

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 July 2020

Public Authority: West Sussex County Council
Address: County Hall
West Street
Chichester
West Sussex
PO19 1RQ

Decision (including any steps ordered)

1. The complainant made two requests about the absence and then departure from post, by the Chief Executive. West Sussex County Council ("the Council") withheld the requested information and relied on section 40(2) of the FOIA to do so.
2. The Commissioner's decision is that the requested information is the personal data of the Chief Executive and that there is no lawful basis under GDPR for disclosure of the withheld information in respect of either request. As disclosure under the FOIA would therefore breach the GDPR principles, the Council is entitled to rely on section 40(2) of the FOIA to withhold the requested information.
3. The Commissioner does not require any further steps.

Request and response

Request one

4. On 21 November 2019, the complainant wrote to the Council and requested information in the following terms:

"will you please inform me why the Chief Executive of WSCC has been absent from his duties for several weeks"

Request two

5. On 29 November 2019, the complainant, referring again to the Chief Executive, made a further request to the Council:

"Can you also please send me the terms of his leaving WSCC 'by mutual consent'"

6. The Council responded to both requests separately on 18 December 2019. It withheld the information in respect of both requests and relied on section 40(2) of the FOIA to do so.
7. The complainant was dissatisfied with both responses. The Council provided further responses in respect of both requests on 18 December 2019. It maintained its original position.
8. The Council issued a formal internal review on 13 February 2020. It maintained its position that section 40(2) would apply to the withheld information.

Scope of the case

9. The complainant contacted the Commissioner on 19 February 2020 to complain about the way his request for information had been handled.
10. The Council provided its submission in respect of the complaint on 13 March 2020, but was reticent to provide the withheld information in respect of request two – as it argued that the terms of the agreement would have been breached if the document were shared on a voluntary basis.
11. The Commissioner considered that she would be unable to reach a decision in respect of this complaint without having viewed the withheld information. In normal circumstances she would immediately have issued an information notice to the Council, thus creating a legal requirement for it to provide the withheld information to the Commissioner, allowing the document to be shared without breaching its terms. Unfortunately, the Covid-19 pandemic struck in late March and, as a result, the Commissioner took the exceptional step of temporarily suspending her use of formal regulatory tools – including information notices – whilst public authorities re-prioritised their resources to care for the vulnerable. As no progress could be made without the withheld information, the Commissioner was left with no option but to pause her investigation.

12. On 25 June 2020, having reviewed her position in light of the easing of restrictions, the Commissioner served such a notice on the Council. That notice was complied with immediately and the Commissioner attaches no blame to the Council for the delays in bringing this investigation to a conclusion – which have been wholly as a result of the exceptional circumstances of the time.
13. Having viewed the withheld information, the Commissioner considers that the scope of her investigation is to determine whether the information is the personal data of the Council's former Chief Executive and, if it is, whether the Council has applied section 40(2) properly in order to withhold it.

Background

14. Mr Nathan Elvery left his post as Chief Executive of West Sussex County Council on 25 November 2019 by mutual consent. Prior to his departure, he had been "away from his duties" since September 2019. The reason for this absence is not in the public domain, but the financial settlement of £265,000 and legal fees of £35,000 are public knowledge.

Reasons for decision

Section 40 – personal information

15. 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.
16. In this case the relevant condition is contained in section 40(3A)(a)¹. 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 General Data Protection Regulation ('GDPR').
17. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.

18. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

19. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. 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.
22. 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.
23. The wording of the request makes clear that the information requested could only relate to Mr Elvery – because it refers to the specific post he held on a specific date. The information concerns Mr Elvery's employment with the Council, has him as its main focus and has biographical significance for him.
24. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that this information both relates to and identifies Mr Elvery. 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 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 GDPR must apply to the processing. It must also be generally lawful.

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

30. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.

31. 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"².

² 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 GDPR would be contravened by the disclosure of information, Article 6(1) of the 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".

