

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 June 2020

Public Authority: Rotherham Metropolitan Borough Council

Address: Riverside House
Main Street
Rotherham
S60 1AE

Decision (including any steps ordered)

1. The complainant has asked Rotherham Metropolitan Borough Council for all forms of recorded information associated with its Register of Members Interests, in particular that information which concerns the Council and councillors who registered as members of UKIP or the Brexit Party. The Council refused to comply with the complainant's request in reliance on the exemption to disclosure provided by section 40(2) of the FOIA.
2. The Commissioner's decision is that Rotherham Metropolitan Borough Council has correctly applied the section 40(2) exemption to the information it holds which falls within the terms of the complainant's request.
3. No further action is required in this matter.

Request and response

4. On 7 September 2019, the complainant wrote to the Council to ask for the following recorded information:

"All letters, emails, memos, notes of telephone conversations and any other communications etc, in the last three months, associated with councillor's Register of Interests, between The Council and Elected Members, registered as either members of UKIP or the Brexit Party."

5. The Council responded to the complainant's request on 3 October 2019 by advising him that the information he has asked for is the personal data of the relevant members and that its disclosure would contravene one of the data protection principles. The Council therefore informed the complainant that the information is exempt under section 40 FOIA.

6. The Council told the complainant that the disclosure of the information would contravene the data protection principle set out in Article 5 of the General Data Protection Regulations which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency')".

7. The Council said that "such processing would not be fair as it would not be within the expectation of the relevant members that such correspondence would be made publicly available - there is an expectation of confidentiality on the part of members, in respect of such information".

8. The Council also confirmed to the complainant that its Monitoring Officer and Chair of the Standards Committee had met with the Leader of the Council and some of the members of the Brexit Party on the 5th July 2019 and had reviewed all Brexit Party members Register of Interest forms and had updated these where necessary.

9. On 4 October 2019, the complainant wrote to the Council to request an internal review. The complainant said:

"I believe that Section 40 refers to the GDPR regulations and, as such, the information that you hold on Elected Members must be Adequate, Relevant and Necessary. Therefore, if you do hold information on Elected Members that does not comply with the above, it should be deleted.

I further believe that the information I have requested is in the public interest and since the information that you hold must be held lawfully, then there is no justifiable reason it cannot be released to me.

However, since it is the process that I wish to scrutinise and not the individual, as a last resort, I would accept information that has been ammonised [sic] or with certain redactions."

10. The Council carried out its internal review and advised the complainant that disclosure of the requested information is "not appropriate in the circumstances, for the reasons stated in the Response". The Council added, "Advice is sought by Members from the Monitoring Officer about the issues referred to in the request, and it would not be within the

reasonable expectation of the Member that such requests for advice, and the advice provided would thereafter be made public". Additionally, the complainant was advised that disclosure would potentially deter Members from contacting the Monitoring Officer to ask for such advice and therefore it would be unfair to provide that advice.

11. The Council told the complainant that it considered that disclosing the information he had requested would breach of Article 5 of the General Data Protection Regulations and that it is therefore exempt under section 40 of the FOIA.
12. Responding to the complainant's comments about the possible anonymisation of the requested information, the Council said, "...even if the information requested were to be anonymised, it is likely that the relevant members could still be identified".
13. The Council also provided the complainant with the following clarification of its initial response:

"As a point of clarification, where it is stated in the original response that the "Monitoring Officer and the Chair of the Standards Committee met with the Leader and some members of the Brexit Party...", it should be noted that meeting was with the Leader of the Brexit Party, along with members of the Brexit Party, not the Leader of the Council."

Scope of the case

14. The complainant contacted the Commissioner on 15 November 2019 to complain about the way his request for information had been handled.
15. The Commissioner informed the complainant that the focus of her investigation would be to determine whether Rotherham Metropolitan Borough Council is entitled to rely on section 40(2) of the FOIA as a basis for refusing to provide the information it is withholding.

Reasons for decision

Section 40 – Personal data

16. 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.

17. In this case the relevant condition is contained in section 40(3A)(a). 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 of the General Data Protection Regulation ("GDPR").
18. 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 will not apply.
19. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, must the Commissioner establish whether disclosure of that data would breach any of the DP principles.
20. Section 3(2) of the DPA defines personal data as:
"any information relating to an identified or identifiable living individual".
21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. 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.
23. 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.
24. The Council has identified Members of the Council as being the data subjects because those Members are the persons (subjects) to whom the withheld information relates.
25. The Council says the withheld information relates to Members of the Council who sought advice from its Monitoring Officer and that they have no reasonable expectation that a request for advice, or the advice given to them, would be made public.
26. The Council has provided the Commissioner with a copy of the information it holds which is being withheld in reliance on the provisions of section 40(2). The withheld information is comprised of emails from various councillors to the Council's Head of Democratic Services and internal emails requiring officers to make appropriate amendments of

the councillors' entries on the Council's published register of councillor interests.

