

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 January 2024

Public Authority: Potto Parish Council
Address: pottopc@btinternet.com

Decision

1. The complainant requested a range of information from Potto Parish Council (the "council"). The council provided some information, confirmed that other information was not held and withheld other information under the exemption for law enforcement (section 31).
2. The Commissioner's decision is that:
 - In relation to request parts 5, 7 and 14, on the balance of probabilities, the council disclosed all the relevant information that it holds and,
 - in relation to part 6, the council wrongly applied the exemption in section 31 and that it should have relied on section 40(5B) of the FOIA to refuse to confirm or deny whether any information was held; the Commissioner has decided to apply this exemption himself proactively.
 - The Commissioner also finds that the council breached section 10(1) and section 17(1) as it failed to issue a refusal notice within the statutory 20 working days.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 3 July 2023 the complainant submitted the following information request to Potto Parish Council (the "council"):

"1 PIR Recommendation 9 required Potto council to carry out a review of its arrangements for handling FOI requests (such as this). # Please provide a full and dated copy of this 'review'.

2 PIR Recommendation 10 required Potto council to agree steps to minimise future non-conformance. # Please provide a full and detailed copy of these agreed 'steps'.

3 PIR Recommendation 11 required Potto council to adopt formal policies and procedures for the handling of correspondence (such as this). # Please provide a dated copy of these new 'policies and procedures'.

4 PIR Recommendation 12 required Potto council to maintain a formal schedule for logging and handling correspondence. # Please provide a clear and helpful extract/copy of this 'formal schedule'.

5 Potto council produced and published a 'letter', shortly after the July 2022 PIR....This 'letter' was circulated only to carefully selected Potto households and to various members of the Press, following which it was subsequently quoted at length 'on-line' and in a number of Newspapers. # Please provide a full and dated copy of this 'letter'

6 The 2023 minutes - Jan item 8.2, Feb item 11.0, March item 4.3.3 and also item 4.10.2, April item 4.3.4 and May item 6.3 record that Potto council forwarded complaints and several other items of public correspondence to the Police. I understand that the Police response to Potto council about this correspondence extends only to 'one or two very short emails' and that it provides a clear record of the Police actions or Police advice to Potto council about this serious issue. # Please provide a full and dated copy of all the information (emails or letters, etc) received from the Police about the correspondence noted above.

7 I cannot find any information in the council's published data that confirms the Council's draft PIR action plan has been approved by the auditor. This approval is required under S10(1)(b) of the 2014 Act. # Please provide a dated copy (email or letter, etc) of the auditor's approval - this information is also required to be 'open for inspection' under S10(4) of the Act.

8 A routine procedure is that meeting minutes are approved as accurate and then published on Potto Council's website. On a number of

occasions, often many months later, serious factual errors have subsequently been found. However, I cannot find the Council's safeguarding Procedure used to address the errors and publish the accurate information. # Please provide a copy of this Procedure.

9 From time to time, council members are obligated to 'declare an interest' during council debates. These declarations are sometimes recorded in the meeting minutes. However, S96(2) of the Act requires a council to record in a separate book all such declarations of interest made by councillors during council meetings. # Please provide a dated copy of this book, or the electronic equivalent document.

10 Potto council has been reminded by the Chief Officer at YLCA on a number of occasions that it must carry out a 'data audit' at least every year, as required by GDPR. # Please provide a full and dated copy of the most recent data audit, including who carried it out, the result and the minute reference number recording that it was approved by the council.

11 I note the council's Budget and Actual expenditure data (for each budget item) has still not been published for 2022-23, albeit that this information was published for 2021-22. It is clear that the council's level of transparency and openness has deteriorated further, post the PIR. # Please provide a full copy of the unpublished 2022-23 data.

12 Chairman's annual reports – these are still not published for several recent years. # Please provide copies of all the unpublished reports.

13 A council that is considering the use of equipment such as the Swarco sign needs to obtain written approval from the Highway Authority. # Please provide a copy of this approval from the Highways Authority, together with the imposed conditions, as specified for using this Swarco equipment in Potto (ref S30 of 1997 Act).

14 If a council's financial reserves are too high, an explanation must be provided to the auditor. The data in the 2022-23 accounts indicate excessive reserves (of above 150% of the council's entire annual precept income), which is a breach of S49A(2)(c) of the 1992 Act. This weakness exposes the council's grossly inadequate (and unlawful) budgeting process. # Please provide a copy of the explanation provided to the auditor for the 2022-23 accounts

15 Monitoring of the effectiveness of the council's work to address the PIR with progress reports was a specific requirement in the PIR: # Please provide dated copies of the two most recent 'reports on progress'."

