

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 March 2017

Public Authority: East Riding of Yorkshire Council
Address: County Hall
Beverley
East Riding of Yorkshire
HU17 9BA

Decision (including any steps ordered)

1. The complainant has requested information concerning the identity of a former councillor who had been in arrears of his/her council tax payments during his/her period of office. The Council has withheld this information in reliance on section 40(2) of the FOIA on the grounds that it is the ex-councillor's personal data and it would be unfair to the ex-councillor to place this information into the public domain
2. The Commissioner's decision is that East Riding of Yorkshire Council has correctly applied section 40(2) of the FOIA to the information it is withholding from the complainant.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. The complainant has submitted the following request for information to East Riding of Yorkshire Council:

"I have seen the FOI request made by [a named person] and the response made by ERYC. It is not absolutely clear why earlier revelations admitted that 5 elected Councillors were Council Tax defaulters since 2011 but only one name was revealed. However reference in the ERYC response to 'Current Councillor Sharpe' possibly suggests that the other defaulting Councillors are no longer Councillors.

- 1) My first request is that you confirm my understanding is accurate or correct me by explaining why you have only named one Councillor when there appear to have been others.

I note that [a named person's] request referred to Councillors not to 'current Councillors'.

- 2) My second request is why you did not explain why you confined your responses to current Councillors when the request was clearly in respect of all Councillors, whether currently in post or not."
- 3) "My third request is that you tell me the legal basis on which you do not feel under an obligation to disclose the names of recent defaulting Councillors no longer in office.
- 4) My fourth request is for any written advice provided by [...] as Head of Democratic Services to either [a named councillor] or the Freedom of Information Officer."
5. The complainant referred the Council to the Upper Tribunal's decision in *DH v Information Commissioner and another [2016] UKUT 139 (AAC)*, asserting that the decision makes no distinction between serving Councillors and former Councillors.
6. The Council responded to the complainant's request on 31 August 2016. In respect of request 1, the Council informed the complainant that [a named person's request was for Councillors who had defaulted on their council tax liabilities for two consecutive months or more since 2011. The Council informed the complainant that there had been two individuals who within the scope of that request – one was a serving Councillor and the other an ex-Councillor.
7. The Council responded to the complainant's second, third and fourth requests as follows:

Request 2: "The response was clear in that it referred to current Councillors."

Request 3: "The case to which you refer dealt with a currently serving Councillor."

Request 4: "There is no recorded information under this heading".
8. On 1 September 2016, the complainant wrote to the Council to ask for an internal review. The complainant was particularly concerned with the Council's "seriously inadequate" response to his third request.
9. The complainant stated, "If ERYC seeks to withhold the names of former Councillors it should provide the legal evidence for so withholding, as it

was asked to do". He asserted that the disclosure of defaulting Councillors and the dates in which he or she defaulted was a matter of public interest due to the possibility of them having committed an offence under Section 106 of the Local Government Finance Act 1992. The complainant suggested that the Council's response to his third request should have been; "Although the *Bolton* decision did not distinguish between serving and former Councillors, we think it should have done so and have decided to risk a legal challenge. We accept there is room for other interpretations".

10. On 20 October 2016, the Council sent the complainant its internal review decision. The Council also referred to the decision of the Upper Tribunal in *DH v Information Commissioner and another [2016] UKUT 139 (AAC)*. It pointed out that the Tribunal had stated that, "An ordinary member of the public could reasonably be expected not to be named in the event of non-payment of council tax even if he is summoned"; whereas due to the provision of Section 106 of the Local Government Finance Act, a Councillor could expect to be identified where summoned for non-payment of council tax. The Council argued that a recent failure to pay council tax is likely to impact on public perceptions and confidence in a councillor.
11. The Council advised the complainant that; "As the ex-Councillor is no longer a Councillor the factors set out above no longer apply" and that, "such a person is currently a member of public and it is not [...] in the public interest for them to be named as an individual who has in the past been summoned for non-payment of Council Tax as they no longer fulfil those functions".

