

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 February 2012

Public Authority: London Borough of Bexley
Address: Bexley Civic Centres
Broadway
Bexleyheath
Kent
DA6 7LB

Decision (including any steps ordered)

1. The complainant has requested the London Borough of Bexley ('the council') to release the details of any non contractual payments paid to two former senior employees of the council on their resignation and the total costs of such payments to the council.
2. The Commissioner's decision is that council has correctly relied on section 40(2) of the Act for the non disclosure of the requested information.
3. The Commissioner requires no further action to be taken.

Request and response

4. On 13 December 2010, the complainant wrote to the Council and requested information in the following terms:

"Apart from salary, choices, health emolument, expenses, annual leave, employers pension, national insurance costs and any other contractual payments, what other financial payments were made to the two Directors or Assistant Directors who have resigned from Bexley Council since 1st January 2010 and what was the total cost to Bexley Council?"
5. The Council responded on 12 January 2011. It stated that it had refused the complainant's request under sections 41(1) and 40(2) of the Act.
6. The complainant requested an internal review on 20 January 2011.

7. Following an internal review the Council wrote to the complainant on 11 February 2011. It stated that it remained of the opinion that sections 41(1) and 40(2) of the Act applied in this case.
8. The complainant contacted the Commissioner on 21 February 2011 to complain about the way his request for information had been handled.
9. During the Commissioner's investigation the council changed its position and informed the Commissioner that it now it wished to rely on sections 40(5) and 41(2) of the Act for the refusal of this request.
10. The Commissioner completed his investigation and issued a decision notice (case reference FS50376406) on 18 October 2011. This notice informed the complainant and the council that the council had incorrectly relied upon sections 40(5) and 41(2) of the Act and requested the council to carry out certain steps in order to comply with the requirements of the Act. Specifically, the council was asked to confirm whether it held the requested information or not and if it does either to disclose it to the complainant or issue a fresh refusal notice in accordance with section 17 of the Act.
11. The council issued a fresh refusal notice to the complainant on 28 November 2011. It advised the complainant that the council does hold the requested information but it was not willing to release it. No specific exemptions were mentioned.

Scope of the case

12. The complainant wrote to the Commissioner on 28 November 2011 to complain about the council's latest refusal notice. He confirmed that he remained dissatisfied with the council's decision not to release the requested information to him.
13. During the Commissioner's second investigation it was established that the council now wished to rely on sections 40(2) and 41(1) of the Act (reverting back to its initial position when it first responded to the complainant's request in January 2011).
14. This notice will first address section 40(2) of the Act to the requested information. The Commissioner will only go on to consider section 41 of the Act if he finds that section 40(2) of the Act does not apply.

Reasons for decision

15. Section 40(2) of the Act states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles or section 10 of the Data Protection Act ('the DPA').
16. In this case, the Council argued that the requested information is the personal data of two third parties and that its disclosure under the Act would breach the DPA. It referred the Commissioner to previous decisions he has made relating to very similar requests and confirmed that the two ex employees concerned have an expectation that this information will remain confidential.
17. Firstly, the Commissioner must consider whether the requested information is personal data. Personal data is defined in Section 1 of the DPA as follows:

““personal data” means 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 intentions of the data controller or any other person in respect of the individual.”
18. The requested information relates to two identifiable living individuals. The information concerns any settlements that were made with the two former employees on leaving the council. Financial settlements of this nature and the details of an employee's contract is personal data as defined in the DPA.
19. As the Commissioner is satisfied that the requested information constitutes the personal data of two third parties, he must now establish whether disclosure of that data would breach any of the data protection principles under the DPA. The council did not state which data protection principle would be breached in this case if the information were disclosed. However, the Commissioner considers the first data protection principle to be most relevant here.
20. The first data protection principle states that:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -

- (a) at least one of the conditions in schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

