

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

### **Decision notice**

**Date:** 4 September 2024

**Public Authority:** Fermanagh and Omagh District Council

**Address:** Townhall  
2 Townhall Street  
Enniskillen  
Co Fermanagh  
BT74 7BA

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

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1. The complainant has requested, from Fermanagh and Omagh District Council (the Council), information relating to a Strategic Capital Projects Grant Programme and covering a specified period of time. The Council disclosed some information, but relied on sections 40(2) and 43(2) of FOIA (the 'personal information' and 'commercial interests' exemptions) to refuse to disclose other information.
2. The Commissioner's decision is that the Council was entitled to rely on section 40(2) in respect of the withheld information relating to Council officials. However, he finds that the Council has failed to demonstrate that section 43(2) is engaged in respect of the information being withheld under that exemption. He also finds that the Council holds further information within scope of the request of 28 November 2023; and that it breached section 17 of FOIA as it previously failed to state its reliance on section 21 in respect of information published on its website.

3. The Commissioner requires the Council to take the following steps<sup>1</sup> to ensure compliance with the legislation.
  - Disclose the information being withheld under section 43(2), subject to any appropriate redactions for personal data.
  - In respect of the information referenced in paragraphs 62 – 69 of this decision notice (the moderation note, appeal requests and meeting agenda), either disclose it or issue a refusal that complies with FOIA.
4. The public authority must take these steps within 30 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 FOIA and may be dealt with as a contempt of court.

## Request and response

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5. On 28 November 2023, the complainant wrote to the Council and requested information in the following terms:

“Under [FOIA], I would like to request the following information in relation to the Strategic Capital Grants programme from July 2022 until October 2023 : [sic]

  - Full copies of all applications submitted by groups in the Erne North DEA [District Electoral Area]
  - A list of all council officers involved at any stage in the assessment process, details of their involvement, and any information held by them in relation to this assessment process
  - Full copies of all documentation relating to the assessment of the above applications - this is also to include copies of the notes made

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<sup>1</sup> The Commissioner expects the public authority to take appropriate precautions to protect any personal data when disclosing information in a spreadsheet or similar format; <https://ico.org.uk/for-organisations/eir-and-access-to-information/information-commissioner-s-office-advisory-note-to-public-authorities/>

- by assessors, details of any correspondence or communication [sic] sent to or received by internal or external parties in relation to the process, and a list of all informal or formal discussions held to discuss applications or the assessment process as well as notes/minutes/comments from those discussions
- Full copies of all briefing materials, preparatory or speaking notes, briefings and documents (both provided to and not provided to) [sic] members for the Grant Aid e-Panel Meeting of 15 February 2023, a list of who was in attendance at this meeting and copies of all records/notes/comments taken by officers during by this meeting or in relation to this meeting, and details of any correspondence or communication [sic] sent to or received by internal or external parties in relation to the assessment process
  - Full copies of all briefing materials, preparatory or speaking notes, briefings and documents (both provided to and not provided to) [sic] members for the Grant Aid Appeals e-Panel Meeting of 31 July 2023, a list of who was in attendance at this meeting and copies of all records/notes/comments taken by officers during by this meeting or in relation to this meeting, and details of any correspondence or communication [sic] sent to or received by internal or external parties in relation to the appeals process
  - A copy of the update provided to Members of the roles and responsibilities of the Grant Aid Appeals Panel by The Grants & Investment Coordinator at the Grant Aid Appeals Panel meeting of the 31st July
  - A copy of the Strategic Capital Project report referenced at the Grant Aid Appeals Panel meeting of the 31st July and all previous versions of this report.
  - Any information held in relation to the discussion that took place at the Grant Aid Appeals Panel meeting of the 31st July regarding the role of Appeals Panel Members and information to be reviewed prior to reaching a decision in relation to an appeal submitted by [organisation name redacted]”.
6. The Council responded on 3 January 2024. It provided some information and explanations, but refused to provide other information, citing sections 40, 41 (the ‘information provided in confidence’ exemption) and

43 of FOIA as its basis for doing so. It provided links to information already published on its website but didn't cite any exemption in respect of that information.

7. Following an internal review, the Council wrote to the complainant on 15 March 2024. It revised its original position. It disclosed further information, but withheld information on the basis of sections 40(2) and 43(2) of FOIA.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 16 March 2024 to complain about the way their request for information had been handled.
9. They challenged the Council's application of section 40(2) of FOIA, in respect of Council officials; the complainant's comments indicate that the complainant isn't challenging the redactions made by the Council under section 40(2) in respect of personal information of applicants in the redacted copies of the application forms disclosed by the Council at internal review stage.
10. They also challenged the Council's application of section 43(2) of FOIA.
11. They said, in their ICO complaint form:

"Four persons were invoved [sic] in decision making, two of whom have declared conflict of interests in the decision, but the authority is refusing to release the details of this information to me ... Who are the two people who declared an interest? From which decisions did they remove themselves? Where are the records relating to this information and why has it not been released?"
12. They also later said "Surely knowing who the individuals are and the nature of their conflict is a legitimate request".
13. A key issue for the complainant therefore seems to be information about conflicts of interests.
14. On section 43(2), they said:

"... some of the redacted information is not commercially sensitive ... For example, in the match funding section of the redacted applications

eventually released, the information on how much match funding is being provided [sic] is not commercially sensitive. Potentially, the source of it may be deemed commercially [sic] sensitive, but the amount is surely not”.

15. They said “not all aspects of the FOI request have been dealt with”.
16. They said “... £1.2 million was allocated and not one council officer or councillor appears to have kept a written note of what happened or who said what ...”.
17. They also expressed concerns about the Council’s handling of the below questions they asked during their correspondence with the Council, saying the Council didn’t answer the second, third and fourth questions:
  - “(1) Can you please provide me with all information held in relation to these declarations of interest?
  - (2) Was a written record kept of these declarations [sic] and the nature of them? Please provide me with this information.
  - (3) If no written record was kept of these declarations, how is the Council able to confirm this happened?
  - (4) Which were the 'relevant assessments' from which the relevant officers removed themselves?”
18. The Commissioner considers that the scope of this case is to decide whether the Council was entitled to rely on sections 40(2) – in respect of Council officials – and 43(2) of FOIA, to refuse to disclose information; and whether the Council holds any additional information within scope of the request. He will also consider any relevant procedural matters.

## **Reasons for decision**

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### **Section 40(2)**

19. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and one of the conditions listed in section 40(3A), 40(3B) or 40(4A) is satisfied.

20. In this case the relevant condition is 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) set out in Article 5 of the UK General Data Protection Regulation (UK GDPR).
21. 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's not personal data, section 40 of FOIA can't apply.
22. If the Commissioner is satisfied the requested information is personal data, he must then establish whether disclosure would breach any of the DP principles.

### **Is the information personal data?**

23. Section 3(2) of the DPA defines personal data as "any information relating to an identified or identifiable living individual".
24. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
25. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name.
26. Information will relate to a person if it's about them, linked to them, used to inform decisions affecting them, has biographical significance for them or has them as its main focus.
27. As outlined above, the complainant particularly wants to know who declared conflicts of interests, and information about those conflicts of interests. At internal review stage, the Council indicated to the complainant that the information being withheld under section 40(2) comprises the names of individuals; in its submissions to the Commissioner, the Council said it comprises contact details and conflicts of interests too.
28. The Commissioner is satisfied that names, contact details and information about conflicts of interests that individuals declared is information that identifies and relates to the Council officials concerned.
29. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

30. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
31. The most relevant DP principle in this case is principle (a).

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

32. 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”.
33. In the case of a request under FOIA, the personal data is processed when it is disclosed in response to the request. This means the information can only be disclosed if to do so would be lawful, fair and transparent.
34. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing.

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

35. The Commissioner considers that the lawful basis most applicable is Article 6(1)(f), where 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”.
36. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information made under FOIA, it’s necessary to consider the below three-part test.
  - Legitimate interest test: whether a legitimate interest is being pursued in the request for information.
  - Necessity test: whether disclosure of the information is necessary to meet the legitimate interest in question
  - Balancing test: whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

37. The Commissioner considers that the 'necessity test' must be met before the 'balancing test' is applied.

### **Legitimate interests**

38. In considering any legitimate interest(s) in the disclosure of the requested information under 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.
39. 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.
40. The complainant considers that it's legitimate to ask for information about who declared conflicts of interests, and the nature of those conflicts of interests. The Council disagrees – for instance, at internal review it told the complainant that disclosure of the withheld information "will not add anything".
41. The Commissioner accepts the complainant's need for transparency as a legitimate interest.

### **Is disclosure necessary?**

42. 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 FOIA must be the least intrusive means of achieving the legitimate aim in question.
43. The Commissioner notes that, as the Council explained at internal review stage, it was content to disclose the names of those at Head of Service level or above, and that it disclosed job titles in respect of other panel members.
44. In its submissions to the Commissioner, the Council said it's not necessary to disclose the withheld information, as it wouldn't change the application or appeal process.



