

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 October 2018

Public Authority: Devon County Council
Address: County Hall
Topsham Road
Exeter
Devon
EX2 4QD

Decision (including any steps ordered)

1. The complainant requested from Devon County Council (the Council) information related to an anonymous telephone call complaining about a piece of land owned by the complainant. The Council provided the complainant with some information and decided to withhold the remainder claiming that it contained personal information of third parties, the disclosure of which would contravene the data protection principles.
2. The Commissioner's decision is that the Council has correctly applied section 40(2) (personal information) of the FOIA when it decided to withhold part of the requested information.
3. The Commissioner does not require the Council to take any steps to ensure compliance with the legislation.

Request and response

4. On 1 March 2018, the complainant wrote to the Council and requested information in the following terms:

"I request all details of Devon Highways enquiry ENQ181076522

In particular but not restricted to:

- *How the request came in;*
- *Date/time;*
- *Exact transcript of the call from caller and operator;*
- *Length of call;*
- *Whether the caller was male/female;*
- *If the caller left a name or number;*
- *If the caller did not withhold their number and you hold that record to release that information;*
- *As all calls are recorded to release that call recording;"*

5. On 29 March 2018, the Council responded partially by:

- providing the information requested under bullet points 1, 2, 4 and 6;

- providing part of the information requested under bullet point 3, consisting of an extract of the transcript of the call, stating that the remainder of the transcript is not relevant to his information request;

- deciding to withhold information requested under bullet points 5 and 8 citing section 40(2) of the FOIA (personal information); and

- stating that it does not hold information requested under bullet point 7.

6. On 29 March 2018, the complainant wrote to the Council to request an internal review, where he also presented his arguments in support of his request for the full transcript of the call requested under bullet point 3 and the audio recording of the call requested under bullet point 8.

7. The Council responded to the complainant on 30 April 2018 providing him with the outcome of its internal review. The Council decided to uphold its original position.

8. Following the internal review, the complainant and the Council engaged in a continuous correspondence, as part of which, on 29 May 2018 the Council decided to disclose a redacted copy of the full transcript requested at bullet point 3.

Scope of the case

9. The complainant contacted the Commissioner on 2 May 2018 to complain about the way his request for information had been handled.
10. The Commissioner considers that the matter to be decided is whether the Council was correct to withhold the recording of the phone conversation, requested under bullet point 8, by citing section 40(2) of the FOIA.
11. The Commissioner has considered the definition of personal data under Data Protection Act 1998 (DPA) which was the relevant legislation in force at the time when the request was received and considered by the Council.

Reasons for decision

Section 40(2) – personal data of third parties

12. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester, and where the disclosure of that personal data would be in breach of any of the data protection principles.

Is the information personal data?

13. The first step for the Commissioner to determine is whether the withheld information constitutes personal data.
14. Personal Data is defined by section 1 of the DPA. If the information is not personal data then the Council will not be able to rely on section 40.
15. Section 1 of the DPA defines personal data as:

"...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 intention of the data controller or any other person in respect of the individual."

16. In the present case, the information which has been withheld under section 40(2) consists of an audio recording of a phone conversation

which took place between a member of the public and a Council official in relation to a complaint about a specified area of road.

17. The complainant contested the applicability of section 40(2) claiming that, bearing in mind that the call was made anonymously, solely by hearing a person's voice cannot lead to their identification taking into account that *"...with over 60 million in the UK, the call could have come from anyone..."*.
18. The Council stated that, despite the fact that the Council has no knowledge as to whether the caller is in fact known to the requester or any other individuals in the local area, it considers that releasing the sound of their voice into the public domain might lead to a suitably motivated individual being able to identify the person concerned.
19. The Commissioner is satisfied that the audio recording requested could potentially lead to identification of the persons involved in the conversation. The content of that audio recording would also relate to those persons and, therefore, this information constitutes personal data for the purposes of section 1(1) of the DPA.

Would disclosure breach the Data Protection Principles?

20. 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.
21. In considering fairness, the Commissioner finds it useful to balance the likely expectations of the data subject, the potential consequences of the disclosure and whether there is a wider legitimate interest in the disclosure of the information in question.
22. The Council stated that it considers that it would be unfair to the data subject to release information into the public domain that might enable them to be identified, as release of their personal data would be against their reasonable expectation. Further the Council added that at no point during the call was the data subject informed that their identity would be revealed to any third parties outside of the Council and so they could reasonably expect that disclosure would not occur.
23. The Commissioner agrees that the individual in question would have no reasonable expectation that the information of the type that has been withheld would be publicly disclosed.

24. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. She will also take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions.
25. The Council stated that given the rural nature of the area that this request is concerned with, it considered that the chances of the data subject being identified are potentially enhanced.
26. The Council confirmed that it had not approached the data subject to request their consent to disclose the information in question.
27. Having examined the withheld information, the Commissioner notes that the data subject explicitly requested to remain anonymous and when asked whether they wished to leave contact details to be contacted subsequently for the purpose of the follow up, responded negatively.
28. In light of the nature of the information and the reasonable expectations of the individuals concerned, the Commissioner is satisfied that release of the withheld information would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the data subject.
29. Notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, depending on the circumstances of the case it may still be fair to disclose requested information if there is a more compelling public interest in disclosure.
30. Given the importance of protecting an individual's personal data, the Commissioner's default position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individuals. Therefore in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
31. The Council considers that there is no evidence that releasing the audio recordings in this case would be in the public interest. In addition, the Council stated that it is unnecessary to reveal the full recording when a copy of the official transcript from the telephone call has already been disclosed in full.
32. The Council is concerned that revealing personal data relating to calls that are made to its Highways Service might discourage the members of the public to report the issues that they may face in the roads maintained by the Council. As a consequence, the effect of the possible disclosure may reduce public confidence in the Council and in turn would

damage the ability of the Council to effectively manage and maintain the highway network.

33. Having examined the withheld information, the Commissioner can confirm that the first part of the transcript disclosed on 29 March 2018 combined with the partly redacted second part disclosed on 29 May 2018, reflect the audio recording of the phone conversation in its entirety. With that in mind, the Commissioner considers that it is sufficient for the interest of the public to have access to the transcript. The Commissioner does not, therefore, believe that there is any public interest in disclosure that outweighs the factors against disclosure covered above.

Conclusion

34. Having considered all the circumstances of this case, the Commissioner has concluded that releasing the withheld information under FOIA would not be within the expectations of the individual. This is because the information consists of a conversation, the content of which has already been disclosed in form of a transcript. Disclosure of the audio recording of the conversation in question could cause significant distress to the data subject and on the other hand would not contribute to increasing the transparency of improving accountability of the Council.
35. In view of the above, the Commissioner finds that disclosing the withheld information would be unfair and in breach of the first data protection principle. Therefore, her conclusion is that section 40(2) of the FOIA was correctly applied.

Right of appeal

36. 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

37. 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.
38. 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

Ben Tomes
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