

Freedom of Information Act 2000 ('FOIA')

Decision notice

Date: 30 April 2013

Public Authority: Mid Devon District Council

Address: Phoenix House
Phoenix Lane
Tiverton
Devon
EX16 6PP

Decision (including any steps ordered)

1. The complainant has requested information from Mid Devon District Council ('the council') relating to an investigation into money paid to Cullompton Town Council by Devon Gateway Trust Ltd. The Commissioner's decision is that the council has correctly applied the exemption for personal data at section 40(2) of the FOIA. The Commissioner has also decided that the council breached section 10(1) of the FOIA by failing to respond within the statutory time limit of 20 working days but does not require any steps to be taken.

Request and response

2. On 13 March 2012, the complainant wrote to the council and requested information in the following terms:

"Since being co-opted onto the previous Cullompton Town Council in its dying stages, I have been trying to establish what went on between CTC and DGT Ltd; in particular, how money from this (apparently defunct) private company, of which the Town Clerk and several Town Cllrs were Directors, ended up in Town Council Coffers – despite apparently being 'Bona Vacantia'. I understand that you were tasked with investigating the matter on behalf of the new Town Council. I also understand that the finding of the investigation was that no further action was necessary. How can this be the case – there is no Agenda item relating to this transaction, nor is there a resolution passed by the

Council, despite several re-elected Town Councillors saying that the matter *was* discussed by the previous Town Council?

The meeting at which your report was discussed was held in private. It is in the public interest that this matter is made public if there is any wrongdoing by Members or Officers of Cullompton Town Council, or Mid Devon DC. In the circumstances, I fail to see how there cannot be, therefore, please disclose:

- material collected during the investigation
 - the findings of the investigation
 - any other notes made and
 - the records of any meetings whereby the findings were discussed – most especially any discussions involving [named individual] and [named individual].”
3. The council responded on 25 April 2012 and refused to confirm or deny that the requested information was held citing the exemption at section 44(1)(a) of the FOIA.
 4. An internal review was requested on 25 April 2012 in which the complainant stated that wanted to know ‘what involvement any Member of Officer of MDDC had in the alleged wrongdoing by the Clerk of Collompton Town Council’. He stated that as the Town Clerk is not a member of the council she could not have been referred to the Standards Committee and therefore the exemption at section 44 of the FOIA could not apply.
 5. The council provided an internal review response on 24 August 2012. It confirmed that an investigation was conducted and stated that any information held in relation to this matter is considered to be the personal information of the individual concerned, disclosure of which would breach the first data protection principle and therefore the exemption at section 40(2) of the FOIA applies.

Scope of the case

6. The complainant contacted the Commissioner on 23 August 2012 to complain about the way his request for information had been handled.
7. The Commissioner has considered the council’s application of the exemption for personal data at section 40(2) of the FOIA.
8. For the avoidance of doubt, the Commissioner has not considered the council’s application of the exemption for prohibitions on disclosure at

section 44 of the FOIA as the council changed its position during the internal review.

Reasons for decision

Section 40(2)

9. 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 Act would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').

10. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

11. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the data protection principles under the DPA. The council stated that disclosure would breach the first data protection principle.

12. The first data protection principle states that:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

13. As explained above, the first consideration is whether the withheld information is personal data. The council explained that most of the evidence collected during the course of the investigation was destroyed by the investigating officer but it does hold a report on the investigation into the actions of a specific council employee, a transcript of an interview with the specific employee, and an index of evidence used in the investigation. The Commissioner is satisfied that the information in this case is the personal data of the specific employee.
14. As the Commissioner is satisfied that the withheld information is personal data, he now needs to consider whether disclosure would breach the first data protection principle, i.e. would disclosure be unfair and/or unlawful.
15. In deciding whether disclosure of this information would be unfair, the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subjects, the consequences of disclosure on those data subjects and balanced the rights and freedoms of the data subjects with the legitimate interests in disclosure.

