

Freedom of Information Act 2000 ('FOIA')

Decision notice

Date: 23 April 2013

Public Authority: Manchester City Council
Address: Town Hall
Albert Square
Manchester
M60 2LA

Decision (including any steps ordered)

1. The complainant has requested correspondence relating to his complaint against an employee of a healthcare provider contracted by Manchester City Council ('the council'). The Commissioner's decision is that the council has correctly applied the exemption for personal data at section 40(2) of the FOIA and is therefore entitled to withhold the information. The Commissioner does not require any steps to be taken.

Request and response

2. On 28 August 2012, the complainant wrote to the council and requested information in the following terms:

"I have just this minute (10.45am) been in touch with the Information Commissioner's staff and they say I am entitled to request access to the response referred to in First Call's letter to the council. I do not know of course to whom the letters is addressed so it may help for you to simply ring First Call."
3. The council responded on 16 October 2012 stating that the request is for information relating to a third party and is exempt under section 40(2) of the FOIA as disclosure would contravene one or more of the data protection principles under the Data Protection Act 1998 ('the DPA').
4. On the same day, the council also issued a subject access request response to a request made on 5 September 2012 for the same information. It stated that although the communication received from

First Call may have arisen out of a complaint submitted by the complainant it does not contain any of the complainant's personal data and therefore there is no question of access under section 7 of the DPA. A complaint about this was the subject of the Commissioner's data protection assessment in case reference RFA0464312.

5. On 1 November 2012, the complainant requested an internal review stating that is in the public interest for the requested information to be disclosed.
6. The council provided its internal review response on 27 November 2012 stating that it was satisfied it had taken the correct approach.

Scope of the case

7. The complainant contacted the Commissioner on 19 October 2012 to complain about the way his request for information had been handled.
8. The Commissioner has considered the application of section 40(2) to the requested information.
9. Any information which may constitute the complainants own personal data has been dealt with as a subject access request under the Data Protection Act 1998 and is therefore outside the scope of this decision notice having been dealt with under a data protection case (case reference RFA0464312).
10. During the Commissioner's investigation, the council indicated that the exemption for information provided in confidence at section 41 of the FOIA would apply in this case and that it would also have sufficient justification to entertain the exemption for vexatious requests at section 14(1) of the FOIA.
11. As the Commissioner has decided that the information is exempt under section 40(2) of the FOIA, he has not considered the application of section 41 or section 14(1).

Reasons for decision

Section 40(2)

12. Section 40(2) of the FOIA 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 1998 ('the DPA').

13. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data 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.”

14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the data protection principles under the DPA. The Commissioner notes in this case that the council argued that disclosure of third party personal data would breach the first data protection principle.

15. 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.”

16. As explained above, the first consideration is whether the withheld information is personal data. The information is a letter from First Call to the council providing feedback from its investigation into the allegations made by the complainant against one of its employees. The Commissioner is satisfied that this is the personal data of the employee subject to the investigation. The Commissioner is also satisfied that some of the withheld information is sensitive personal data as it relates to the alleged committing of an offence.

17. As the Commissioner is satisfied that the withheld information is personal data, he now needs to consider whether disclosure would

breach the first data protection principle, as the council has claimed, i.e. would disclosure be unfair and/or unlawful.

18. In deciding whether disclosure of this information would be unfair, the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subjects, the consequences of disclosure on those data subjects and balanced the rights and freedoms of the data subjects with the legitimate interests in disclosure.

Nature of the information and reasonable expectations

19. The Commissioner recognises that information relating to complaints against individuals carries a strong general expectation of privacy due to the likelihood that disclosure could cause the data subjects' distress and could also cause permanent damage to their future prospects and general reputation.
20. Although the individual in this case is not an employee of the council, the company the individual was working for was contracted by the council to provide health care services. Therefore, the Commissioner believes that his guidance on 'Access to information about public authority employees'¹ is relevant. In that guidance the Commissioner states that a factor to take into account when considering whether to release information is whether the information is about the employees' professional or personal life and that the threshold for releasing professional information will generally be lower than that for releasing truly personal sensitive information e.g. that found in an employee's occupational health record. The guidance also states that arguments in favour of disclosure are stronger where a disciplinary measure is being taken against a senior member of staff over a serious allegation of impropriety or criminality and that arguments in favour of disclosure are weaker where the information is about an internal disciplinary procedure concerning a relatively minor matter.
21. The council stated that it is conscious that employers generally have a duty of care to protect the confidentiality of investigations undertaken in a disciplinary context and it would be perverse if the council did not treat the confidentiality of the communication it received about a third party employee in the same way.

