

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 7 June 2018

**Public Authority:** Spelthorne Borough Council  
**Address:** Council Offices  
Knowle Green  
Staines-upon-Thames  
TW18 1XB

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to a disciplinary hearing he believes took place following a complaint he made to the Council. The Council refused to provide the information citing the exemptions provided by section 40(2) – third party personal data and section 41 – information provided in confidence, as its basis for doing so.
2. The Commissioner's decision is that the Council is entitled in this case to rely on section 40(5) to refuse to confirm whether it held the requested information, as to do so would in itself constitute the disclosure of personal data in breach of the data protection principles. Furthermore the Commissioner is satisfied that if the information was in fact held, it would be exempt from disclosure under section 40(2).
3. The Commissioner does not require the public authority to take any further action in this matter.

#### Request and response

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4. On 17 November 2017 the complainant wrote to the Council and requested information in the following terms:

"The information I am requesting relates to a disciplinary hearing investigated and conducted by Spelthorne Councils Human Resources Department on behalf of Head cematries officer [named officer]. The hearing would relate to an incident at [a named location on a specific date and time]. The two members of the public involved are myself

[name of complainant] and [name of individual accompanying the complainant].

I do not require details of any individual involved in the hearing, no names, job titles, locations etc. The Information I would like is The date of the disciplinary, The case to answer at the disciplinary, The questions posed at the disciplinary, The responses to the questions, The number of witnesses, was any photographic evidence presented. Once again may I stress I do not want any individuals personal data."

5. On 7 December 2017 the Council responded. It refused the request under section 40(2) on the basis that it was third party personal data.
6. The complainant requested an internal review on 8 December 2017. The Council sent him the outcome of its internal review on 4 January 2018. The Council upheld its original decision to refuse the request under section 40(2). It also advised the complainant that it now considered the information was exempt under section 41 on the basis that information relating to disciplinary hearings was provided in confidence.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 11 January 2018 to complain about the way his request for information had been handled.
8. The Commissioner considers the matter to be determined is whether the Council was entitled to refuse to comply with the request under either of the exemptions cited.
9. The Commissioner will start by looking at section 40.

### **Reasons for decision**

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#### **Section 40 – personal information.**

10. In very broad terms section 40 is designed to accommodate the provisions of the Data Protection Act. It ensures that when dealing with a request a public authority is not obliged to provide a response which would interfere with the provisions of that Act or breach any of the data protection principles contained within that Act. The application of section 40 therefore has to be read in conjunction with the provisions of the Data Protection Act. It should be noted that since the Commissioner received this complaint the Data Protection Act 1998 was replaced by the Data Protection Act 2018 which also introduced some amendments to the FOIA. The new Data Protection Act came into force on 25 May 2018. However, as the Commissioner's role is to consider whether a

public authority handled a request correctly at the time it provided its response. She will therefore consider whether the Council's response was in accordance with the legislation that was in place at that time. In this case the Council received the request on 17 November 2017 and issued its initial response within the statutory time for compliance on 7 December 2017. Therefore the relevant legislation is the Data Protection Act 1998.

11. The Council has refused the request under section 40(2). This provides that a public authority can refuse a request that captures the personal data of someone other than the person making the request and releasing that personal data to a member of the public would breach any of the data protection principles.
12. However, before looking at the Council's application of section 40(2) the Commissioner will consider whether even indicating whether the requested information was held would risk breaching the Data Protection Act 1998. This is because the request is based on the premise that, following a very specific incident, a council employee was the subject of a disciplinary hearing. Therefore to confirm such information was held would in itself reveal whether a disciplinary hearing had resulted from the incident and the subsequent complaint.
13. Section 40(5) of the FOIA states a public authority is not obliged to confirm or deny whether it holds the requested information, where providing such a confirmation or denial to a member of the public would breach any of the data protection principles.
14. Personal data is defined by section 1 of the Data Protection Act 1998 as being data which relates to a living individual who can be identified by that data or from that data and any other information likely to come into the possession of the person holding that data.
15. It is important to recognise that the test for applying section 40(2) is whether providing the requested information to **a member of the public** would breach the principles of Data Protection Act 1998. In effect the test is whether disclosing the information to the world at large would breach the principles. This would include other members of the local community, other visitors to cemetery and the work colleagues of the employee involved. The Commissioner considers that it is likely that at least some of these people would be able to identify the individual concerned from the request. Furthermore, the complainant himself clearly knows the individual concerned by sight as well as his place of work and employer. It is quite possible that this would allow the complainant to identify the individual concerned more precisely. The Commissioner is therefore satisfied that there is sufficient knowledge available which when combined with the details of the request would

allow a determined person with a particular reason for wishing to identify that individual to do so.

