

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 November 2016

Public Authority: Kettering Borough Council
Address: Municipal Offices
Bowling Green Road
Kettering
NN15 7QX

Decision (including any steps ordered)

1. The complainant has requested information regarding downloading pornography onto laptops used by councillors. The Commissioner's decision is that Kettering Borough Council has correctly applied the exemption at section 40(2) of the FOIA. She does not require the public authority to take any steps to ensure compliance with the legislation.

Background

2. As background to this complaint, Kettering Borough Council ('the council') informed the Commissioner that prior to 2012 it issued laptops to its elected members to enable them to carry out their official duties. The laptops were routinely audited and when audits were undertaken in 2005 and 2011, coinciding with the local elections, a number were found to contain pornographic material. The matters were dealt with as complaints under the Member's Code of Conduct in accordance with the Standards regime previously in place under the Local Government Act 2000. In four of the five cases it was found that the councillors were not personally responsible for downloading the pornographic material, as it was downloaded by third parties.

Request and response

3. On 15 February 2016, the complainant wrote to the council and requested information in the following terms:
 - "1 - Since 2005 how many laptops used by councillors have been found to have been used to download pornography when inspected by council staff?
 - 2 - Which councillor does each finding relate to?
 - 3 - What dates do each finding relate to?
 - 4 - What action was taken in each case after the finding?"
4. The council responded on 14 March 2016. In relation to question 1 it responded '5 laptops' and in relation to question 4 it said that all cases were referred to the Standards Board for England for investigation and that no further action was required on any of the cases. It cited the exemptions at section 40(2) and 41 of the FOIA in response to questions 2 and 3.
5. On 21 April 2016 the complainant requested an internal review.
6. The council provided an internal review on 20 May 2016 in which it maintained its original position relating to the application of section 40(2) but did not state whether it still wished to apply the exemption at section 41.

Scope of the case

7. The complainant contacted the Commissioner on 10 June 2016 to complain about the way his request for information had been handled.
8. During the course of the investigation, the council informed the Commissioner that it is withdrawing its reliance on the exemption at section 41.
9. The Commissioner informed the council that she does not consider that the information requested at part 3 of the request, i.e. the dates each finding relates to, constitutes personal data. The council informed the Commissioner that it would disclose such information to the complainant.
10. Therefore, the Commissioner has considered the council's application of section 40(2) to part 2 of the request.

Reasons for decision

Section 40(2)

11. 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').

12. 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.”

13. 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 data protection principles under the DPA. The Commissioner notes in this case that the council said that disclosure would breach the first data protection principle.

Is the withheld information personal data?

14. As explained above, the first consideration is whether the withheld information is personal data. The Commissioner is satisfied that the requested names of councillors are personal data.

Does the disclosure of the information contravene any of the data protection principles?

15. The council considers that the disclosure of the information would contravene the first data protection principle.

16. 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.”

17. 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

18. The Commissioner recognises that information relating to investigations against 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.

19. In her guidance on personal data¹, the Commissioner states that the expectations of an individual will be influenced by the distinction between his or her public and private life and this means that it is more likely to be fair to release information that relates to the professional life of the individual. However, information relating to an investigation will carry a strong general expectation of privacy. This was recognised by the Information Tribunal in the case of *Rob Waugh v Information Commissioner and Doncaster College*² when it said at paragraph 40 that:

“...there is a recognised expectation that the internal disciplinary matters of an individual will be private. Even among senior members of staff there would still be a high expectation of privacy between an employee and his employer in respect of disciplinary matters.”

20. The council said that in refusing the request the time that has passed since the investigations was considered to be an important factor. It said that all the cases are now historical with at least five years having passed since the investigations took place. It explained that with the

¹ <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

² Appeal no. EA/2008/0038, 29 December 2008

exception of one Councillor, all the cases were dealt with by the Standards Board for England ('SBE') and that the legislation in force at the time made clear provision for the confidentiality of the investigations and the outcomes. It said that the investigation reports were deemed to be confidential under the provisions of Section 63 of the Local Government Act 2000. The council explained that although the legislation has been repealed, the councillors would have a legitimate expectation that the information contained in those reports would remain confidential.

