

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** **7 September 2018**

**Public Authority:** **Billingham Town Council**

**Address:** **Billingham Library & Customer Service Centre  
Billingham  
TS23 2LN**

### **Decision (including any steps ordered)**

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1. The complainant has requested from Billingham Town Council (the Council) information in relation to a phased return to work from long-term absence of a specific Council employee. The Council provided parts of the information requested and decided to withhold the remainder relying on section 40(2) (personal information), stating that it contains sensitive personal data.
2. The Commissioner has exercised her discretion to consider section 40(5) (personal information). Her decision is that section 40(5) is engaged and that the Council should have refused to confirm or deny whether it held the requested information.
3. The Commissioner also found that the Council has breached the requirement of section 17(7) by failing to inform the complainant of his right to complain to the Commissioner.
4. The Commissioner does not require the Council to take any steps to ensure compliance with the legislation.

## Request and response

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5. On 16 January 2018, the complainant wrote to the Council and requested information in the following terms:

*"Dear Billingham Town Council, following absence due to ill health, we learned that your [redacted] is on a phased return to work, with reduced hours compared to the 37 hour full time working week.*

*(1) Since returning to work, how many weeks has [redacted] been authorised to work at reduced hours until the Town Council will require [them] to return to a full time 37 hour working week?*

*(2) Is the maximum permissible duration for a phased return to work (following sickness absence) contractually stipulated, or has the Town Council set no limits on the duration of phased returns to work?*

*(3) Is/was [redacted] being paid [their] full salary (applicable for a 37 hour working week) for the duration of [their] phased return to work?"*

6. The Council responded on 8 February 2018. It stated that the requested information was deemed sensitive personal data and "*personal information of this nature regarding an employee of the Council is exempt as per FOIA, section 40(2) and section 40(3)(a)(i).*"
7. Remaining dissatisfied with the response received, on 19 February 2018 the complainant requested the Council to conduct an internal review of its handling of the request.
8. Following an internal review the Council wrote to the complainant on 5 March 2018. It stated that it considered the requested information to be exempt from disclosure under section 40(2) (personal information) of the FOIA.

## Scope of the case

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9. The complainant contacted the Commissioner on 26 March 2018 to complain about the way his request for information had been handled.
10. During the course of the investigation, the Council changed its position. It decided to disclose information related to the second and third question included in the initial request for information. However, the Council continued to rely on section 40(2) of the FOIA regarding the first question.

11. The complainant requested the Commissioner to investigate the handling of his request by the Council in relation to the first question of his information request.
12. As covered below, the Commissioner's view is that the Council should have refused to confirm or deny whether it held the requested information and cited the exemption provided by section 40(5) of the FOIA. The analysis below therefore covers section 40(5).
13. The Commissioner has also considered whether the Council complied with the section 17 requirements when it issued the refusal notice.

## Reasons for decision

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### Section 40(5) – Personal information

14. The Commissioner has discretion to consider exemptions not cited by the public authority. Given her role as the data protection regulator, the Commissioner will in particular consider whether to exercise that discretion to consider any limb of section 40 where necessary to avoid any breach of data protection law.
15. The Council cited section 40(2) of the FOIA. However, the Commissioner's view is that, for the reasons given below, the wording of the request meant that confirming or denying whether the requested information was held would itself involve a disclosure of sensitive personal data. As a result, her view is that section 40(5) of the FOIA should have been cited, which provides an exemption from the duty to confirm or deny where to do so would involve disclosing personal data and that disclosure would be in breach of any of the data protection principles.
16. The complainant may argue that it is absurd to consider an exemption from the duty to confirm or deny after the Council had confirmed that the information was held. Nonetheless, the approach of the Commissioner is that a public authority can cite further exemptions during her investigation, including exemptions from the duty to confirm or deny where it had previously stated whether the information was held. The Commissioner takes the same approach when exercising her discretion to consider exemptions not cited by the public authority. Particularly where to do otherwise would perpetuate a data protection breach, this may mean belatedly applying an exemption from the duty to confirm or deny.
17. The duty to confirm or deny whether requested information is held is imposed by section 1(1)(a) of the FOIA. Consideration of section 40(5)

involves two steps: first, whether providing the confirmation or denial would involve a disclosure of personal data, and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.

18. On the issue of whether confirmation or denial in response to the complainant's request would involve a disclosure of personal data, the definition of personal data is given in section 1(1) of the Data Protection Act 1998 (DPA). Whilst the DPA 1998 has since been replaced, as it applied at the time of the complainant's information request it is relevant here. Section 1(1) of the DPA states that:

*"personal data' means data which relate to a living individual who can be identified:*

*(a) from those data, or*

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

19. Complying with section 1(1)(a) in this case would effectively also confirm or deny whether the individual mentioned in the request had been on a long-term sickness absence. Clearly this information would both relate to and identify that individual and so would be their personal data.
20. Section 2 of the DPA sets out what categories of personal data are classed as *sensitive* for the purposes of that Act. This includes personal data as to an individual's physical or mental health or condition. The personal data in question here is, therefore, sensitive.
21. The next step is to address whether disclosure of that personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on the first data protection principle, which requires that personal data is processed fairly and lawfully.
22. Covering first whether disclosure would be fair, the Commissioner's view is that cases where it will be considered fair to disclose into the public domain sensitive personal data are likely to be extremely rare. Sensitive personal data has, by its very nature, been deemed by the DPA to be the most private information about identifiable individuals. As disclosure of this type of information is likely to have a detrimental or distressing effect on the data subject, the Commissioner will generally take the view that it would be unfair for it to be disclosed.
23. In the present case the complainant would argue that part of the information containing this personal data is already in the public domain

and so confirmation or denial at this stage would not be unfair. The Commissioner notes that there is relevant personal data in the public domain. Even so, the Commissioner does not agree that it is *necessarily* the case that data subject could not hold a reasonable expectation that his or her sensitive personal data would not be disclosed in response to the complainant's request. She does, however, accept that the existence of that personal data in the public domain is a relevant factor when considering whether disclosure would be fair.

24. Even if the Commissioner found that disclosure would be generally fair, this would not impact on the outcome of the complaint if she found that no condition from Schedule 3 of the DPA could be satisfied. In order to address the point about relevant information being in the public domain, the Commissioner has proceeded on the basis that in the circumstances of this case disclosure could reasonably be considered to be fair, and she has gone on to consider the applicability of Schedule 3 DPA conditions.
25. The Commissioner's general view is that the two conditions in Schedule 3 that might apply in relation to disclosures made under the FOIA are the first condition, which provides that the data subject has consented to disclosure, and the fifth condition, which is that the data subject has already deliberately made the personal data public.
26. The Commissioner is aware of no evidence that the data subject has deliberately made their personal data public and the Council confirmed that the data subject did not consent to the disclosure of their personal data.
27. In light of this, the Commissioner concludes that none of the DPA Schedule 3 conditions apply in relation to this request. This means that confirmation or denial as to whether this sensitive personal data is held would contravene the first data protection principle. The finding of the Commissioner is, therefore, that the exemption provided by section 40(5) of the FOIA is engaged and the Council was not obliged to confirm or deny whether it held information within the scope of the complainant's information request.

### **Section 17(7) – refusal of request**

28. Section 17(7) of the FOIA specifies that, when refusing a request, a public authority must inform a requestor of their right to complain to the Commissioner.
29. In this case the Council did not inform the requestor of this right. The Council therefore breached section 17(7).

## **Right of appeal**

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30. 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)

31. 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.
32. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**