

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 August 2019

Public Authority: Cambridgeshire and Peterborough Combined Authority

Address: Incubator 2
First Floor
Alconbury Weald
Huntingdon
PE28 4XA

Decision (including any steps ordered)

1. The complainant has requested information regarding the departure of the Chief Executive of the council.
2. The Commissioner's decision is that, in respect of request item [1] Cambridgeshire and Peterborough Combined Authority has failed to demonstrate that section 12(1) – cost of compliance, is engaged. In respect of request item [3] the council is entitled to withhold information under section 40 – personal information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to request item [1] that does not rely upon section 12(1).
4. The public authority 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 20 September 2018, the complainant wrote to Cambridgeshire and Peterborough Combined Authority ('the council') and requested information in the following terms (numbering added):

[1] "I would like to receive all emails and documents (including drafts or ones which have been deleted) and minutes and details of meetings which are related in any way to the departure of [Chief Executive]."

[2] I would like to find out why he left and to see his notice of resignation.

[3] I also want to find out whether he has signed any agreement with the combined authority in relation to his departure (e.g. a confidentiality agreement) and when his departure was triggered (for example, when he handed in his resignation notice).

[4] In addition, I want to find out how long he will continue to be paid for and if he received any extra financial (or other) benefit as a result of him leaving. And if so, what this was."

6. On 4 October 2018 the council asked for clarification:

"We require further information in order to identify and locate the information you have asked for. In regarding to your request for 'all emails and documents', would you please let me know what timescale you require and the names of who you would like to receive correspondence from/to."

7. The complainant gave clarification on the same day:

"The timescale is from the start of [Chief Executive] tenure as interim chief executive to the present day.

I wish to see correspondence to and from all members of the combined authority."

8. The council responded on 23 October 2018. With regard to each request item:

[1] Refused to provide the requested information. It cited the following exemption as the basis for doing so: FOIA section 40(2) – personal information and section 12 – cost of compliance.

[2] Confirmed that the data subject's employment ended "by resignation by mutual agreement" but that no further information is held.

[3] Confirmed that the resignation was based on a settlement agreement but refused to provide details of the agreement citing FOIA section 40(2).

[4] Provided information regarding the payment made.

9. The complainant requested an internal review on 26 October 2018 with regard to the following request items:

[1] stating as the request was only for information relating to the data subjects departure then the cost should not be prohibitive; and

[3] requesting release of the settlement agreement on the basis that personal data could be redacted.

10. Following an internal review the council wrote to the complainant on 20 November 2018. It upheld its position and added:

"The Authority would point out that, since your request, there have been discussions regarding this matter at both the Overview & Scrutiny and Audit and Governance Committees, but these minutes are in the public domain as they are published on the Authority's website."

Scope of the case

11. The complainant contacted the Commissioner on 24 December 2018 to complain about the way the request for information had been handled. Specifically disputing the council's reliance on the exemptions at section 40(2) and section 12. The complainant stated that the Chief Executive had been in post a year so the amount of correspondence for [1] should not be cost prohibitive. Furthermore that it is in the public interest to know under what terms the settlement agreement and related pay-out was made.
12. The Commissioner considers the scope of this case is to establish whether the council has correctly engaged the exemptions at section 40(2) and section 12.

Reasons for decision

Section 12 – cost of compliance

13. Section 12 of the FOIA states that a public authority is not obliged to comply with a request if it estimates that to do so would exceed the appropriate limit.

14. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 define the appropriate limit for section 12. These are known as the "Fees Regulations" for brevity. Regulation 3 of the Fees Regulations states that the appropriate limit is £450.00 for non-central government public authorities and must be calculated at the rate of £25 per hour, giving an effective time limit of 18 hours.
15. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
16. Section 12(1) requires a public authority to estimate the cost of complying with the request, rather than to formulate an exact calculation. The question for the Commissioner here is whether the cost estimate by the Council was reasonable. If it was, then section 12(1) was engaged and the Council was not obliged to comply with the request.

The Council's position

17. The council states that *"the amount of work involved in identifying this body of information, including deletions, and retrieving it would exceed £450 of officer time."*
18. It stated that the complainant had asked *"for all correspondence which he wanted 'to include correspondence to and from all members of the combined authority'"*. The council argued that the data subject was in the post of Chief Executive for a period of 16 months therefore this would involve looking at 16 months of correspondence.
19. The council maintained that in looking at the request it *"considered that the body of e-mails and other correspondence built up between the Chief Executive of the organisation and its Members and officers would take more than 18 hours to retrieve."*
20. It stated that *"the authority did not apply a specific calculation to the costs as it was of the firm opinion interrogating the available databases including attempting to locate documents that may be on the accounts*

of the various Members of the Authority, including gaining access to such systems would take a number of days and would certainly cost far more than the £450 costs ceiling."

The Commissioner's view

21. The Commissioner asked the council to provide a detailed estimate of the time/cost to provide information in-scope of the request in terms of the four activities: determining if it is held; locating, retrieving and extracting the information.
22. She asked the council to include a description of the nature of the work that would be needed to be undertaken to support the estimate, along with volumetric and time per activity information. She asked whether a sampling exercise had been undertaken to determine the estimate.
23. The Commissioner advised the council that a number of Information Tribunals have made it clear that an estimate for the purposes of section 12 has to be 'reasonable' which means that it is not sufficient for a public authority to simply assert that the appropriate limit has been met; rather the estimate should be realistic, sensible and supported by cogent evidence.
24. The Commissioner considers that the council, in its response, have simply asserted that the appropriate limit is met. Although the council confirms that the information is all held electronically, it has not provided details of search terms it used to sample the data, nor the number of machines that would need interrogation that are not network connected, or any indication that it carried out sampling exercise to establish the volume of information held.
25. Furthermore the Commissioner has considered the meaning of the request. The Complainant requested:

"I would like to receive all emails and documents (including drafts or ones which have been deleted) and minutes and details of meetings which are related in any way to the departure of [Chief Executive].

