

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 September 2015

Public Authority: Sully and Lavernock Community Council

Address: Council Offices
Jubilee Hall
Smithies Avenue
Sully
Penarth
CF64 5SS

Decision (including any steps ordered)

1. The complainant requested the names of two candidates who were unsuccessful in a co-opting exercise undertaken by Sully and Lavernock Community Council ('the Council') to recruit new councillors. The Council withheld the information requested under section 40(2) of the FOIA. The Commissioner's decision is that the Council has correctly applied section 40(2) to the withheld information. He does not require any steps to be taken.

Request and response

2. On 12 December 2014 the complainant wrote to the Council regarding two new community councillors who were co-opted in May 2014 and requested information in the following terms:

"You indicate that 4 Candidates put their names forward – perhaps you could inform me who the two unsuccessful candidates were on this occasion?"
3. Following a number of emails the complainant sent to the Council chasing a response, a reply was issued on 6 February 2015 stating that it was unable to provide the names of the two unsuccessful candidates "as this would be a breach of their rights".

4. On 24 February 2015 the complainant wrote to the Council and requested an internal review of its decision to withhold the names of the two unsuccessful candidates.
5. The Council provided the outcome of its internal review on 25 March 2015 and upheld its decision to withhold the information requested.

Scope of the case

6. The complainant contacted the Commissioner on 27 March 2015 to complain about the way his request for information had been handled.
7. The scope of the Commissioner's investigation is to determine whether the Council should disclose the information requested on 12 December 2014.

Reasons for decision

Section 40 – the exemption for personal data

8. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the FOIA would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').
9. The Council considers that the information requested constitutes the personal data of the individuals who were unsuccessful in the co-opting exercise and that disclosure would breach the first data protection principle.

Is the requested information personal data?

10. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information as data which relates to a living individual who can be identified:
 - from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

11. In considering whether the information requested is "personal data", the Commissioner has taken into account his own guidance on the issue¹. The two main elements of personal data are that the information must "relate to" a living person, and that person must be identifiable. Information will "relate to" a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts them in any way.
12. The withheld information in this case comprises the names of two individuals who applied for vacant positions as councillors with the Council. The Commissioner is satisfied that the requested names relate to living individuals who may be identified from that data. The requested information therefore falls within the definition of personal data as set out in the DPA.

Would disclosure breach one of the data protection principles?

13. Having accepted that the information requested constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles. He considers the first data protection principle to be most relevant in this case. The first data protection principle has two components:
 - personal data shall be processed fairly and lawfully; and
 - personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

Would disclosure be fair?

14. In considering whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has first considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations of the individual concerned, the nature of those expectations and the consequences of disclosure to the individual. He has then balanced against these the general principles of accountability, transparency as well as any legitimate interests which arise from the specific circumstances of the case.

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Data_Protection/Detailed_specialist_guides/PERSONAL_DATA_FLOWCHART_V1_WITH_PREFACE001.ashx

The Council's position

15. The Council provided the Commissioner with some background information about the subject matter of this request, ie the co-option of new councillors. The Council explained that it advised the local authority for the area (the Vale of Glamorgan Council) that it had two vacancies for councillors. In accordance with statutory processes, notices were placed on boards in the Council and the Vale of Glamorgan Council offices. The notices advised that a by-election would be held if the relevant number of electors gave notice in writing to the Returning Officer for the Vale of Glamorgan Council requesting such an election be held. The notices provided a time limit of 14 days.
16. As no requests for a by-election were received, the co-option process commenced, as determined by statute. A notice was published on 25 April 2014 on the Council notice board, as a result of which four applications were received. After considering the applications, the Council decided to interview all four candidates, and appointed two of the candidates as councillors. The request in this case is for the names of the two unsuccessful candidates who applied to be co-opted on to the Council
17. The Council confirmed that it did not provide any specific advice or guidance to the applicants during the co-option process about what would happen to their personal data. However, it considers that the unsuccessful applicants would have had a general expectation that their identities would not be disclosed into the public domain. The Council considers that the reasonable expectations of the individuals are based on the fact that the applications were received as a result of co-option rather than via a by-election, where applicants would have an expectation that their names/details would be published to allow members of the public to vote and elect their preferred candidate(s) for councillor.
18. In terms of the consequences of disclosure, the Council provided limited representations other than to comment that it was difficult to know what unwarranted harm disclosure may have on the individual(s). However, the Council stated that the individual(s) may not want the general public to be aware that they were unsuccessful in their application to become a community councillor.
19. The Council also considers it difficult to assess what the legitimate interest is in disclosure of the information in view of the fact that the individual(s) were unsuccessful in their applications.

The complainant's position

20. The complainant argues that *if* there had been a formal, publicly held by-election, residents would have known the identities of *all* of the candidates who applied to become a councillor. He is of the view, therefore, that any person applying to become a councillor through co-option would have been aware that, if successful, their names/identities would become public knowledge. He does not there, see any justification for the Council to withhold the names of the unsuccessful candidates.

The Commissioner's position

21. Turning firstly to the issue of the extent to which the disclosure of the information in question would have been within the reasonable expectations of the individuals concerned. The Commissioner notes that, on the whole, the information relates to the professional lives of the individuals concerned in that they were applying for a position as a councillor.
22. The Commissioner understands that, generally, community and town council seats are awarded either through election or by co-option. Co-option is when a council chooses from a list of volunteers if there are insufficient candidates at election time or the electorate does not call for an election when a seat falls vacant. In light of this the Commissioner accepts that the expectations of individuals applying to be co-opted onto a community council would be different than those seeking election by the public through the normal democratic channels. He therefore accepts that, in this case, the individuals concerned would not have had a reasonable expectation that if their application was unsuccessful, their identities would be disclosed into the public domain.
23. In assessing the consequences of disclosure, the Commissioner is mindful of the fact that it is not always possible to quantify or prove the impact that disclosure may have on the data subject. In this particular case, in light of the reasonable expectations of the individuals, the Commissioner considers that disclosure would amount to an infringement into the privacy of the individuals in question and has the potential to cause unnecessary and unjustified distress to the individuals.
24. Notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information. The Commissioner has therefore gone on to consider whether there are any countering arguments which would outweigh such an intrusion. He must consider whether there is any pressing social need for the information to be disclosed which might

outweigh any expectation of non-disclosure and shift the balance towards it being fair to release that information.

25. The Commissioner acknowledges that there is a tension between public access to information and the need to protect personal information. As far as possible, a public authority must be transparent and accountable for its actions. However, the individuals in this case were unsuccessful in their applications for councillor, and therefore they are not senior public figures nor do they hold an elected office. The Council does not routinely publish the names of such individuals.
26. The Commissioner is satisfied that disclosure of the withheld information would be unwarranted by reason of prejudice to the rights, freedoms and legitimate interests of the individuals in question. The Commissioner does not believe that any legitimate interest in the public in accessing the withheld information would outweigh the potential damage and distress caused by disclosure in this case.
27. In view of the above, the Commissioner is satisfied that the withheld information is personal data and that disclosure of any of it would breach the first data protection principle as it would be unfair to the individuals concerned. As the Commissioner has determined that it would be unfair to disclose the requested information he has not gone on to consider whether disclosure is lawful or whether one of the conditions in Schedule 2 of the DPA is met. The Commissioner therefore upholds the Council's application of the exemption provided at section 40(2) of the FOIA.

Right of appeal

28. 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

29. 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.
30. 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

Anne Jones
Assistant Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF