

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 October 2019

Public Authority: Teignmouth Town Council
Address: Bitton House
Bitton Park Road
Teignmouth
TQ14 9DF

Decision (including any steps ordered)

1. The complainant has requested full disclosure of a report of an investigation carried out at its request for Teignmouth Town Council, which it had previously disclosed in redacted form.
2. The Commissioner's decision is that Teignmouth Town Council acted correctly in relying on the section 40(2) FOIA (Personal information) exemption to withhold the redacted information.
3. The Commissioner does not require Teignmouth Town Council to take any steps to ensure compliance with the legislation.

Request and response

4. On 16 April 2019, the complainant wrote to Teignmouth Town Council (TTC) and requested the following information:
"Please supply a full unedited/ unchanged copy of the report of the investigation report [sic] by [name redacted] into the CIC/ Mayor produced June 2018. ('the report')".
5. On 10 May 2019, TTC responded and provided a redacted copy of the report. The information redacted was withheld relying on the section

40(2) FOIA exemption (Personal information). This position was maintained by TTC following an internal review.

6. The complainant's information request was almost identical with an earlier information request made to TTC by another member of the public. In response to that request, TTC had disclosed pages 1-36 of the 78 page report being considered here.
7. On receipt of a complaint about that earlier request, TTC had sought advice from the Commissioner. The Commissioner provided a preliminary view and a suggested approach to the matter.
8. In the light of the Commissioner's preliminary view, TTC disclosed further information from pages 36-52 of the report, with some minor redactions, which led to the earlier matter being resolved informally and no formal decision notice being issued at that time.
9. TTC continued to withhold pages 53-78 of the report; this comprised the author's notes of his interviews with witnesses.

Scope of the case

10. On 31 May 2019, the complainant contacted the Commissioner to complain about the way her request for information had been handled. She said that the report had cost the tax payer some £3,000 and the events leading up to production of the report had caused lots of divisions within her community. She asked the Commissioner to review her earlier decision and her preliminary view.
11. In investigating this matter, which included a review of her preliminary decision, the Commissioner asked another member of her staff, who had played no part in forming her preliminary view, to consider the withheld information afresh.
12. The Commissioner has had regard for the representations she received from both the complainant and TTC. She has noted background correspondence between TTC and the author of the report. She has noted other relevant correspondence between TTC and some of the persons whose personal data is contained within the report. She has also reviewed the information still being withheld.

Reasons for decision

13. Section 40(2) 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) FOIA is satisfied.

14. In this case the relevant condition is contained in section 40(3A)(a)¹ FOIA. This applies where 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 General Data Protection Regulation ('GDPR').
15. 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 FOIA cannot apply.
16. 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?

17. Section 3(2) DPA defines personal data as:

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

18. The two main elements of personal data are that the information must relate to a living person and that person must be identifiable.
19. An identifiable living individual is one who can be recognised, 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.
20. 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.
21. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to persons who either are, or recently have been, either members or officers of TTC or of another nearby authority. She is satisfied that this information both relates to and identifies the people concerned. This

¹ As amended by Schedule 19 Paragraph 58(3) Data Protection Act 2018 ('the DPA').

information therefore falls within the definition of 'personal data' in section 3(2) DPA.

22. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under 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 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 a FOIA request, the personal data is processed if it is disclosed in response to the request. This means that the information can only be disclosed if doing so would be lawful, fair and transparent.

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

26. Article 6(1) of the 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.
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.

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

28. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under 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;
 - 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(s).
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 interests in disclosure of the requested information under FOIA, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
31. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
32. In her representations, the complainant reminded the Commissioner that her preliminary view in the earlier case had been preliminary and not final. She said that the Commissioner had merely said that the withheld information 'could' be withheld but that TTC had then treated this as a final view. The complainant added that the text which TTC had already disclosed named relevant individuals and indicated that interviews with them had been recorded. The complainant said she assumed that witnesses would have signed off their statements and would stand by the evidence they had given. She added that the report had cost the taxpayer £3,000 and said that the events leading up to its production had caused lots of divisions within her community.
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33. The complainant said that, unlike herself, the people detailed in the report were either councillors, or officers, or received remuneration from the public purse. As such, the need for truth was paramount to ensure these people were accountable to the public for their actions. She asked the Commissioner to direct full disclosure of the report.
34. The Commissioner accepted the evidence of the complainant that the report had been produced at cost to the public purse; it had been about the actions of council members and officers when they had been on official business. She noted that concerns had been expressed within the community at official events which had occurred and that these events had led TTC to commission the report. Accordingly the Commissioner decided that there was a legitimate interest in the full facts being made known to the public to achieve greater openness, transparency and accountability.

Is disclosure necessary?

35. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
36. TTC told the Commissioner that all of the information still being withheld by it was the personal data of the persons who had acted as witnesses and who had provided oral evidence to the author of the report during his investigation; as such it was not suitable for disclosure. TTC told the Commissioner about its concerns that threats had been made to some of the persons named following the earlier publication of the redacted report.
37. The author of the report told TTC, when asked, that he had no objection to the report being considered openly by it. He added that he could see no reasons for TTC to consider the report in private.
38. The Commissioner has seen that, when the witnesses interviewed gave their evidence, no undertakings regarding confidentiality had been requested or given. However she recognises that when a personal statement is made by a person to an investigation there will generally be an expectation by that person that their actual statement would not be published later for the general public to see (which is what a disclosure under FOIA is considered to be) albeit their views may be anonymously represented in any findings. If this were to happen more widely, then it would hamper investigations and result in individuals

being less frank with their comments and in giving evidence, which would work to the detriment of such investigations.

39. In this matter, the information already disclosed from the report includes the full unredacted summary of findings of the investigation. The Commissioner has reviewed those findings. She has also considered the interview records that comprise the withheld information.
40. In the light of her review, the Commissioner considered that the summary already published provided a complete, accurate and balanced account of the evidence given by the witnesses, as it is recorded in the withheld sections of the report. She found that this, already disclosed, information satisfies the legitimate interests in disclosure.
41. The Commissioner therefore decided that further disclosure is not necessary to satisfy the legitimate interest of the public. As such it would not meet the requirements of DP principle (a) and would therefore be unlawful.
42. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she did not go on to conduct a balancing test.

The Commissioner's decision

43. The Commissioner therefore decided that TTC was entitled to withhold the information under section 40(2) FOIA, by way of section 40(3A)(a).

Right of appeal

44. 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

45. 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.
46. 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

Dr Roy Wernham
Senior Case Officer

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