32. In considering the application of Article 6(1)(f) of the 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.
33. 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

34. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests or purely private concerns. However, the more trivial the interest, or the more unrelated the private concern is to the broader public interest, the less likely it is that any balancing test would conclude that unrestricted disclosure to the general public is proportionate.
35. The complainant made several arguments which he felt demonstrated the "public interest" in disclosure. Section 40(2) of the FOIA does not require a *public* interest test, but some of the arguments are relevant to the *legitimate* interest test.
36. The complainant highlighted a damning report produced for the Department for Education about the operation of the Council's children's services department.³ The report, which related to the time when Mr Elvery was Chief Executive, was critical of the way the Council managed

³ <https://westsussex.moderngov.co.uk/documents/b7039/Item%205b%20-%20Childrens%20Commissioners%20Report%2017th-Dec-2019%2010.30%20County%20Council.pdf?T=9>

its children's services department and recommended that control be removed from the Council altogether. In justifying such an extreme measure, the report noted that:

"there could be limited confidence in WSCC's top leadership capacity to address the children's service failings and change its course."

37. Elsewhere, the report noted the consistent references, from former Council employees, to a "bullying" culture at the Council which starts *"at the very top of the organisation, politically and managerially."*⁴
38. The complainant also referred to various allegations that Mr Elvery had been profligate with taxpayers' money and argued that the Council should have dismissed Mr Elvery – rather than reach an agreement.
39. Finally and specifically in relation to request one, the complainant argued that there was legitimate interest in understanding whether the reason for Mr Elvery's absence from post was related to the publication of the DfE report – given that they occurred at a similar time.
40. In addition, the Commissioner also notes that there is always a broad legitimate interest in understanding the ways in which a public authority spends taxpayers' money.
41. At this point, the Commissioner considers it necessary to contemplate the nature of the withheld information in this case.
42. The withheld information in respect of request two is the document forming the agreement between the Council and Mr Elvery, setting out the terms of his departure. The agreement sets out the costs to be paid as well as numerous standard clauses relating to the future relationship between the two parties.
43. Whilst there is no specific withheld document in respect of request one, having viewed the agreement, the Commissioner considers that the agreement would provide the information that the complainant has requested. Nevertheless, the Commissioner has considered both requests separately as she considers that the legitimate interest test is different for both.

⁴ It is also reasonable to note at this point, as the report did, that Mr Elvery strongly contested many of the report's findings

Request Two

44. In respect of request two, the Commissioner does not consider that the legitimate interests that the complainant has identified would be satisfied by disclosure of the agreement and they therefore fail this part of the test.
45. The Commissioner agrees that there would be a legitimate interest in understanding how the Council in general – and Mr Elvery in particular – responded to the failings outlined in the report. However, having reviewed the actual information itself, the Commissioner does not consider that it contains anything that would be of use to a person wishing to investigate the matter.
46. Equally, there is nothing in the withheld information that would address any of the allegations the complainant has made about Mr Elvery's tenure at the Council.
47. Whilst either or both of these legitimate interests would potentially carry substantial weight in any balancing exercise, as the withheld information could not satisfy the legitimate interests anyway, the Commissioner considers that these interests therefore fall at the first hurdle and there is no need for her to consider the necessity test in relation to these interests.
48. Although it usually carries the least weight, the Commissioner does consider that there remains a legitimate interest in general transparency which would, theoretically at least, be satisfied to some extent by disclosure. She has therefore gone on to consider whether disclosure would be necessary to satisfy this legitimate interest.

Is disclosure necessary?

49. '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.
50. Disclosure under the FOIA is disclosure to the world at large – not just to the individual requestor. It is the equivalent of the Council publishing the information on its website.
51. In this particular case, the Commissioner notes that the settlement figures themselves are in the public domain. Thus disclosure of the

entire agreement is not necessary to reveal how much the Council paid to Mr Elvery.