5. On 25 July 2023 the council responded and, in relation to some parts of the request, directed the complainant to information published on its website. It directly disclosed other information and confirmed that other information was not held.
6. On 30 July 2023 the complainant asked the council to review its handling of their request, specifically directing the council to reconsider its response to request parts 5,6,7 and 14 . At the time the complaint was submitted to the Commissioner the council had not responded to the complainant's request for an internal review.

Scope of the case

7. On 22 September 2023 the complainant contacted the Commissioner to complain about the council's handling of their request. The complainant asked the Commissioner to consider the council's handling of request parts 5,6,7 and 14.
8. On 4 October 2023 the Commissioner advised the council that he had received the complaint. On 6 October 2023 the council sent its internal review response to the complainant. This confirmed that the council was maintaining its position.
9. During the Commissioner's investigation the council revised its position in relation to part 6 of the request, confirming that further information was held and that this was being withheld under the exemption for law enforcement (section 31).
10. The Commissioner has considered whether the council complied with parts 5,6,7 and 14 of the complainant's request.

Reasons for decision

Section 1 (duty to provide information) and section 17 (refusal notices)

11. Section 1 of the FOIA requires public authorities to confirm or deny whether information specified in a request is held and, where it is, to provide it to a requester.
12. Section 17 of the FOIA sets out public authorities' duties where requested information is being withheld. In short, section 17 requires an authority in such cases to issue a refusal notice which specifies the exemption(s) being relied on and explains why the exemption applies.

13. The complainant believes that the council has failed to disclose all the information falling within the scope of request parts 5,6,7 and 14.
14. The Commissioner approached the council and directed it to provide details of any searches conducted for relevant information and, where, no further information was held, to provide explicit assurances in this regard. The relevant request parts and the council's responses are summarised under the headings below.

Request part 5

15. Part 5 of the request asked for a copy of a letter which the complainant described in the following manner:

" (The council) produced and published a 'letter', shortly after the July 2022 PIR....This 'letter' was circulated only to carefully selected Potto households and to various members of the Press, following which it was subsequently quoted at length 'on-line' and in a number of Newspapers."

16. The council confirmed that it did not produce or receive a copy of the letter in question, stating:

"...we understand that it was addressed to residents directly, it may have gone to individual councillors personal emails but we cannot confirm this, we also believe that it was published on the local village Facebook pages (Potto Patter) which are not in any way part of the parish council, we can confirm that it was not received by the parish council therefore we do not hold a copy."

Request part 7

17. Request Part 7 states:

"I cannot find any information in the council's published data that confirms the Council's draft PIR action plan has been approved by the auditor. This approval is required under S10(1)(b) of the 2014 Act. # Please provide a dated copy (email or letter, etc) of the auditor's approval."

18. The council's response to the Commissioner states:

"There is no requirement for the auditors to approve the PIR Action Plan, Please note that para 10(4) refers to Local Government Act 1972 section 100 applies to principal authorities not smaller authorities" this statement was provided by the auditors. [The complainant] has been informed on multiple occasions that the PIR as approved at the public meeting is available on the Potto Parish Council website at Potto Parish

Website....Therefore, the initial statement is incorrect as has been pointed out and the information has been sent to [The complainant] on multiple occasions, there is clearly no further action required."

19. In essence, the Commissioner understands that the council's position is that there is no requirement for it to take the action which the complainant implies it should and that, therefore, relevant information is not held.

Request Part 14

20. Part 14 of the request asked:

"If a council's financial reserves are too high, an explanation must be provided to the auditor. The data in the 2022-23 accounts indicate excessive reserves (of above 150% of the council's entire annual precept income), which is a breach of S49A(2)(c) of the 1992 Act. This weakness exposes the council's grossly inadequate (and unlawful) budgeting process. # Please provide a copy of the explanation provided to the auditor for the 2022-23 accounts."

21. The council's response to the Commissioner states:

"....the question is based on an incorrect assumption by [The complainant] that the PPC reserves are 150% above our entire precept, this is incorrect, therefore there cannot possibly be any documentation to explain this as it is an incorrect statement..."

22. Again, the Commissioner understands that the council disputes the factual premise of the request and considers that it follows that relevant information is not held.

Request Part 6

23. Request part 6 states:

"The 2023 minutes - Jan item 8.2, Feb item 11.0, March item 4.3.3 and also item 4.10.2, April item 4.3.4 and May item 6.3 record that Potto council forwarded complaints and several other items of public correspondence to the Police. I understand that the Police response to Potto council about this correspondence extends only to 'one or two very short emails' and that it provides a clear record of the Police actions or Police advice to Potto council about this serious issue."

24. The request asked for a copy of the identified information and the council provided an email in its initial response. The complainant has suggested that further relevant information is held and the Commissioner directed the council to respond to this allegation.

