

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 October 2014

Public Authority: Derbyshire County Council
Address: County Hall
Matlock
Derbyshire
DE4 3AG

Decision (including any steps ordered)

1. The complainant has requested information in relation to the departure of Derbyshire County Council's (the council) Chief Executive. The council provided some information but refused the remainder under section 22, 40(2) and 42 of the FOIA.
2. The Commissioner's decision is that the council has correctly relied on section 40(2) and 42 of the FOIA to withhold the information it has under those exemptions, but has found that the information withheld under section 22 of the FOIA should be provided to the complainant.
3. As the Commissioner has found that the information withheld under section 22 of the FOIA should have been provided to the complainant at the time of the request, the Commissioner has found that the council has breached section 10 of the FOIA, in not providing this information within the required 20 working days from the date of the request.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the information that the council withheld under section 22 of the FOIA.
5. 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

6. On 22 November 2013, the complainant wrote to the council and requested information in the following terms:

"I did also want to ask for the information held on Nick Hodgson's departure earlier in the year. This would include who made the decision, when the decision was made, what severance pay was provided, the basis for that payment, (ie whether it was calculated on a year's salary, two year's salary or any other calculation), how this basis complied with any existing council practices or procedures for when council officers leave their jobs and any information that explains why a very experienced senior officer departed so abruptly."

7. The council responded on 20 December 2013. It broke the request down into the following 5 points:

- 1) "who made the decision and when was it made"
- 2) "What severance pay was provided"
- 3) "the basis for the calculation"
- 4) "how the basis of calculation complied with any existing council practices or procedures for when council officers leave their jobs"
- 5) "any information that explains why a very experienced senior officer departed so abruptly"

8. The council refused to provide the information for:

- Point 2) relying on section 22 of the FOIA
- Point 3) and 5) relying on section 40(2) of the FOIA
- And for point 4) it advised that it did not hold a written policy or practice for when an employee's contract of employment terminates by agreement. It advised that if the complainant was requesting the legal advice, then this would be refused under section 42 of the FOIA.

9. On the 13 January 2014, the complainant requested an internal review. The council provided its internal review on the 5 February 2014. It maintained its original response.

Scope of the case

10. The complainant contacted the Commissioner on the 5 February to advise that he is not satisfied with the council refusing the information it has with regards to his request.
11. The Commissioner considers the scope of the case is to determine if the council has correctly applied section 22 for point 2, section 40(2) for points 3 and 5 and section 42(1) for point 4 as outlined in paragraphs 7 and 8 above.

Reasons for decision

12. Section 22 of FOIA states that:

"Information is exempt information if-

- a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),*
- b) the information was already held with a view to such publication at the time when the request for information was made, and*
- c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)."*

13. With respect to the council's application of section 22 of FOIA for point 2) in paragraph 7 and 8 above, the Commissioner has recently issued a decision notice¹ with regards to a separate request to the council for this information from another party.
14. The Commissioner in that decision notice found that although section 22 of the FOIA was engaged, the public interest was in favour of disclosure

¹ Decision notice Ref: FS50517278

of the information. As the Commissioner has already considered the council's arguments and determined that the information should be released, he stands by that decision notice as the reasons to why the information being withheld under section 22 of the FOIA by the council should be released for this request.

Section 40(2) of FOIA

15. Section 40(2) of FOIA states that:

"Any information to which a request for information relates is also exempt if-

a) It constitutes personal data which do not fall within subsection (1), and

b) Either the first or second condition below is satisfied."

16. Section 40(2) of the FOIA provides that third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act 1998 (the DPA).

Is the withheld information personal data?

17. Personal data is defined by the DPA as any information which relates to a living individual who can be identified from that data or from that data along with any other information in the possession or is likely to come into the possession of the data controller.

18. The Commissioner is satisfied that the withheld information, for points 3 and 5 in paragraph 7 above, falls within the definition of personal data as set out in the DPA because it 'relates to' an identifiable living individual.

Would disclosure contravene any of the Data Protection Principles?

19. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of disclosure against the legitimate public interest in disclosing information.

Reasonable expectations

20. The withheld information relates to a confidential agreement between the chief executive and the council with regards to the termination of his contract. That being the basis of the calculation of the sum paid to the chief executive, and information that explains why his employment with the council has ended.
21. The council state that as this was a confidential agreement, there would be an expectation that information relating to this would remain as such.
22. The council has told the Commissioner that the chief executive was aware that the total sum received on the termination of his employment would be published with the council's accounts.
23. However the council maintain that as the basis for the calculation for the total sum paid is not a set formula, but decided on a case by case basis, then the details of the calculation would carry an expectation of privacy as set out in the agreement.
24. The council also state the chief executive would have an expectation that the reason/s for why his employment came to an end would remain confidential.
25. The Commissioner has considered the seniority of the chief executive, being the most senior employee of the council, and he considers the reasonable expectations of a senior employee to be less than a junior employee when it comes to withholding some types of personal information and this has to be balanced on the type of personal information sought.
26. The Commissioner is of the opinion that individuals would generally have a reasonable expectation that information which relates to their personal terms of employment, such as human resources information, would not be disclosed to the wider public.