Scope of the case

12. The complainant contacted the Commissioner on 6 October 2016 to complain about the way his request for information had been handled. The complainant made clear to the Commissioner his reasons why he disagreed with the Council's refusal to disclose the identity of the now former Councillor.

The complainant asserted that the Council's justification for non-disclosure is inadequate being solely based on the grounds that the Councillor is no longer in office. The complainant disputed the Council's interpretation of the Upper Tribunal's decision and he asserted that he made clear in his request for review that he wanted to know if the former Councillor was allowed to vote on a budget decision in contravention of the Local Government Finance Act.

In addition to his complaint about the Council's decision to withhold the identity of the second Councillor, the complainant also complained about the time taken for the Council to complete its internal review.

13. The Commissioner has investigated whether the Council is entitled to withhold the name of the second Councillor which it referred to in its response to the complainant's Request 3.
14. The time taken by the Council in conducting its internal review is not a matter which falls within the ambit of Section 50 of the FOIA. The Commissioner will comment on this element of the complainant's complaint in the other matters section which follows her decision.

Reasons for decision

Section 40 – Personal data

15. The Council has advised the Commissioner that it is relying on section 40(2) of the FOIA to withhold the identity of the former councillor who had defaulted on his/her council tax payments.
16. It is the Council's opinion that the withheld information does not constitute sensitive personal data as defined by section 2 of the Data Protection Act 1998 ("the DPA").
17. Section 40(2) provides an exemption from the duty to disclose information which is the personal data of any third party and where disclosure would breach any of the data protection principles contained in the DPA or section 10 of that Act.
18. In the Commissioner's opinion the withheld information in this case is undoubtedly personal data, being the identity of a former councillor.
19. To determine whether the Council should have disclosed the withheld information, it is necessary for the Commissioner to consider whether the disclosure of the former councillor's identity would breach any of the data protection principles contained in Schedule 1 of the DPA.
20. The Commissioner considers that the first data protection principle is the one most relevant in this case.
21. The first data protection principle has two components:
 1. Personal data must be processed fairly and lawfully, and
 2. Personal data shall not be processed unless one of the conditions in Schedule 2 of the DPA is met.

The Council's representations

22. It is the Council's position that disclosure of the withheld information would be unfair to the former councillor on the grounds that the information relates to his/her private life.
23. To support its position, the Council has drawn the Commissioner's attention to the Upper Tribunal's decision in the case of DB v (1) Information Commissioner, (2) Bolton Council ("the Bolton case").
24. At paragraphs 39 – 40 of its decision in the Bolton case, the Tribunal acknowledged that there is a private element to the non-payment of Council Tax, even in the case of a councillor.
25. The Tribunal referred to the provision of section 106 of the Local Government and Finance Act 1992 which prohibits a councillor from voting on the setting of Council Tax where they have been in arrears of their own Council Tax for two months or more. It noted that a recent failure to pay Council Tax is likely to impact on the public's perceptions and confidence in a councillor as a public figure, and, unless the electorate knows the identity of a councillor to whom the restriction applies, they cannot discover whether the councillor is failing to fulfil his/her functions.
26. Additionally, the Tribunal stated that the public may wish to know if they can trust a councillor to properly discharge his/her functions if they stand for office again.
27. In this case, the Council asserts that none of the factors considered by the Tribunal apply. It points out that the withheld information relates to a private individual who has stepped down from being a councillor. It has assured the Commissioner that there is no question of the individual being involved in the setting of Council Tax as they are no longer a councillor and there is no indication that the individual wishes to stand for office again. The Council argues that the person's non-payments of Council Tax are historic and as he/she is no longer a public figure, the withheld information should be regarded as relating to that person's private life.
28. It is the Council's opinion that the former councillor would hold a reasonable expectation that his/her personal data would not be disclosed to the public. This position is supported by the fact that it was the Council's practise during the person's period as a councillor was not to disclose this type of information and that the Tribunal's decision in the Bolton case came after the date he/she left office.
29. The Council has asked its former councillor whether he/she was prepared to consent to the disclosure of the withheld information and

the Council has advised the Commissioner that the person was unwilling to provide this consent.

30. Having considered the above, the Council asserts that disclosure of the withheld information would be unfair to the former councillor. Likewise, the Council does not consider that it could satisfy any of the DPA Schedule 2 conditions for processing which would be required to disclose his/her identity in the context of this information request.
31. The Council assures the Commissioner that it has no legitimate purpose which would make it necessary to disclose to the public the name of an individual who was in arrears of council tax payments when he/she is no longer a councillor. Likewise, the Council can find no necessary and legitimate purpose pursued by any third party.
32. If it is a third party's concern is that an offence under section 106 of the Local Government and Finance Act 1992 has been committed, this can be dealt with by asking if any councillors were in breach of the provisions of section 106 during the period concerned.
33. Here, the Council has assured the Commissioner that the former councillor did not act in contravention of section 106 and therefore no referral was made to the Director of Public Prosecutions which would have been necessary under this provision.
34. The person concerned is no longer a councillor and there is no prospect of him/her being in a position to contravene section 106 for the foreseeable future. Consequently, in the circumstances of this case and in relation to the complainant's information request, there is no necessary and legitimate purpose which would require the disclosure of the identity of the former councillor.

The Commissioner's decision

35. The Commissioner has considered the Council's representations in this matter, together with the Upper Tribunal's decision in the Bolton Case.
36. The Commissioner agrees with the Council that the distinguishing feature of this complaint is the fact that the withheld information concerns a person who is no longer a councillor.
37. The Commissioner must accept the Council's assurance that the former councillor has not committed any offence under section 106 of the Local Government and Finance Act whilst in office and on the facts of this case, the Commissioner finds that the former councillor's non-payment of council tax is primarily a private matter.
38. The Commissioner agrees with the Council that its former councillor would have a legitimate expectation that his/her identity would not be

disclosed to the public in the context of this information request. In the Commissioner's opinion such a disclosure would be unfair.

39. The Commissioner has difficulty in finding any legitimate interest the public might have which now makes it necessary for the Council to disclosure of the former councillor's identity and his/her council tax history. In the Commissioner's opinion condition 6 of Schedule 2 of the DPA cannot be met and there is no alternative relevant condition in Schedule 2 which would allow the processing the former councillor's personal data.
40. The Commissioner's decision is that East Riding of Yorkshire Council is entitled to withhold the name of the former councillor who was in arrears of his/her council tax payments in reliance on section 40(2) of the FOIA.

Other matters

41. Although they do not form part of this notice the Commissioner wishes to highlight the complainant's concern about the length of time taken by the Council to conduct its internal review.
42. Part VI of the section 45 Code of Practice makes clear that it is desirable for a public authority to have a procedure in place for dealing with complaints concerning the handling of requests for information. This procedure should encourage a prompt determination of the complaint.
43. The Commissioner considers that internal reviews should be completed as promptly as possible.
44. The Commissioner acknowledges that there is no statutory timescale for the completion of an internal review which is provided by the FOIA. Nevertheless, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review.
45. In exceptional circumstances it may take longer than 20 working days, however in no case should the time taken exceed 40 working days. Ordinarily, the Commissioner would rarely expect a public authority to exceed 40 working days and this should only occur where the issue(s) at hand are particularly complex and/or where they involve large amounts of recorded information.
46. In this case neither of these factors was present.
47. The Commissioner routinely monitors the performance of public authorities and their compliance with the legislation she is tasked in

regulating. The Commissioner will record procedural breaches and she will use this information should any patterns of non-compliance emerge in the future.

48. The Commissioner acknowledges that the Council apologised to the complainant for its lateness in completing its internal review. She also notes the Council's reason for this as being "due to pressure of work".

Right of appeal

49. 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@hmcts.gsi.gov.uk

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

50. 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.
51. 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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