Nature of the information and reasonable expectations

16. The Commissioner recognises that information relating to investigations into individuals carries a strong general expectation of privacy due to the likelihood that disclosure could cause the data subjects' distress and could also cause permanent damage to their future prospects and general reputation.
17. In his guidance, 'Requests for personal data about public authority employees'¹, the Commissioner states that a factor to take into account when considering whether to release information is whether the information is about the employees' professional or personal life and that the threshold for releasing professional information will generally be lower than that for releasing truly personal sensitive information e.g. that found in an employee's occupational health record. The guidance also states that arguments in favour of disclosure are stronger where a disciplinary measure is being taken against a senior member of staff over a serious allegation of impropriety or criminality, particularly the case where an external agency is involved in an investigation, and that

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx

arguments in favour of disclosure are weaker where the information is about an internal disciplinary procedure concerning a relatively minor matter.

18. The council has stated that the data subject would have a reasonable expectation that the requested information would not be disclosed to the public. During the course of the investigation, the data subject was assured that the interview itself and the subsequent report would not be passed to anyone other than the Chair of the Personnel Committee and that this is in accordance with well-established practices within the council.
19. Although the Commissioner considers that the withheld information in this case relates to the data subjects' role as a public sector employee, rather than their private life, he is satisfied that the data subject in this case would have an expectation of confidentiality and privacy in relation to the withheld information.

Consequences of disclosure

20. In order to assess the impact of the consequence of disclosure on whether disclosure would be fair, it is necessary to consider whether disclosure of the withheld information would cause unwarranted damage or distress to the data subject.
21. The council has stated that it is critical that it is able to conduct investigations and that those involved are open and honest in responding. It said that disclosing information of this type would undermine this process and potentially lead to the council's ability to successfully conduct such investigations being reduced.
22. As it is the consequences of disclosure on the data subject that is a relevant when considering whether disclosure would be unfair, the Commissioner has not taken the council's argument regarding the successful conduct of investigations into account.
23. However, the Commissioner considers that disclosure of information relating to the investigation of an individual in this case would be an intrusion of privacy, could cause distress, and could also cause damage to the data subjects' future prospects and general reputation.

Legitimate interests in disclosure

24. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for its own sake along with specific interests which in this

case is the legitimate interest in the handling, and outcome, of an investigation into a specific council employee.

25. As part of the information request, the complainant stated that it is 'in the public interest that this matter is made public if there is any wrongdoing by Members or Officers of Cullompton Town Council, or Mid Devon DC'.
26. The council did not submit any arguments as to how the legitimate interest in the requested information has been satisfied in this case.
27. Having regard to the particular circumstances of this case, although the Commissioner does not consider that the public interest in this matter requires disclosure of the withheld information, he does acknowledge that there is a legitimate interest in the handling, and outcome, of an investigation into a specific council employee.

Conclusion on Section 40(2)

28. Taking all this into account, the Commissioner concludes that it would be unfair to the data subject concerned to release the requested information as he considers that their right to privacy in relation to an investigation into them outweighs the interests of the public in knowing the details of this specific investigation. The Commissioner has therefore decided that the council was entitled to withhold the information under section 40(2), by way of section 40(3)(a)(i).
29. As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, he has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

Section 10 – Time for compliance

30. Section 10(1) 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 day following the date of receipt."

31. The request was submitted on the 13 March 2012 but the council did not respond until 25 April 2012. The Commissioner therefore finds that the council did not make the information available within 20 working days and consequently finds a breach of section 10(1) of FOIA.

Other matters

32. As he has made clear in his published guidance on internal reviews, the Commissioner considers that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner's view of a reasonable time for completing an internal review is 20 working days from the date of the request for review. In this case the Commissioner notes that complainant first requested an internal review on 25 April 2012 but the council did not provide an internal review response until 24 August 2012, almost four months later. The council should ensure that internal reviews are carried out promptly in future.

Right of appeal

33. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

34. 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.
35. 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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