45. The Council has already told the complainant that “Two conflicts of interest were declared during the assessment with the relevant officers removing themselves from the room during the relevant assessments”.
46. Therefore, there is already some transparency from the Council about the composition of the assessment panel, and the fact that conflicts of interests were declared. Furthermore the Council has indicated that where conflicts of interests were declared, the officers in question didn't take part in the assessments.
47. The Commissioner appreciates that the complainant wants to know more about the conflicts of interests and the officials in question; however, he considers that disclosing the personal data in question 'to the world' under FOIA would add no real value, in terms of transparency. He also accepts the Council's point that it wouldn't change the application or appeals process.
48. He therefore considers that disclosure isn't reasonably necessary.
49. Consequently, there's no lawful basis for disclosure of the withheld personal data of the Council officials, and the Commissioner finds that the Council was entitled to rely on section 40(2) of FOIA to withhold the information.

### **Section 43(2)**

50. Section 43(2) of FOIA provides that information is exempt if its disclosure would, or would be likely to, prejudice (harm) the commercial interests of any person, including the public authority holding it.
51. The Commissioner's understanding is that the Council is claiming the higher level of likelihood ('would' prejudice), because in its submissions the Council said “disclosing the commercially sensitive information **would** create a real prejudice ...” (emphasis added). The Council's submissions state that the parties whose commercial interests would be prejudiced are the “Third party organisations making the grant applications”; furthermore the Council emphasised the “need to protect the commercial interests of the organisations”.
52. The Commissioner has first considered whether the envisaged harm relates to the type of interests the exemption is designed to protect, namely commercial interests, in this instance the commercial interests

of the third parties. The Council has argued that disclosure would prejudice the ability of the organisations to compete for funding.

53. The Commissioner's guidance<sup>2</sup> explains that a commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The Commissioner isn't satisfied that all of the third party organisations are legal persons – his understanding is that most of them are unincorporated associations.
54. Even if they were all legal persons and the Commissioner accepted that the envisaged harm relates to commercial interests, he wouldn't be satisfied that a causal link exists between disclosure and the envisaged harm and that the envisaged harm 'would' occur, as he explains below.
55. His guidance (cited in paragraph 53 above) discusses information about third parties, and says:

"... if you propose to withhold information because the disclosure would, or would be likely to, prejudice a third party's commercial interests, **you must have evidence that this accurately reflects the third party's concerns.** It is not sufficient for you to simply speculate about the prejudice which might be caused to the third party's commercial interests. You need to consult them for their exact views in all but the most exceptional circumstances ... There may occasionally be situations where it is genuinely not possible to obtain the third party's views ... In these specific circumstances, you may present arguments regarding the likelihood of prejudice on the third party's behalf, **but they must be based on your prior knowledge of the third party's concerns. You need to provide evidence that your arguments genuinely reflect the third party's concerns**" (emphasis added in bold).

56. In this instance however, the Council doesn't appear to have consulted the third party organisations, or even a sample of them. Neither did the Council show that its arguments are based on its prior knowledge of the third parties' concerns, or provide evidence that they genuinely reflect the third parties' concerns. In his request for submissions, the

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<sup>2</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

Commissioner had directed the Council to his published 'Key Questions for Public Authorities'<sup>3</sup> and asked the Council to address the relevant ones in sufficient detail, but the Council didn't provide any comments in that regard.

57. Furthermore, at internal review stage the Council disclosed redacted copies of the application forms submitted by the third party organisations, and they show that the application forms contained a section about FOIA that says "Applicants should be aware that the information provided in this grant aid application form could be disclosed in response to a request under [FOIA] ...".
58. The Commissioner's understanding, based on the information available to him, is that none of the third parties has raised concerns about disclosure of this specific information.
59. As the third parties don't all appear to be legal persons, and in any event the Council has failed to evidence that its arguments genuinely reflect concerns of the third parties, the Commissioner finds that section 43(2) isn't engaged.

### **Does the Council hold further information?**

60. As the Commissioner's guidance<sup>4</sup> explains, when he receives a complaint disputing the amount of information a public authority holds, he isn't required to prove beyond doubt that the public authority does or doesn't hold further information. Rather, he makes a decision based on the civil standard of the 'balance of probabilities' – that is, more likely than not.
61. In his correspondence with the Council, the Commissioner highlighted certain information referenced in the supporting documents provided to him; he asked the Council to help him to understand whether it was held by the Council, and if it was, whether it was being withheld or had been disclosed.