52. Nevertheless, given Mr Elvery's position, as the most senior non-elected official at the Council, the Commissioner still considers that there would be a legitimate interest in understanding the terms that the Council agreed to be bound by – and there is no alternative means of satisfying this interest.
53. As the Commissioner has determined that disclosure would be necessary, she has gone on to carry out a balancing exercise.

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

54. 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.
55. 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.
56. 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.
57. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
58. In carrying out her balancing exercise, the Commissioner is conscious of Mr Elvery's seniority and the effect this would have on his reasonable expectations. As a general rule, the Commissioner considers that the

more junior an employee is, the more reasonable the expectation they will have that information relating to their employment will not be disclosed. Conversely, more senior employees should reasonably expect that some of the details of their employment will need to be placed into the public domain. This is a concomitant responsibility that comes alongside the role and the salary – although even then, senior officers still have a reasonable expectation that the most sensitive personal information will not be made public.

59. In this particular case, Mr Elvery, prior to signing the agreement, held the most senior non-elected position possible at the Council.
60. To assist with her considerations about the balancing exercise, the Council drew the Commissioner's attention to a previous decision notice she had issued in respect of a request made for a similar agreement reached with the outgoing Chief Executive of Cambridgeshire and Peterborough Combined Authority. In that decision, the Commissioner set out her balancing exercise thus:

"59. The Commissioners guidance "Requests for personal data about public authority employees"⁵ states that employees' expectations as to what information will be released will have to take account of statutory or other requirements to publish information. For example, the "Accounts and Audit (Amendment no 2) (England) Regulations 2009"⁶ require local authorities in England to publish in their annual accounts the amounts paid to employees in connection with the termination of their employment by job title if the total remuneration is between £50,000 and £150,000 and by name if it is over £150,000. However, this legislation only directly affects reasonable expectations regarding the actual amounts of money paid out. Reasonable expectations in other contexts may differ, but it should be recognised that there is an increasing public expectation of transparency regarding the expenditure of public money and the performance of public authorities.

"60. The council advised "as with all such agreements the document contains a confidentiality requirement". The Commissioner can

⁵

https://ico.org.uk/media/fororganisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

⁶ <http://www.legislation.gov.uk/ukxi/2009/3322/made>

confirm that there is a clause written into the agreement to this effect.

- "61. The council provided evidence that the individual has sought assurance from the council that the settlement agreement would remain confidential despite questions and requests raised by third parties.*
- "62. The Commissioner considers that the basis of a settlement agreement is that it remains an essentially private and confidential matter between employer and employee. There is an emphasis on confidentiality implicit in most such agreements. As such the Commissioner is satisfied that it would not be within the reasonable expectations of an individual that information regarding the terms under which their employment concluded would be disclosed.*
- "63. The public undoubtedly has a legitimate interest in knowing how much money a public body is spending on settlement agreements. There is also a strong argument that a public body should be transparent and accountable to the public. It could therefore be argued that settlement agreements should be disclosed to promote such openness and accountability.*
- "64. However the Commissioner also considers that in releasing the details of the settlement payment, the council has met the legitimate interests of transparency and accountability to a degree.*
- "65. Having reviewed the document, the Commissioner is not persuaded that disclosure of the Settlement Agreement will be particularly informative in terms of revealing any further information regarding the circumstances of the Chief Executive's departure."*
61. Whilst the Commissioner is not aware that Mr Elvery has made representations in favour of withholding the information, she considers that all the other factors apply equally to the situation in this case.
62. There is no evidence that Mr Elvery has consented to disclosure of the withheld information. The Council was not obliged to seek his consent and the Commissioner considers highly unlikely, given the nature of the

⁷ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2615650/fs50810395.pdf>

document, that consent would be given in the circumstances. Disclosure would therefore take place without Mr Elvery's consent and contrary to his reasonable expectations.

