

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 September 2018

Public Authority: City of York Council

Address: West Offices

Station Rise

York

YO1 6GA

Decision (including any steps ordered)

1. The complainant has requested information regarding unpaid business rate accounts. City of York Council refused to disclose the requested information citing section 44(1)(a) of the FOIA by virtue of the statutory prohibition in section 2(2) of the Local Government Act.
2. The Commissioner's decision is that the exemption is not engaged, City of York Council incorrectly cited section 44(1)(a).
3. The Commissioner requires the public authority to disclose the requested information.

Request and response

4. On 11 February 2018, the complainant requested information from the City of York Council ('the council') in the following terms:

"Would you provide a list indicating, for 2015/16, 2016/18 & 2017/18, the value of each individual account currently unpaid for non-domestic rates for properties in York.

If it is easier, I would be happy for the list to include only payments owing more than £100.

Please indicate, in each case, what recovery action has been taken and what is planned together with an indication of any amounts that have been written off giving the reason for so doing."

5. The council responded on 12 February 2018. It stated:

"This information is exempt under section 44 of the FOIA because it is considered that due to the forthcoming local election, it could affect public support for a particular party. Should you wish to submit a new request for this information following the election, the council would be happy to consider this."

6. Following an internal review the council wrote to the complainant on 2 March 2018 and upheld its original position. It stated:

"On review, it appears that the Council correctly engaged Section 44 exemption of the FOIA in this case due to the request being received in a pre-election period ('Purdah') and the obligations of the Council under Section 2 of the Local Government Act 1986, as amended in 1988, relating to pre-election restrictions.

If you wish to re-submit your request now that this pre-election period has passed, the Council will respond accordingly."

Scope of the case

7. The complainant contacted the Commissioner on 4 March 2018 to complain about the way his request for information had been handled. Specifically whether the council was correct to withhold the information,

citing FOIA section 44 (prohibitions on disclosure), during the pre-election period.

8. The Commissioner considers the scope of this case is to establish whether the council correctly applied section 44 of the FOIA to the information request during the pre-election period for the Holgate Ward by-election.

Background

9. The Holgate Ward by-election took place on Thursday 15 February 2018.

10. The legal basis of restrictions and official guidance on publicity during the pre-election period is described by the Local Government Association in their guide "*Purdah: A short guide to publicity during the pre-election period*"¹ ('the Guide'). It states:

- "*Local authorities in England and Wales are under a duty to have regard at all times to the relevant Code of recommended Practice on Local Authority publicity issued under sections 2 and 4 of the Local Government Act 1986 ('the LGA')*
- "*The Pre-election restrictions are governed by Section 2 of the Local Government Act 1986², as amended in 1988³. Essentially the restrictions state that councils should "not publish any material which, in whole or in part, appears to be designed to affect public support for a political party."*
- "*Section 4⁴ of the Act makes clear that councils need to have regard to the code of recommended practice that supports the Act. The current code of practice was published in 2011⁵ ('the Code')."*

¹https://local.gov.uk/sites/default/files/documents/Purdah%20guidance%20update_03%20-%205%20Feb%202018.pdf

² <http://www.legislation.gov.uk/ukpga/1986/10/section/2>

³ <http://www.legislation.gov.uk/ukpga/1988/9/section/27>

⁴ <http://www.legislation.gov.uk/ukpga/1986/10/section/4>

⁵ <https://www.gov.uk/government/publications/recommended-code-of-practice-for-local-authority-publicity>

Reasons for decision

Section 44 – Prohibitions on disclosure

11. Section 44(1)(a) of the FOIA provides that information is exempt information if its disclosure is prohibited by or under any enactment. This is commonly known as a statutory bar to disclosure. It is an absolute exemption and so there is no public interest test to apply. In this case the council has said that section 44(1)(a) applies by virtue of the statutory prohibition in section 2(2) of the LGA.
12. Section 2(2) of the LGA states:
- "Prohibition of political publicity:*
- (1) *A local authority shall not publish, or arrange for the publication of, any material which, in whole or in part, appears to be designed to affect public support for a political party.*
- (2) *In determining whether material falls within the prohibition regard shall be had to the content and style of the material, the time and other circumstances of publication and the likely effect on those to whom it is directed and, in particular, to the following matters—*
- (a) *whether the material refers to a political party or to persons identified with a political party or promotes or opposes a point of view on a question of political controversy which is identifiable as the view of one political party and not of another;*
- (b) *where the material is part of a campaign, the effect which the campaign appears to be designed to achieve."*
13. The withheld information in this case relates to the value of individual unpaid business rate accounts and the associated recovery action planned or undertaken including any amounts of money that have been written off.