Consequences of disclosure

27. The council has not asked the chief executive if he would give consent to the release of this information but has kept him updated with this request and he has not indicated that the information can be released.
28. The council has told the Commissioner that distress may result from the release of this personal data, but considers that there are also wider implications relating to trust and confidence in the council's respect for

the reasonable expectations of individuals generally, especially where a confidentiality agreement has been signed.

29. The Commissioner acknowledges the council's view on the wider implications of disclosing employee personal information which may result in a loss of trust and confidence in council's. But he also does not consider that because a confidentiality agreement is in place, the information will always be exempt from disclosure under the FOIA.
30. The Commissioner does however consider that some distress may be caused to the chief executive in releasing the withheld information.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure.

31. The complainant considers that there is a clear, legitimate interest in releasing the information withheld under section 40(2), to enable the public to understand how the situation has arisen.
32. The complainant states that there has been no clarity about the decision, why it was reached, and why what the amount agreed on, was agreed on. Also if a significant payment has been made outside of any council policy or procedure, then the public has the right to know this basis otherwise there would be significant public concern if payments are being made to senior employees outside of any established procedure.
33. The complainant argues that there is a lack of transparency and this places question marks about how the council can be held accountable if there is no understanding of why a large payment was made.
34. The Commissioner acknowledges the complainant's arguments about openness and transparency in order to allow the public an insight into council decisions, especially when it comes to public funds.
35. However, as the Commissioner has previously determined that the council should provide the total sum paid, this would go some way to allow the public see how the council is spending public funds as a whole.
36. The Commissioner does recognise that confidentiality agreements can also benefit the public purse in that they can reduce the need for lengthy and costly employment disputes.
37. On weighing up all of the above the Commissioner's considers that the legitimate interests in the public accessing the full details of the settlement agreement, or reasons for the departure, do not outweigh the potential damage and distress which could be caused to the data subject.

38. Therefore the Commissioner's decision is that the council has correctly relied on section 40(2) of the FOIA to withhold the information it has under this exemption.

Section 42 of FOIA

39. Section 42(1) of the FOIA states:

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

40. There are two categories of legal professional privilege (LPP): advice privilege where no litigation is contemplated or pending, and litigation privilege where litigation is contemplated or pending.
41. The council states that the advice is subject to both legal advice privilege and litigation privilege.
42. The council has explained that it has taken legal advice from its in-house lawyers and from counsel on its options with regards to the termination of the chief executives contract of employment.
43. The council has told the Commissioner that it does not have a set policy or legislation in regards to confidentiality agreements, and they are made on a case by case basis, and so that is why it requires the legal advice to establish the confidentiality agreement.
44. The communication in question needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact which is usually to be found by inspecting the documents themselves.
45. The Commissioner has examined the withheld advice and is satisfied that it covers confidential communications between a legal advisor and client, made for the dominant purpose of seeking or giving legal advice in relation to the termination of the chief executives contract of employment.
46. However, information does not attract LPP if the contents of the legal advice have been disclosed; the privilege would be lost.
47. The Commissioner has not been presented with any evidence that the advice has been disclosed in this case, the council has also stated that it has not been made available to the public or a third party. Therefore the Commissioner is satisfied that section 42(1) of the FOIA is engaged for point 4 of the request, highlighted in paragraphs 7 and 8 of this decision notice.

Public interest test

48. Section 42(1) of the FOIA is a qualified exemption, therefore the Commissioner must consider whether, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

49. The council recognises that the chief executive is the most senior employee at the council and there is a public interest in transparency in relation to senior public sector employees and their termination payments.
50. The Commissioner sees that there would be public interest in knowing the details of the departure of the chief executive. Disclosing this information would enable the public to see that legal advice had been sought and received. This in turn would serve the public interest in knowing that decisions being made on the basis of that advice are sound and therefore would show accountability for these decisions.

Public interest in favour of maintaining the exception

51. The council has stated that it needs to ensure that it has the ability to have frank discussions with its legal advisers and to disclose this information would have an adverse effect on its ability to obtain such advice.
52. The Commissioner and Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice would have an adverse effect on the course of justice through weakening the general principle behind LPP.
53. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. In the Information Tribunal decision of *Bellamy and Secretary of State for Trade and Industry (EA/2005/0023)* it stated:

"... there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest... it is important that public authorities be allowed to conduct free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cases..." (paragraph 35)

54. The council has sought legal advice in relation to a settlement agreement with the then chief executive. The Commissioner is of the opinion that disclosing this information will have an adverse effect on the council's ability to obtain full and frank legal advice should it be required again for future.
55. Therefore the Commissioner's decision is that the council has correctly relied on section 42(1) of the FOIA to withhold the information it has under this exemption.

Section 10(1) of the FOIA

56. Section 10(1) of the FOIA states:

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working days following the date of receipt."

57. As the Commissioner has found that the information withheld under section 22 by the council should have been provided to the complainant, the Commissioner's decision is that council has breached section 10(1) of the FOIA, as it has not provided this information within the required 20 workings days following the receipt of the request, the date of receipt being 22 November 2013.

Right of appeal

58. 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

59. 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.
60. 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

Andrew White
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