63. The Commissioner considers that disclosure in such circumstances would be an intrusion into Mr Elvery's privacy and would therefore cause him a certain amount of distress.
64. Whilst the complainant (and, possibly, others) may have concerns about Mr Elvery's effectiveness as a chief executive – concerns that may or may not be justified – the withheld document contains minimal information that would shed light on the matter either way.
65. The Council noted that its decision (to enter into an agreement) had been delegated to the Deputy Monitoring Officer, after having consulted both the (elected) Cabinet Member for Finance and the Chair of the relevant scrutiny committee. The resulting agreement had been looked at by both the Council's external and internal auditors.
66. Having considered the matter the Commissioner's view is that the transparency value which might result from disclosure of the withheld information is outweighed by the intrusion in to Mr Elvery's private life that would result. She is therefore satisfied that there is no lawful basis for the personal data to be disclosed and thus disclosure would breach the GDPR principles. She is therefore satisfied that the Council is entitled to rely on section 40(2) of the FOIA to withhold information in respect of request two.

Request one

67. As well as the legitimate interest in transparency, the Commissioner considers that there would be a legitimate interest in understanding why Mr Elvery was absent from his duties prior to his departure – particular if the reason was linked to publication of the DfE report. Given that he remained on full pay during his absence, there would be a legitimate interest for the council taxpayers of West Sussex in understanding why they were paying a substantial amount of money to an individual who was not carrying out his duties – and potentially to another individual to carry out those duties in his absence.
68. For the avoidance of doubt, the Commissioner is making no finding of fact as to whether the absence and the report are linked. Nothing in this decision notice should be construed as confirming that any such link does or does not exist.
69. Whilst the complainant is certain that he knows the reason and the Commissioner is aware of rumours circulating online, she is satisfied that the real reason is not in the public domain. Nevertheless, she

considers that there is a legitimate interest in disclosure and has gone on to consider the necessity test.

Necessity

70. The Council noted in its submission that such an absence could (and, more appropriately, should) be dealt with via the normal channels of performance management. However in the Commissioner's view this is not sufficient to satisfy the legitimate interest in understanding why an individual is unable to carry out their duties. She has therefore gone on to carry out a balancing exercise.

Balancing exercise

71. The Commissioner considers that the same considerations that apply to request two apply to request one – but there are some further considerations in respect of request one.
72. "Absent from duties" could cover a wide spectrum of scenarios ranging from the very personal (such as absence due to illness, maternity/paternity leave or family issues) to scenarios linked to the role itself. Using a "catch-all" term allows the Council to avoid the possibility of indirectly revealing special category personal data.
73. The Commissioner agrees that it would be more appropriate for the Council to manage any concerns it had about an employee's absence via the usual channels of performance management.
74. In this particular case, the Commissioner considers that the timing of the request is significant. At the time the request was submitted, Mr Elvery was absent from his duties but, at the point the Council responded (which was within the 20 working day deadline), he had left the Council.
75. Had Mr Elvery still been absent from his duties at the point the request was responded to, the factors involved may have balanced out differently. However, the Commissioner is satisfied that, at the point the request was responded to, the reasons for Mr Elvery's absence were resolved and, given that he had left the Council, the matter would not be subject to further discussion or action.
76. The Commissioner therefore concludes that disclosing the withheld information in respect of request one would be a significant intrusion into Mr Elvery's privacy. If this were likely to lead to further legitimate lines of investigation or enquiry there might be some justification – but the Commissioner does not consider that this would be likely to result.

77. The Commissioner is therefore satisfied that Mr Elvery's rights outweigh the legitimate interests in disclosure and therefore no lawful basis for disclosure of his personal data exists.
78. As there is no lawful basis for processing, disclosure would breach the GDPR principles and therefore the Council was entitled to rely on section 40(2) to withhold the requested information.

Right of appeal

79. 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

80. 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.
81. 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

Phillip Angell
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