21. The council also informed the Commissioner that the SBE published the case summaries on its website but they were only publically available for a limited period which did not exceed two years and therefore the councillors would have a reasonable expectation that their information would not be in the public domain after this time.
22. In relation to the case that was not dealt with by the SBE, the council explained the investigation by the SBE was not completed due to the changes to the standards regime introduced by the Localism Act 2011. The case was investigated by the council through the internal process adopted under the Localism Act and a report was prepared by an investigating officer. The councillor was informed that the report would remain confidential subject to any decision of the ICO.
23. Given the nature of the investigations, the Commissioner is satisfied that there would have been strong expectations of confidentiality and privacy in this case.

Consequences of disclosure

24. 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 information would cause unwarranted damage or distress to the data subjects.
25. The council said disclosure would be unfair because of the expectations of the councillors concerned after detailed and comprehensive investigations were carried out in confidence. It said that whilst it is acknowledged that the purpose and motive of the requester should not be taken into consideration (except where para 6 of Schedule 2 of the DPA is relevant) it recognised that the requester is a journalist for a local newspaper and the information, if disclosed, may be released into the public domain in such a way that is likely to cause damage and distress to the individuals.
26. The council also said that disclosure may have a detrimental effect on the well-being of one of the councillors.

27. In this case, the Commissioner considers that disclosure of the requested councillor's names under the FOIA would be likely to lead to renewed media interest in the issue. She considers that disclosure of information relating to an investigation regarding the downloading of pornography would be an intrusion of privacy, could cause distress and potential permanent damage to the councillors' future prospects and general reputation and could impact on their wellbeing. The Commissioner also considers that disclosure could have an adverse impact on the councillors' family members.
28. Even without any media interest, the Commissioner considers that disclosure would cause distress due to the nature of the information and the strong expectations of privacy.

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

29. 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 knowing which councillors used council laptops to download pornography.
30. The complainant has said that time should not have any bearing on whether the requested information should be released because if a councillor has downloaded pornography onto a council laptop it doesn't matter whether it occurred yesterday, last year or ten years ago. He said and that it is in the public interest that the electorate know whether elected councillors are breaking the council's IT policy on a laptop funded by the tax payer. He also said that distress is being confused with embarrassment.
31. The council acknowledged that councillors should be accountable for their actions as elected members but reiterated that in the cases considered by the SBE the councillors were not found to be personally at fault and that a full and proper process was followed in accordance with legislation in place at the time. It said that the process set out the extent of the public scrutiny they could expect and they should now be entitled to privacy on these matters.
32. The council explained that four of the parties are no longer councillors and have not been elected members since 2011. It also said that the information has no current relevance as it relates to events that occurred more than five years ago. It said that the council no longer provides laptops to councillors and, therefore, the downloading of pornography is no longer an issue. It submitted that there is no wider

legitimate public interest that would outweigh the rights of privacy of the individuals in this matter.

Conclusion on the analysis of fairness

33. Taking all of the above into account, the Commissioner concludes that it would be unfair to the individuals to release the requested information. It is clear that disclosure would not have been within their reasonable expectations and that the loss of privacy could cause unwarranted distress. She acknowledges that there is a legitimate interest in knowing whether elected councillors have breached the council's IT policy by downloading pornography onto council laptops but does not consider that this outweighs the individuals' strong expectations of, and rights to, privacy. She considers that the councillors' rights and freedoms are not outweighed by the legitimate public interest in disclosure, and accepts that disclosure of the personal data in this case could cause damage and distress and would be unfair and unnecessary in the circumstances. 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).
34. 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, she has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

Right of appeal

35. 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

36. 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.
37. 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

Deborah Clark
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