25. The council confirmed to the Commissioner it was applying the exemption for law enforcement (section 31) to the request.

Conclusions in relation to request parts 5,7 and 14

26. In relation to request parts 5,7 and 14 the Commissioner has concluded that, on the available evidence and on the balance of probabilities, that the council has correctly confirmed that it holds no additional information. He, therefore, finds that, in respect of these parts of the request, the council complied with section 1 but that in failing to issue a valid refusal notice in respect of part 6 of the request within the time for compliance it breached section 10 and section 17.

Conclusions in relation to request part 6

27. In relation to request part 6 this part of the request identifies information relating to a potential criminal offence by a specific individual, the Commissioner has exercised his discretion and proactively applied section 40(5B) of FOIA to the request. He has set out the reasons for this below.

Section 40 – personal information

28. Any information provided under the FOIA is a disclosure made to the world and authorities should, therefore, not usually consider the identity of the requester when deciding whether it is appropriate to confirm or deny if information is held or whether to make a disclosure. In cases where the requested information is the personal data of the requester, authorities should consider whether it is appropriate to process the request as a subject access request under the UK General Data Protection Regulation ('UK GDPR').
29. Section 40(5A) of FOIA excludes a public authority from complying with the duty to confirm or deny in relation to information which, if held, would be exempt information by virtue of section 40(1) of FOIA as it is the applicant's own personal information.
30. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny does not arise in relation to other information – i.e. third party personal information - if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK GDPR to provide that confirmation or denial.
31. The decision to use a 'neither confirm nor deny' response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus for a 'neither confirm nor deny' response in most cases, will be theoretical considerations about the consequences of confirming or denying

whether or not particular information is held. The Commissioner's guidance explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds information about an individual can itself reveal something about that individual.

Would the confirmation or denial that the requested information is held constitute the disclosure of either the complainant's or a third party's personal data?

32. Section 3(2) of the Data Protection Act 2018 (DPA) defines personal data as:- "any information relating to an identified or identifiable living individual".
33. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
34. 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.
35. In the circumstances of this case the Commissioner accepts that, if held, any information within the scope of the request would clearly be the personal information of an identified or identifiable individual. Therefore, he is satisfied that if the council were to confirm or deny whether it holds the requested information, this would in turn be disclosing personal information to the world at large.
36. The Commissioner also considers it appropriate to consider whether confirming or denying whether it holds the requested information would result in the council's disclosure of criminal offence information relating to identified or identifiable individuals.
37. Information relating to criminal convictions and offences is given special status in the UK GDPR. Article 10 of UK GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences.
38. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:-
 - (a) the alleged commission of offences by the data subject; and
 - (b) proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings, including sentencing.

39. From the wording of the request, the Commissioner is satisfied that the requested information clearly relates to an alleged criminal offence.
40. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes confirming or denying whether the information is held in response to a request for information under FOIA, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA 2018 can be met.
41. The Commissioner has considered each of these conditions and whether any of them could be relied on by the council to confirm or deny whether it holds criminal offence data falling within the scope of this request. The Commissioner has considered these on his own merit and finds that, having regard for the restrictive nature of the Schedule 1, Parts 1 to 3 conditions, none of the conditions can be met.
42. As none of the conditions required for processing criminal offence data are satisfied there can be no legal basis for confirming whether or not the requested information is held; providing such a confirmation or denial would breach data protection principle (a).
43. The Commissioner, therefore, concludes that the council should have cited section 40(5B) of the FOIA to neither confirm nor deny holding information within the scope of the request, as it could not do so without disclosing personal information relating to the individual to whom the request relates. He now applies this exemption himself in order to prevent any further disclosure of personal information.

Other matters

45. Although they do not form part of this decision notice the Commissioner wishes to note a number of matters of concern about the council's practices.

Request handling practice

46. The code of practice issued under section 45 of the FOIA (the "Code") contains recommendations for good practice in relation to the handling of requests for information¹.

47. The Commissioner has previously documented his concerns about the council's practice in relation to the handling of requests for information².

48. The Commissioner is mindful that the council is small and has limited resources, however, this does not absolve it of its responsibilities under the FOIA. He considers that if the council were to follow the recommendations of the Code and provide clearer responses in line with the duties set in the FOIA, it would be less likely that complaints would be needed to be made to the Commissioner, with the additional drain on time and resources that this brings.

49. The Commissioner expects that the council's future handling of requests will conform to the recommendations of the Code and comply with its statutory duties under the FOIA.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

² See the "other matters" section of the following decision notice, issued on 22 November 2023: <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4027531/ic-249871-b0k5.pdf>

Right of appeal

50. 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

51. 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.
52. 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

Christopher Williams
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