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http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Data_Protection/Detailed_specialist_guides/PUBLIC_AUTHORITY_STAFF_INFO_V2.ashx

22. The Commissioner acknowledges that the complaint relates to an allegation of criminal activity which could adversely affect the individual's ability to conduct their job. Having seen the withheld information, he also acknowledges that it contains information of a professional as well as a personal nature. However, this does not distract from the general expectation of privacy that is held in relation to information concerning the investigation of complaints against individuals.
23. The council stated that the individual would not have any reasonable expectation that unsubstantiated allegations and the measures taken by the employer in response to those allegations would be made public under the FOIA.
24. The Commissioner also notes that First Call intended for all details of its investigation to remain completely confidential and that, prior to this request, it had refused a request from the complainant to disclose detailed information about the outcome of its investigation.
25. Although the Commissioner considers that the withheld information in this case relates to the individuals professional life as well as their private life, he is satisfied that the individual would have a reasonable expectation of confidentiality and privacy in relation to the withheld information.

Consequences of disclosure

26. In order to assess the impact of the consequence of disclosure on whether disclosure would be fair, it is necessary to consider whether disclosure of the information would cause unwarranted damage or distress to the data subjects.
27. The Commissioner considers that disclosure of information relating to a complaint and allegation of criminal activity that has not been upheld would be an intrusion of privacy, would cause distress, and could also cause permanent damage to the data subjects' future prospects and general reputation.

Legitimate interests in disclosure

28. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for its own sake along with specific interests which in this case is the legitimate interest in knowing how a complaint has been investigated and the outcome of that investigation.

29. The complainant has alleged that the First Call employee is a serial cannabis smoker who is under the influence of drugs when working alone, driving to the homes of disabled and vulnerable children and adults, and administering medicine to them. He has alleged that the employee and her husband are on other illicit drugs and that;

“It is not beyond the grounds of possibility that like the proverbial kid in a candy store that all patients are not getting their full medication [sic]”.

He has said that it is in the public interest to know that a ‘cannabis chain smoking’ care assistant is nursing vulnerable children and adults and that other organisations who may employ the individual in future are entitled to know.

30. The Commissioner is aware that First Call wrote to the complainant prior to this request advising that it has policies and procedures in place to protect both its service users and employees and that it endeavours to ensure that all carers meet the requirements set by the company and follow procedures. It assured the complainant that his concerns had been investigated thoroughly and addressed appropriately. The Commissioner is also aware that the complainant has shared his concerns regarding the employee with the police.
31. The Commissioner believes that the fact that the complaint has been investigated thoroughly, addressed appropriately, and reported to the police, goes some way to satisfying the legitimate interest in the handling of the complaint and the subsequent investigation. Nevertheless, the Commissioner is satisfied that there is a legitimate public interest in disclosure in this case.

Conclusion on Section 40(2)

32. As the complaint was investigated thoroughly and addressed appropriately, and having seen the withheld information in this case, the Commissioner does not consider that the legitimate interest of knowing how a complaint has been investigated and the outcome of that investigation outweighs the legitimate interests of the privacy of the data subject. The employee would not expect such information to be disclosed and disclosure of this type of information is likely to have a detrimental and distressing effect on them.
33. Taking all this into account, the Commissioner concludes that it would be unfair to the individual concerned to release the requested information as he considers that their right to privacy in relation to complaints against them outweighs the interests of the public in knowing how a complaint has been investigated and the outcome of that

investigation. The Commissioner has therefore decided that the council was entitled to withhold the information under section 40(2), by way of section 40(3)(a)(i).

34. As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, he has not gone on to consider whether there is a Schedule 2 condition, or in the case of sensitive personal data, a Schedule 3 condition, for processing the information in question.

Right of appeal

35. 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

36. 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.
37. 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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