The timescale is from the start of [Chief Executive] tenure as interim chief executive to the present day. I wish to see correspondence to and from all members of the combined authority."

26. The Commissioner questions the council's assertion that the period of correspondence falling within the scope of the request is the entire tenure of the Chief Executive. Furthermore considering that the request is for information regarding the Chief Executive's departure, it would seem unlikely that a high volume of officers would be involved in such meetings and discussions.

27. The Commissioner finds that, without any further evidence of a sampling exercise, or information regarding officers or teams targeted and searches undertaken, there is not enough information to establish whether the council's estimate is reasonable.
28. As the council has failed to provide sufficient evidence to demonstrate that compliance to the request would exceed the appropriate limit, the Commissioner does not find that section 12(1) is engaged.

Section 40 - personal information

29. The council advised the Commissioner that the primary reason for withholding information in scope of [1] was section 12 – cost compliance. However it also stated, that it was citing section 40(2) because of a high probability that the information identified would contain personal data. The Commissioner cannot consider the application of an exemption on the basis of information that is likely to be held therefore she has only considered the application of section 40(2) in relation to request item [3].
30. 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 one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
31. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
32. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
33. 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 DP principles.

Is the information personal data?

34. Section 3(2) of the DPA defines personal data as:
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¹ As amended by Schedule 19 Paragraph 58(3) DPA.

"any information relating to an identified or identifiable living individual".

35. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
36. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
37. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
38. In regard to the Settlement Agreement [3] the council states *"The sole purpose of this document was to evidence the agreement upon which [Chief Executive] left the authority."* It explains that being specific to the individual, the redaction of any details would not protect the rights of the data subject.
39. The Commissioner has viewed the withheld information. The Settlement Agreement relates to one individual, being an agreement between them and the council. That individual being in the role of Chief Executive of the council at the time that the Settlement Agreement was created and is the focus of the request and therefore directly linked to the withheld information.
40. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information both relates to and identifies the person concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
41. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
42. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

43. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

44. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
45. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

46. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.
47. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"².

48. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
 - i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

49. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

50. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
51. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
52. The complainant considers that, in the interests of transparency, the public have a right to know the terms of the Settlement Agreement and the related pay-out. The complainant states "*Secrecy of an agreement like this undermines public confidence and trust in our public figures.*"
53. The Commissioner accepts that there is a legitimate interest in understanding the terms under which the payment was made. As previously confirmed, the council have provided the value of the severance payment. The Commissioner notes this has been reported in the press, along with questions regarding the circumstances of the Chief Executive's departure.

Is disclosure necessary?

54. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
55. The Commissioner considers the release of the financial elements of the settlement agreement by the council and its explanation that the payment: "*included notice and compensation for loss of office and which were subject to the normal rules in relation to deductions for PAYE and NI*", and that "*save for the figure referred to, no payments were made*

to him after this date” goes some way towards meeting the legitimate interests identified. However, the Commissioner accepts that disclosure would give the public more insight into the terms of the agreement.

Balance between legitimate interests and the data subject’s interests or fundamental rights and freedoms

56. It is necessary to balance the legitimate interests in disclosure against the data subject’s interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
57. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
58. In the Commissioner’s view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual’s general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
59. The Commissioners guidance “*Requests for personal data about public authority employees*³” states that employees’ expectations as to what information will be released will have to take account of statutory or other requirements to publish information. For example, the “*Accounts and Audit (Amendment no 2) (England) Regulations 2009*⁴” require local authorities in England to publish in their annual accounts the amounts paid to employees in connection with the termination of their employment by job title if the total remuneration is between £50,000 and £150,000 and by name if it is over £150,000. However, this

³ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

⁴ <http://www.legislation.gov.uk/uksi/2009/3322/made>

legislation only directly affects reasonable expectations regarding the actual amounts of money paid out. Reasonable expectations in other contexts may differ, but it should be recognised that there is an increasing public expectation of transparency regarding the expenditure of public money and the performance of public authorities.

60. The council advised "*as with all such agreements the document contains a confidentiality requirement*". The Commissioner can confirm that there is a clause written into the agreement to this effect.
61. The council provided evidence that the individual has sought assurance from the council that the settlement agreement would remain confidential despite questions and requests raised by third parties.
62. The Commissioner considers that the basis of a settlement agreement is that it remains an essentially private and confidential matter between employer and employee. There is an emphasis on confidentiality implicit in most such agreements. As such the Commissioner is satisfied that it would not be within the reasonable expectations of an individual that information regarding the terms under which their employment concluded would be disclosed.
63. The public undoubtedly has a legitimate interest in knowing how much money a public body is spending on settlement agreements. There is also a strong argument that a public body should be transparent and accountable to the public. It could therefore be argued that settlement agreements should be disclosed to promote such openness and accountability.
64. However the Commissioner also considers that in releasing the details of the settlement payment, the council has met the legitimate interests of transparency and accountability to a degree.
65. Having reviewed the document, the Commissioner is not persuaded that disclosure of the Settlement Agreement will be particularly informative in terms of revealing any further information regarding the circumstances of the Chief Executive's departure.
66. On balance, the Commissioner considers that the data subject's expectation of confidentiality outweighs the public interest for disclosure of the draft settlement agreement.
67. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

68. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

Right of appeal

69. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

70. 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.
71. 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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