21. The council presented very few arguments for the Commissioner to consider. It only stated that the two former employees would have no expectation that the information contained in the compromise agreements would be released into the public domain. It confirmed that the two former employees would expect the information contained in these agreements to remain confidential and therefore disclosure in this case would be unfair.
22. The Commissioner has reviewed the requested information and considered whether disclosure in this case would be unfair or not.
23. The Commissioner accepts that compromise agreements play an important role in employee/employer relationships and that they avoid the time and expense of litigation in an Employment Tribunal when an employee/employer relationship has come to an end. He acknowledges that such agreements are reached in private between the employee and the employer. They usually contain the reasons for the relationship coming to an end and any payments made to the employee by way of settlement and contain strict confidentiality clauses to protect the information contained within them.
24. The Commissioner accepts that as these agreements are reached in private and do contain confidentiality clauses that both former employees will have the expectation that all details contained in the agreements they signed will remain confidential and will not be disclosed to a third party or released into the public domain.
25. The Commissioner has considered the seniority of the two former employees in this case and the type of information being requested by the complainant. While he may accept that both individuals held senior public positions within the council and may have expected information relating to their roles to attract more transparency, the Commissioner considers the level of transparency and accountability will depend on the type of information being requested.
26. The Commissioner makes a general distinction between information relating to one's professional life and information which relates to one's private life and generally considers the latter attracts more privacy and warrants more protection. Although the requested information in this case does relate to the former employees' professional lives he

acknowledges that the information is what he would consider to be 'HR information' i.e. information relating to conditions of employment – such as pay, pension, any disciplinary matters and in this case any settlements reached on their employment coming to an end. The Commissioner considers an employee's 'HR information', whether a senior employee or not, is information which attracts privacy and therefore warrants more protection than more role specific information, such as a decision taken by that particular person in the course of their duties whilst working for the council.

27. In the Information Tribunal case of *Rob Waugh v Information Commissioner and Doncaster College (EA/2008/0038)* the Tribunal considered a request for very similar information to that being considered in this notice. Similar to this case, the information was contained in a compromise agreement and the Tribunal made the following comment:

"there is a recognised expectation that the internal disciplinary matters of an individual will remain private".

28. The Tribunal also highlighted in this hearing the fact that the compromise agreement was bound by a confidentiality clause. It recognised that this clause was to limit the information that could be made available to the public about the termination of the senior employee concerned. The Tribunal stated that this gave rise to:

"a reasonable expectation that no further information would be released."

29. Very similar information was being considered by the Tribunal in this hearing to that being considered in this notice. It ruled that such information should remain private and that disclosure would breach the first data protection principle outlined in the DPA.
30. The Commissioner accepts that it could be argued that there is a legitimate public interest in the disclosure of this information. He accepts that disclosure would enable the public to understand more clearly what non contractual payments are agreed in such cases. He understands that if such payments are made they can be in large sums and are met by the public purse and there is a legitimate public interest in knowing exactly how public money is spent in such circumstances. However, in this case the Commissioner does not accept that the legitimate interests of the public warrant the intrusion into the privacy of the individual's concerned that disclosure would cause.
31. As the Commissioner explained previously, the individuals concerned would have no expectation that this information would be released into

the public domain. The requested information is contained within compromise agreements which are bound by strict confidentiality clauses. Such clauses will have created the expectation that the contents of the agreement will remain private and confidential. It is the Commissioner's view that disclosure would be unfair on the data subjects concerned, as it would be an unwarranted intrusion into their right to privacy. Although the information relates to their roles as public servants, it is generally accepted by the Commissioner and the Tribunal in cases already heard that 'HR information' such as the information being considered here attracts privacy and should not generally be released into the public domain. The data subjects may have already suffered an element of distress going through the process leading up to their resignation and the agreements being reached. Disclosure of the requested information could cause them further distress.

32. For the reasons explained above, the Commissioner is satisfied that disclosure would be unfair and in breach of the first data protection principle outlined in the DPA. He has therefore concluded that section 40(2) of the Act is engaged in this case.
33. As the Commissioner is satisfied that section 40(2) of the Act applies, there is no need for him to go on to consider section 41 of the Act.

Right of appeal

34. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

35. 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.
36. 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

Rachael Cragg
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