner must consider whether the QP's opinion was a "reasonable" opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the QP in a particular case. The opinion also does not have to be the only reasonable opinion that could be held, or the most reasonable opinion. The Commissioner only needs to satisfy himself that

the opinion was reasonable; in other words, that it was an opinion that a reasonable person could hold.

26. The Commissioner will consider all relevant factors to assess whether the opinion was reasonable. In this case, he is satisfied that the QP had knowledge of and involvement in this matter. Indeed, having chaired the meeting in question, he appears on the audio recording. The QP was therefore well-placed to express an opinion on the likely outcome of disclosure.
27. The Commissioner accepts that the opinion is reasonable. Specifically, he accepts that it is reasonable for the QP to hold the opinion that disclosure of the recording would be likely² to result in the envisaged inhibition.
28. The Commissioner is satisfied that the exemption is engaged, and has considered the balance of the public interests.

Public interest test

29. Having accepted that the opinion of the QP (that inhibition to the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation would be likely to result from disclosure) was reasonable, the role of the Commissioner here is not to challenge or reconsider his conclusion on the reasonableness of that opinion. Instead, his role is to consider whether the public interest in disclosure equals or outweighs the concerns identified by the QP.
30. Having found that the QP's opinion was reasonable, appropriate weight must be given to that here. It would not be in the public interest to harm the ability of the Council to carry out its work. However, as to how much weight this should carry in the balance of the public interests, the question here is what the severity, extent and frequency would be of the inhibition identified by the QP.
31. With regard to the severity, extent and frequency of the envisaged inhibition to public affairs (specifically, to the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation) the Commissioner does not consider that it would be

² As per the judgement of the Information Tribunal in *John Connor Press Associates v Information Commissioner* (EA/2005/0005, 25 January 2006), the Commissioner interprets the expression "likely to" prejudice as meaning that the chance of prejudice being suffered "should be more than a hypothetical or remote possibility; there must have been a real and significant risk."

significant. Council meetings such as this one are a public forum and are minuted; individuals are already aware that their contributions are recorded, and may form part of the official public record.

32. The Commissioner has also considered the public interest in disclosure.
33. The Commissioner considers that there is a strong public interest in the disclosure of information about what decisions are taken at Council meetings and how those decisions are made. However, the publishing of the minutes goes a long way in meeting this interest.
34. The Commissioner is not aware of any evidence to suggest that the minutes are not an accurate record of this meeting. The complainant has not made an allegation of the minutes being inaccurate in their complaint to the commissioner. The Council has provided a copy of the recording to the Commissioner, he has listened to part, but not all of the recording, in order to conserve his limited resources. For the sample of the recording considered by the Commissioner, the minutes appear to be an accurate and fairly detailed record of the discussion.
35. Nevertheless, as one would expect, the recording of the meeting does contain additional information that is not in the minutes. The minutes are not a verbatim transcript of all that was said in the meeting, and additional information can be garnered from the recording, for example, about the tone of comments made by the meeting participants. The Commissioner considers that there is some public interest in the disclosure of this additional information, not contained in the minutes, in order to provide a fuller picture of what occurred at the meeting.
36. Given that the Commissioner considers that the severity, extent and frequency of the inhibition to the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation, that the QP considers would be likely as a result of disclosure, would not be significant, he considers that this is outweighed by the public interest in disclosure.
37. On balance, having considered the competing public interests, the Commissioner's decision is therefore that the public interest in favour of maintaining the exemption does not outweigh the public interest in favour of disclosure of the audio recording.
38. He therefore orders the Council to disclose the parts of the recording that do not identify or relate to the complainant.

Other matters

39. Whilst the Commissioner cannot require a public authority to take action under the DPA via a FOIA decision notice, in view of his decision that some of the requested information is the personal data of the complainant, the Council should consider providing a response to the complainant under the DPA in respect of this information, if it has not already done so. From the submissions provided by the Council, it appears that it may have already issued a response to a SAR providing the relevant extracts of the recording.

Right of appeal

40. 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

41. 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.
42. 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

Victoria James
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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