

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 March 2019

Public Authority: North West Leicestershire District Council

Address: Councils Offices
Whitwick Road
Coalville
Leicestershire
LE67 3FJ

Decision (including any steps ordered)

1. The complainant requested from North West Leicestershire District Council (the Council) information in relation to a compensation payment recorded in the Council's accounts for 2016/17. The Council decided to withhold some information relying on sections 40(2) (personal information) and section 41 (information provided in confidence) of the FOIA, whilst for the remainder of the request it stated that it did not hold the requested information.
2. The Commissioner's decision is that the Council has correctly applied the exemption provided by section 40(2). Following that conclusion it was not necessary to also consider the application of section 41.
3. The Commissioner also found that the Council incorrectly stated that it did not hold further information, resulting in a breach of section 1(1) of the FOIA. She requires the Council to take the following steps to ensure compliance with the legislation:
 - Provide the complainant with a fresh response regarding Question (2).
4. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 11 February 2018, the complainant wrote to the Council and requested information in the following terms:

"The Council's former Head of Finance received a compensation payment of £37,030 in 2016/17.

- (1) What was the compensation for?
(2) Who made the decision to pay it?*

Please let me have a copy of the minute or decision record that confirms this decision"

6. The Council responded on 2 March 2018. It provided the complainant with a link which, according to the Council, would offer him access to the information in relation to question (1). The information provided in the link consisted of the Council's "Annual Statement of Accounts 2016-2017". Regarding question (2), the Council stated that "...the person who made the decision to pay the compensation was the Chief Executive of North Leicestershire District Council." However, the Council asserted that this information is not held in recorded form.
7. Remaining dissatisfied with the response received, on 19 March 2018 the complainant asked the Council to revisit the request and to provide him with a fresh response.
8. On 26 March 2018 the Council responded to the complainant stating that it could not provide further information in relation to question (1) because it is exempt under section 40(2) (personal information) of the FOIA. The Council also confirmed its original position in respect of question (2), stating that it did not hold any information falling within the question's scope.
9. On 1 May 2018 the complainant wrote back to the Council requesting an internal review of the handling of his request to be conducted.
10. The Council sent him the outcome of its internal review on 23 May 2018. It did not change its position.

Scope of the case

11. On 8 June 2018 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

12. During the course of the Commissioner's investigation, the Council informed the Commissioner that it wished to also cite section 41 of the FOIA, since it considered that the withheld information requested under Question (1) contained information provided in confidence.
13. In light of the above, the scope of this case and the following analysis concern whether the Council was correct:
 - a. to withhold the information requested under Question (1) of the request relying on section 40(2) and section 41 of the FOIA; and
 - b. to state that it did not hold information within the scope of Question (2) of the complainant's requests.
14. At the time the request was made and dealt with, the relevant legislation in respect of personal data was the Data Protection Act 1998 ("the DPA 1998"). The determination in this case must therefore have regard to the DPA 1998, and the terms of the FOIA as applicable at that time.

Reasons for decision

Information requested under Question (2)

Section 1 – general right of access

15. Section 1(1) of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and, if so, to have that information communicated to them.
16. In this case, the complainant clearly believes that the Council holds information from which it can answer Question (2). The Council's position is that it does not.
17. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
18. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public

authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that the requested information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

19. As stated above (paragraphs 6 and 8), the position of the Council was that the decision on the compensation payment was made by the Council's Chief Executive, but that no recorded information was held recording that.
20. However, during the course of the Commissioner's investigation, in its response to the Commissioner's queries, the Council stated that "*This decision was made by the Chief Executive (Head of Paid Service) following consultations with the Human Resources team and (Deputy) Statutory Officers... It should be noted that the Chief Executive has delegated authority under the Council's Constitution to make decisions relating to matters of this nature and of this value. The final decision document in a matter such as this is the Settlement Agreement itself which is subject to contractual confidentiality provisions described above.*"
21. On the basis of this statement of clarification the Commissioner considers that the Council stated incorrectly that it did not hold information falling within the scope of Question (2) in its original refusal notice and, therefore, breached section 1(1) and section 10 of the FOIA. Consequently, the Commissioner has ordered the Council to issue a fresh response to address this matter.

Information requested under Question (1)

Section 40 (2) - Third party personal data

22. This exception provides that third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the DPA 1998.

Is the information personal data?

23. The first step for the Commissioner to determine is whether the withheld information constitutes personal data.

24. Personal Data is defined by section 1 of the DPA 1998. If the information is not personal data then the Council will not be able to rely on section 40(2) of the FOIA.
25. Section 1 of the DPA 1998 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."*
26. The definition of personal data set out in section 1 of the DPA 1998 provides that, for information to be personal data, it must relate to a living individual and that individual must be identifiable from the information. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts them in any way. The second part of the test is whether the withheld information identifies any living individual.
27. The Commissioner has considered the nature of the information which the complainant seeks, namely *"a copy of the minute or decision record that confirms"* the reasons behind the compensation payment identified in the Council's *"Annual Statement of Accounts 2016-2017"*.
28. The Council explained to the Commissioner that the details of the compensation payment in question are recorded in a settlement agreement reached between the Council and its former Head of Finance.
29. The Commissioner believes that it is clear that information falling within the scope of Question (1) would relate to and identify the former Head of Finance and so would constitute the personal data of that individual.

