

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 6 July 2023

**Public Authority:** Cambridgeshire County Council

**Address:** Scott House  
5 George Street  
Huntingdon  
PE29 3AD

### **Decision (including any steps ordered)**

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1. The complainant has requested information from Cambridgeshire County Council ("the Council") in relation to a summary report for a consultation from January 2022. The Council provided some of the requested information but withheld the remainder, citing section 40(2) of FOIA – personal information.
2. The Commissioner's decision is that the Council has incorrectly cited section 40(2) of FOIA – personal information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Provide the complainant with the names and information relating to those who are in a public facing role e.g., any Councillors or names of Councils and the Clerks (any information that belongs to private residents, or those not in a public facing role, that these individuals have provided as part of their response should remain redacted).
4. The public authority 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

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5. On 25 October 2022, the complainant wrote to the Council and requested information in the following terms:

"A Summary Report of this consultation dated January 2022 has been published at <https://www.cambridgeshire.gov.uk/asset-...> and page numbers referred to below relate to that report. Please provide the following information to help inform comments on subsequent actions taken by the Council.

1. Is a full report available and if so where can it be viewed?

2. The Summary Report states on page 6 that: "Responses were also received on behalf of a number of different groups or organisations. All of the responses from these groups have been made available to board members in full and will be published alongside the results of the public consultation survey"; and under Stakeholder Responses on page 83 that: "All of the responses from these groups will be published alongside the results of the public consultation survey". Please advise where these responses can be viewed or make them available in response to this enquiry.

3. How were these and other stakeholders consulted? Was this by (a) proactive contact such as a written or verbal alert targeted to individual stakeholders, in which case please provide a list of those stakeholders who were consulted; or (b) simply by reliance on public awareness of published announcements?

4. Lists of stakeholders on page 18 and pages 82-83 include some 27 persons submitting responses declared to be on behalf of electoral constituents or public bodies. In the public interest of transparency and accountability, please provide the names of these officers, details of their responses to questions, and comments submitted for each of the schemes in the survey.

5. What were the criteria for stating in key findings (pages 7-10) that residents "weren't clear on their support or opposition" to individual schemes given that, in at least one of these cases, the percentage of residents who expressed a clear preference exceeded the percentage who neither supported or opposed them?

6. Please provide reference(s) to the minutes and associated documents of those Council committee meeting(s) at which these Active Travel Schemes were considered and approved."

6. On 21 November 2022, the Council provided some information. However, for points 2 and 4, the Council withheld them under section 22 of FOIA – information intended for future publication.
7. On 21 December 2022, the Council provided an updated response, advising that it upheld its original decision for point 2 of the request, however, for point 4 of the request, a new response should be issued.
8. On 24 January 2023, the complainant contacted the Council, as they had not received an updated response to point 4 of their request.
9. On 21 February 2023, the Council provided some information in relation to point 4 of the request. However, it advised that some information had been redacted due to personal information. It cited section 40(2) of FOIA.
10. On 23 February 2023, the complainant contacted the Council and advised that the updated response did not provide the information asked for in point 4 of the original request.
11. On 28 February 2023, the Council asked the complainant to clarify their request to avoid any further misunderstandings.
12. On 1 March 2023, the complainant explained that they want all the respondents declared in the survey to be on behalf of electoral constituents or public bodies, not just the 13 that are listed in the spreadsheet. The complainant explained that they want their names, together with the individual responses to all of the questions in the survey. If names aren't available, they want the role or capacity in which each of the stakeholders' responses were accepted by the Council as being from a public representative.
13. Following an internal review the Council wrote to the complainant on 26 April 2023. It stated that the information was withheld under section 40(2) of FOIA as it constitutes personal information.

### **Scope of the case**

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14. The complainant contacted the Commissioner on 11 May 2023, to complain about the way their request for information had been handled.
15. The Commissioner considers that the scope of this case is to determine if the Council was correct to withhold the information under section 40(2) of FOIA – personal information.

## Reasons for decision

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### Section 40 personal information

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)<sup>1</sup>. 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 5 of the UK General Data Protection Regulation ('UK 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 cannot apply.
19. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

### Is the information personal data?

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. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA

the data subjects. The names of the data subjects quite obviously is information that both relates to and identifies those concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

25. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

26. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

27. Article 5(1)(a) of the UK GDPR states that:

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

28. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

29. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

30. 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"<sup>2</sup>.

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<sup>2</sup> 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 UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".

31. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the 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.
32. 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**

33. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
34. 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.
35. The Commissioner acknowledges that there is a wider legitimate interest in the release of the requested information, as this would demonstrate, for instance, elected members' views – either their own or on behalf of the residents of a specific area.
36. The Commissioner is therefore satisfied that there is a legitimate interest in the requested information and he will now go on to consider the necessity test.

### **Is disclosure necessary?**

37. '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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

38. The Commissioner is satisfied that the information on behalf of private residents disclosed already meets the legitimate interests of the complainant. Whilst some information is redacted, it still shows the results from the consultation.
39. The Commissioner is therefore satisfied that the Council was entitled to rely on section 40(2) of FOIA when refusing to provide this information which identified private individuals. This does not apply, however, for the information received from publicly facing individuals.

**Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms**

40. With regards to the personal data of the public facing individuals, it is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
41. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
42. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
43. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
44. The Council has explained to the Commissioner that a data protection statement was included in the consultation wording, which advised that "You do not have to give us any personal information. We will not

publish any personal details you do give us unless specifically indicated, but we may publish your response, and include it in public reports, with personal details removed...”.

45. The Commissioner would expect to see such a statement as described above, but this would be there to reassure members of the public that their personal information would not be released. He is, however, not satisfied that this would relate to those individuals in a public facing role, such as Councillors and the Clerks of Councils.
46. As explained earlier, the Commissioner is satisfied that personal information should remain redacted for anyone who is not in a public facing role.
47. Based on the above factors, however, the Commissioner has determined that the information in relation to those in public facing roles (such as the Councillors), should have their names released as there is insufficient evidence to demonstrate that this information should remain redacted. In this case, the individuals are adding information to a public consultation, mostly on behalf of the area they represent. The legitimate interest of openness and transparency therefore merits this information being released. The public have a right to know how their elected representatives conduct their roles and what views they may submit for a public consultation. People in an elected position will also have an expectation of greater scrutiny than a normal member of the public.
48. In this instance, therefore, the Commissioner has determined that there is a valid basis for processing and so disclosure of the information relating to public facing individuals would be lawful. The public authority was therefore not correct to apply section 40(2) of FOIA to this part of the request.



## Right of appeal

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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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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 .....**

**Michael Lea**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**