27. The Commissioner notes that all the withheld emails concern the data subjects' role as councillors and they do not, in the main, relate to the councillor's personal lives. Only one email contains information about a councillor's personal life, which is information the data subject considered necessary to convey to the Council. It is this email, and one other, which can be properly characterised as 'seeking advice'. The emails generally 'advise' the Council of something in the sense of conveying information.
28. Having examined the withheld emails, the Commissioner accepts that the information they contain is the personal data of the councillors who sent them. The Commissioner also accepts that the internal emails contain the personal data of the data subjects.
29. The Commissioner finds that the exemption provided by section 40(2) of the FOIA is engaged. She must now consider whether the disclosure of the withheld emails would breach any of the data protection principles set out in Article 5 of the General Data Protection Regulation ('GDPR').
30. In this case, the most relevant data protection principle for the Commissioner to consider is the one provided by Article 5(1)(a) of the GDPR. This states that:

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

31. Where a request has been made under the FOIA, personal data is 'processed' if it is disclosed in response to that request. This means that the information can only be disclosed if disclosure would be lawful, fair, and transparent.
32. Article 6(1) of the GDPR specifies the requirements for lawful processing. It states 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. In this case, the Commissioner considers that the most applicable lawful basis is provided by Article 6(1)(f). This 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".

33. In considering the application of Article 6(1)(f), it is necessary for the Commissioner 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 interests or fundamental rights and freedoms of the data subjects.
34. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.
35. In considering any legitimate interests in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. Such interests include the requester's own interests, the interests of third parties, commercial interests and those interests which have wider societal benefits.
36. Legitimate interests can include the broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
37. Where a requester is pursuing a purely private concern which is unrelated to any broader public interest, the unrestricted disclosure the personal data into the public domain is unlikely to be proportionate and be more easily overridden in the balancing test.
38. In the three-part test outlined above, '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.
39. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
40. In the Council's opinion, if the Council was to disclose the information requested by the complainant, "...it would potentially have the effect of deterring Members from contacting the Monitoring Officer to ask for such advice..." and the Council asserts that this would be 'unwanted'.
41. The Council recognises the legitimate interest of the public in the personal interests of its members. It says that operates in an open and

transparent manner and that transparency is always its preferred option. To that end, the Council says that it meets the public's legitimate interest by recording appropriate information on its Register of Member's Interests. The Council makes it's Register available for public inspection at the Town Hall.

42. The Council adds that its Members are aware of what information they need to disclose for the purpose of Register in the knowledge that the information will be made publicly available.
43. The Council says that it members seek advice from the Monitoring Officer in a 'confidential environment', and that it would not be within members' reasonable expectation that their requests for advice, and the advice provided, would thereafter be made public.
44. In the Council's opinion, disclosing the information requested by the complainant would potentially have the effect of deterring its Members from contacting the Monitoring Officer to ask for advice, particularly where there is no reasonable expectation on the part of Members that such information would be made public.
45. The Commissioner accepts the complainant and the public have a legitimate public interest in knowing Rotherham Metropolitan Borough councillors have made appropriate declarations of their personal and political interests, where they are required to do so.
46. She further accepts that the Council has properly reflected those declared interests it its Register. This is because she has seen no evidence which suggests that any of the data subjects have acted improperly or that the Council's Register is not an accurate record.
47. In the Commissioner's opinion, the public's legitimate interest is met by the Resister of Members Interests being publicly available at the Town Hall. In effect, there is no necessity for the withheld information to be disclosed.
48. There are insufficient grounds to warrant the disclosure of the withheld emails into the public domain to satisfy a requester's wish 'to scrutinise' the process and not the individuals concerned. In the Commissioner's opinion, such scrutiny can be achieved by viewing the Register of Interests and challenging any entry or entries which the viewer has concerns about.
49. The Commissioner must strike a balance between the rights and freedoms of individuals of the councillors to correspond with the Council on matters which concern them, against the legitimate interests which may require the disclosure of their personal information. In this case she

is of the view that the wider public interest in transparency has been served by publication of the Council's Register.

50. As the Commissioner has decided that there is no necessity for the withheld emails to be disclosed, the Commissioner is not required to carry out a balancing test.
51. The Commissioner's decision is that the Council has properly applied the exemption to disclosure provided by section 40(2) of the FOIA. She is satisfied that disclosure of the withheld information would not meet the requirements of data protection principle (a) and would therefore be unlawful.

Right of appeal

52. 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

53. 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.
54. 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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