The council's position

14. The council maintains that it *"considered the timing of the request, being during the Purdah (pre-election) period for a local election and the fact that decisions regarding business rates and recovery action is likely to have an impact on the support of the public for political parties."*

15. It advised that the identity of the applicant, which is not usually a consideration under the FOIA, is a factor in this case. The applicant is known to the council as being an active member of a political party. The council stated *"it was therefore known the request was specifically related to political views about business rates."* Furthermore the council provided a web page *"showing the applicants political motivation and how this request related to an ongoing politically motivated campaign related to business rates."*
16. The council advised that in terms of its rationale in determining that the information fell within the remit of the prohibition, it had also considered information provided in the Guide.
17. The council referred the Commissioner to the following extracts from the Guide that it considered particularly relevant:
 - *"Councils should not publish any material which, in whole or in part, appears to be designed to affect public support for a political party."*
 - *In general you should not issue any publicity which seeks to influence voters."*
 - *Particular care should be taken during the pre-election to have regard for the Code."*
 - *Publicity is defined as "any communication, in whatever form, addressed to the public at large or to a section of the public"."*
18. The council concludes that *"a response to a request under the FOIA, is a response to the public at large, and in particular, in this case, the constituents and electorate of York, during the Purdah period... to release it would be in breach of the legislation under the Local Government Act 1986."*

The complainant's position

19. The complainant states that *"The York Council once again appears to be selectively interpreting "Purdah" restrictions as a reason to ban responses to individual FOI requests."*
20. He asserts that other councils respond to information requests during this time, and that the council *"itself responds to some FOI during this period."*
21. He states that *"the Council has failed to indicate in its decision how publishing a list of Business Rate defaulters – of which there are likely to*

be several hundred – could favour a particular candidate or party in an election.”

The Commissioner's decision

22. Section 2(2) of the LGA is titled "*Prohibition of political publicity*". The complainants request was for information derived from the day to day business administration of the council. The Commissioner must therefore assess whether the LGA provides a statutory bar to the disclosure of information of this kind under the FOIA, during a pre-election period.
23. The Commissioner identifies that the LGA, the Code and the Guide, describe the prohibition of 'political publicity' by 'local authorities'. She must therefore establish whether the release of factual information under the FOIA can be considered political publicity, within the definition of the LGA and the Code. More precisely, does the LGA apply only to information that the council is releasing directly, which therefore can be considered for its own publicity? Or can it refer to any information that may influence elections including, as in this case, information that could be used by a third party in a political campaign?
24. The title of section 2(2) is "*Prohibition of political publicity*". It continues "*A local authority shall not publish, or arrange for the publication of, any material which, in whole or in part, appears to be designed to affect public support for a political party.*" The Commissioner considers that the prohibition relates to material that is published by, or on behalf of, a local authority. She extrapolates that this means the publication of material designed by the local authority for its own purpose.
25. The Commissioner appreciates that information caught by the FOIA would be disclosed to the 'world at large', however she does not consider that 'disclosure' can be interpreted to be the same as the publication of material by the council itself.
26. The Commissioner finds that the council's arguments regarding the impact of releasing the information on public support for political parties; the requester's political motivation; and his potential intentions to publish the information are not relevant, as she has determined that the LGA relates to materials published by the council for its own purpose.
27. The Commissioner concludes that the statutory bar was not enacted at the time of the request. As such disclosure of the requested information, during the pre-election period, would not be contrary to the LGA section 2(2).

28. The Commissioner therefore finds that the exemption at section 44(1)(a) is not engaged.

Right of appeal

29. 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

30. 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.
31. 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
Group Manager
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