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<sup>3</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/key-questions-for-public-authorities-foi-act-2000/>

<sup>4</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/determining-whether-we-hold-information/>

62. For instance, the Commissioner asked the Council about information regarding a 'moderation meeting' (he notes that the complainant referenced such a meeting, including in their internal review request), and other information regarding an 'Appendix 2' apparently containing some appeal requests from applicants (mentioned in some meeting minutes seen by the complainant; the complainant also referenced this 'Appendix 2' in their supporting evidence to the Commissioner). On those pieces of information, respectively, the Council told the Commissioner "Moderation note was not disclosed to the complainant as it had no impact on the outcome of the Erne North scoring ..." and "The appeal requests ... were not disclosed as they were not relevant to reaching a decision in relation to the appeal submitted by [organisation name redacted]".
63. The Commissioner's understanding, based on the Council's comments, is that those pieces of information haven't been disclosed, and aren't being withheld under any exemption – his understanding is that the Council simply considers they aren't relevant to the request.
64. However, the Commissioner has considered whether those pieces of information are within scope of the request – his view is that they are.
65. He notes that under the third bullet point, the complainant asked for "Full copies of all documentation relating to the assessment of the ... applications ... discussions held to discuss applications or the assessment process ..."; and that under the fifth bullet point, they asked for "Full copies of all ... documents (both provided to and not provided to) [sic] members for the Grant Aid Appeals e-Panel Meeting of 31 July 2023".
66. The Commissioner has seen a copy of the 'moderation note' mentioned in paragraph 62 above, as the Council sent it to him. He hasn't seen a copy of the 'Appendix 2' appeal requests, as the Council doesn't seem to have sent them to him, despite saying it had.
67. The Commissioner considers that the information referenced in paragraph 62 above falls within scope of the third and fifth bullet points in the request, respectively.
68. In its submissions to the Commissioner, the Council has also highlighted a meeting agenda that hasn't been disclosed. The Commissioner considers that the meeting agenda in question falls within scope of the

fifth bullet point in the request, as it relates to the meeting referenced in that bullet point.

69. The Commissioner therefore finds that, on the balance of probabilities, the Council does hold further information within scope of the request of 28 November 2023 that hasn't been disclosed or withheld under any exemption – the moderation note (to the extent it concerns the "Strategic Capital Grants programme" referenced in the request), appeal requests and a meeting agenda.
70. Much of the complainant's focus, in respect of information they believe is 'missing', relates to notes made or held by individuals who were involved in the assessment and appeal processes. The Council has explained to the Commissioner that those processes don't involve taking individual notes, and that members of staff involved have been consulted and have confirmed that no further, individual notes are held.
71. In light of that confirmation, the Commissioner considers, and emphasises to the complainant, that it's more likely that not that the Council doesn't hold the type of individual notes the complainant has asked about, in their correspondence with the Council about the request.
72. As noted at paragraph 17 above, the complainant told the Commissioner that the Council didn't answer three questions they had asked the Council (the second, third and fourth questions listed in paragraph 17 above). First, the Commissioner considers it's worth highlighting to the complainant the general point that (as his guidance<sup>5</sup> explains) public authorities don't have to create new information to respond to a request under FOIA, and they aren't required to answer questions unless they already hold the answer as recorded information. In any event, in this instance the complainant has provided the Commissioner with a document showing that the Council, in its correspondence with the complainant, made comments that do address the second and third questions – the Council has said "Written declarations [ie of conflicts of interests] were recorded and retained", and based on the Council's submissions those comments were made on 18 April 2024. Regarding the fourth question, the Commissioner's understanding is that the

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<sup>5</sup> <https://ico.org.uk/for-the-public/official-information/what-to-expect-after-making-an-information-request/>

recorded information held by the Council that answers that particular question is being withheld under section 40(2) of FOIA. He directs the complainant to the paragraphs above, dealing with the Council's application of section 40(2) and his decision regarding that exemption.

### **Procedural matters**

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73. In its submissions to the Commissioner, the Council has said it should have cited section 21 of FOIA ('information accessible to applicant by other means') in respect of information within scope of the request that had been published on the Council's website (the Council provided the complainant with some links, in its original response of 3 January 2024).
74. The Commissioner finds a breach of section 17 of FOIA, because the Council failed to state its reliance on section 21 in respect of information published on its website.

## **Right of appeal**

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75. 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)

76. 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.

77. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Daniel Kennedy**  
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