16. Before going any further it is important to understand that when applying section 40(5) a public authority is not restricted to considering only the response it would have to provide in the absence of the exemption from the duty to confirm or deny. For example, even if the public authority did not hold the requested information, it is entitled to consider what the position would be if it did and had to confirm this was the case. This makes sense when it is recognised that very often harm will only be caused where a public authority has to confirm the information was held. In such a situation it would be obvious that the information was held as soon as the public authority claimed the exemption. To overcome this problem public authorities are entitled to consider whether either a hypothetical confirmation the information was held, or a hypothetical denial that it was held, would breach any of the data protection principles. The application of the exemptions from the duty to confirm or deny is explained in more detail in the Commissioner's guidance, [Duty to confirm or deny](#) ; in particular please see 'Practical Considerations when using a neither confirm nor deny response' on page 8 of that guidance.
17. The Commissioner will start her analysis by looking at what would be revealed if the Council had to confirm it did hold the requested information. Clearly confirming that information about a disciplinary hearing was held would reveal that such a disciplinary hearing had taken place. Furthermore, as the Commissioner has already concluded that the individual concerned could be identified by the details of the request and local knowledge, she is satisfied that this would in effect reveal that there had been a disciplinary hearing into that individual's conduct. This in itself would be a disclosure of personal data.
18. The next question is whether revealing this to the public would be a breach any of the data protection principles. The Council has argued disclosing the information about a disciplinary hearing would breach the first data protection principle. The first principle states that personal data shall be processed fairly and lawfully and that in particular personal data shall not be processed unless one of the conditions in Schedule 2 of the Data Protection Act 1998 is also satisfied. The processing of personal data includes its disclosure.
19. The Commissioner's approach to the first principle under the Data Protection Act 1998 is to start by looking at whether the processing would be fair.
20. 'Fairness' is a difficult concept to define. It involves consideration of:
  - The possible consequences of disclosure to the individual.

- The reasonable expectations of the individual regarding how their personal data will be used.
- The legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the particular individual.

Often these factors are interrelated.

21. The Commissioner considers that an employee would have a very firm expectation that personnel issues and in particular disciplinary matters would remain private between themselves and their employer. They would have no expectation that such information would be shared with their peers or disclosed to the wider public. This approach was supported by the Tribunal in the case of *Rob Waugh v Information Commissioner and Doncaster College* (E/2008/0038, 29 December 2008) in which it found that,

“... there is a recognised expectation that the internal disciplinary matters of an individual will be private.”

22. To disclose information against such expectations would be distressing for the individual concerned. Not only would such a disclosure be intrusive there would be possible consequences for the future career or employability for that individual if it became known that they had been the subject of a disciplinary hearing. It may also impact on their working relations with colleagues or others who they dealt with in a professional capacity.

23. In respect of the third bullet point the Commissioner is aware of the circumstances that gave rise to the request and recognises the complainant's wish to understand whether his concerns were dealt with appropriately. However it is still necessary to weigh these considerations against the impact disclosure would have on the individual in question and their expectation that personnel matters would remain confidential. It also has to be remembered that a disclosure under the FOIA is considered to be a disclosure to the world at large rather than solely to the person making the request. The Commissioner is very clear in her view that in this case although the wider general public has a legitimate interest in being reassured that the Council's staff conduct themselves in a professional manner and that the Council deals with complaints properly, this does not justify revealing details of an individual employee's disciplinary record.

24. In light of the above the Commissioner is satisfied that if the Council was in a position where it was required to confirm it held the requested information, and so disclose there had been a disciplinary hearing, this would amount to the unfair processing of personal data. This would breach the first data protection principle. The Council would therefore

have been entitled to rely on section 40(5) to refuse to confirm or deny that the information was held.

25. It follows therefore that if the requested information was held by the Council its disclosure would be far more intrusive than simply acknowledging a disciplinary hearing had taken place. The request seeks the details of any such disciplinary hearing, including the nature of the case brought against the individual, the questions posed and the answers received, together with the evidence that was presented.
26. The Commissioner notes that the complainant has specifically said he is not seeking any names or other personal details. However simply removing names and other personal details from any information that may be held would be ineffective. The complainant would still know who the information related to and the risk of them being identified would remain.
27. The Commissioner is therefore satisfied that even if the information was held the Council would be entitled to withhold that information under section 40(2) of the FOIA.
28. For completeness the Commissioner would add that had this request and complaint been considered by reference to the Data Protection Act 2018 the outcome would have been the same.

## Right of appeal

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29. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

30. 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.
31. 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

**Rob Mechan**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**