Would disclosure breach the data protection principles?

30. The data protection principles are set out in schedule 1 of the DPA 1998. The Commissioner considers that the first data protection principle is most relevant in this case. The first principle states that personal data must be processed fairly and lawfully, the conditions of which are set out in schedule 2 of the DPA 1998.
31. The Commissioner's considerations below have focused on the issue of general fairness. In considering fairness, the Commissioner finds it

useful to balance the reasonable expectations of the data subject and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

32. The information surrounding the payment of the compensation to the former Head of Finance relates to issues within their private life in the period prior to leaving the Council; *"It is the Council's view that this relates to an individual's private life and it would be unfair to share this information."*
33. The Council maintains that the data subject held a reasonable expectation that this matter will be kept private. It follows that the details of the settlement agreement were made subject to contractual confidentiality.
34. In addition, the Council is of the opinion that disclosure of the withheld information would cause the data subject unnecessary and disproportionate distress.
35. The Commissioner notes that the data subject in the present case formerly held a senior position within the Council. The Commissioner notes that individuals holding such positions should hold a greater expectation that information relating to their public role would be subject to a higher level of scrutiny.
36. However, the Commissioner notes that the withheld information contains detailed personal information of the former employee and a confidentiality clause. Although the Commissioner considers that the withheld information relates to the individual's professional life, given the nature of it, she is satisfied that the individual would have a strong expectation of confidentiality and privacy in this case.
37. Having viewed the withheld information the Commissioner considers that, due to the reasonable expectations of the data subject in this situation, disclosure of the withheld information would constitute an intrusion into their privacy, which would be likely to cause them a significant degree of distress.
38. Notwithstanding a data subject's reasonable expectations or any consequences of disclosure, it may still be fair to disclose the requested information if there is a more compelling public interest in disclosure, bearing in mind that the information sought in the present request concerns expenditure of public funds.
39. Consequently, the Commissioner recognises the public's legitimate interest in openness and transparency concerning the expenditure of public funds, including payments and salaries to its senior officers.

40. In order to address the issue of the legitimate interest of the public, the Commissioner refers the First-tier Tribunal case of Gibson v Information Commissioner and Craven District Council (EA/2010/0095)¹, in which the Tribunal held that the legitimate interest of the public only outweighed the prejudice to the rights, freedoms or legitimate interests of an individual to the extent that the information concerned related to the use of public funds. In that case, the disclosure of settlement payments was found to be fair. However the disclosure of further contextual information was not ordered as this would interfere with the rights, freedoms and legitimate interests of the data subject.
41. With that in mind, the Commissioner examined the information already made public in relation to the subject matter of this request and whether the Council had acted in compliance with its statutory requirements. In this respect, the Commissioner referred to her guidance on requests for personal data about public sector employees². That guidance states that such requests relate to issues such as severance payments, compromise agreements and circumstances in which an employee leaves the authority. As with other requests for employee's information, a public authority must first consider whether disclosure would be fair.
42. The guidance states that the expectations of employees as to what information will be released will have to take into account any statutory or other requirements to publish information and it gives the Accounts and Audit (Amendment no. 2) (England) Regulations 2009³ as an example. In this case the Council has disclosed some information relating to the departure of the former Head of Finance pursuant to those regulations. This means that whatever public interest exists in relation to the expenditure of public money to which the complainant's request relates, that public interest has already been partially satisfied through the disclosure of some relevant information.
43. In addition, the Commissioner notes that the settlement agreement contains special provisions of confidentiality of the terms of the agreement, which is an indication that the data subject does not expect that circumstances of this agreement will become public.
44. In light of the above, the Commissioner's conclusion is that disclosure of the withheld information would contravene the first data protection principle. The Commissioner considers that the data subject had a

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<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i485/Decision;%20EA.2010.0095;%2022-2-11.pdf>

2 https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

3 http://www.legislation.gov.uk/ukxi/2009/3322/pdfs/ukxi_20093322_en.pdf

reasonable expectation of privacy in relation to details of their departure from the Council's employment and to release the requested information would be unfair and would be likely to cause distress to the data subject. She is, therefore, satisfied that the Council was correct to refuse disclosure under section 40(2) of the FOIA.

45. Having in mind that the Commissioner's finding is that the Council correctly applied section 40(2), it is not necessary to also consider the application of section 41 of the FOIA.

Right of appeal

46. 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

47. 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.
48. 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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