

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 August 2013

Public Authority: Wirral Metropolitan Borough Council
Address: Municipal Buildings
Cleveland Street
Birkenhead
Merseyside
CH41 6BU

Decision (including any steps ordered)

1. The complainant has requested details of all contact, whether written or verbal that took place between the council and a suspended member of staff from the date of his suspension. The council withheld information under section 40(2) (personal data). The complainant also requested details of the council's policies and procedures regarding the suspension of staff which was provided to him.
2. The Commissioner's decision is that the council has correctly applied section 40(2) to the information.
3. The Commissioner has however decided that the council breached section 10(1) of the Act in that it did not provide a response to the complainant within 20 working days following the receipt of his request.
4. The Commissioner does not require the council to take any steps.

Request and response

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

"Please provide evidence of any and all contact, whether written or verbal, that has been made between Wirral Metropolitan Borough Council and David Green; or between David Green and Wirral Metropolitan Borough Council between the date of his suspension and today's date. This will include the letter / email / memo / document / aide memoir / piece of paper sent to him, which represents the "letter of suspension".

Please also provide details of the policy and the procedure pertaining to such suspensions - this being the policy and procedure that is currently applying to David Green as an employee of the Metropolitan Borough of Wirral."

6. After the complainant has written again to the council stating that it had breached its duty to reply within 20 working days the council responded on 7 September 2012. It stated that it had carried out a review of the request. It stated that the information is exempt under section 40(2) but did provide details of its policies and procedures as regards staff suspensions.
7. The Commissioner wrote to the council on 26 October 2012, followed by a telephone call and a further letter on 29 October 2012 asking the council to confirm whether it would carry out an internal review of its decision. It did not do so. He therefore wrote to it on 3 December 2012 stating that he had deemed the case eligible for investigation.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He argues that although the information is personal data there is a strong public interest in the information being disclosed which will override the individual's expectation of privacy in this case.
9. The individual was a senior manager at the council and a report by the Audit Commission had identified issues with his actions in negotiating a contract with an outside agency which took over part of the councils functions. After the report was published the council suspended the individual pending an independent investigation into his actions.

Reasons for decision

10. There is no requirement for the council to provide details of any verbal communications unless that information has been recorded. The Act only applies to recorded information.
11. Section 40(2) of the Act provides an exemption to the disclosure of personal data as defined by the Data Protection Act 1998 (The DPA) where a disclosure of that information would breach any of the data protection principles.

Is the information personal data?

12. The first question which the Commissioner therefore needs to consider is whether the information is personal data for the purposes of the DPA or not. Personal data is defined in the DPA as information which

"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"

13. The council provided the withheld information to the Commissioner. It is correspondence between the council and the individual or his representatives which relates to the individual's suspension from work. The identity of the individual is known as the complainant requested information specifically relating to him. The Commissioner is therefore satisfied that the information is personal data.

Would disclosure breach any of the data protection principles?

14. Under section 40(2), having decided that the information is personal data, the next question which the Commissioner must consider is whether a disclosure of that information would breach any of the data protection principles of the DPA.
15. The most relevant data protection principle in this case would be the first data protection principle. This requires that information is processed 'fairly and lawfully'. If a disclosure would on the face of it be fair and lawful then the Commissioner must then consider whether any of the conditions stated in schedule 2 of the Act are applicable. If one of those

conditions can be met then the information can be disclosed. The Commissioner must therefore firstly decide whether a disclosure of the information would be 'fair and lawful'.

16. For a disclosure of personal data to be fair the individual must generally have an expectation that the information held about them would be disclosed. This would be because they were told that that would occur or because it would have been obvious at the time that they provided their information. In the case of a disclosure under the Freedom of Information Act the expectation would need to be that their personal data might be disclosed to 'any member of the public'. This is because a disclosure under the Act is considered to be global rather than just to the applicant.
17. When making this decision the Commissioner can also consider whether any of the other circumstances of the case would make a disclosure of the information fair in spite of the expectations of the individual. The Tribunal has referred to this in the past in the terms of a 'pressing social need' for that information to be disclosed.
18. The Commissioner therefore needs to consider whether the individual would expect that correspondence between him and his employer about his suspension would be disclosed to any member of the public. If that is not the case he must consider whether there is a pressing social need for that information to be disclosed which would make a disclosure of the information fair in any event.
19. In general, employers are under an implied duty of confidence to keep personnel information about employees confidential. Details about their private lives and affairs, their disciplinary record and their general performance during their employment will generally only be disclosed outside the authority in rare circumstances, for instance in response to requests for references where the employee has given consent for a disclosure of this information to occur.
20. In this case some information has already been put into the public domain, for instance details of the suspension itself and the reasons for that suspension. However the complainant is seeking information which goes into much greater depth than an overall explanation by the council of the actions it has taken in response to the report of the Audit Commission. He is asking for details of the correspondence issued between the parties during the course of the suspension.
21. Having considered the withheld information the Commissioner is of the view that the individual would have no expectation that the correspondence would be disclosed to any member of the public in response to a freedom of information request. Although a suspension is

not disciplinary action per se, it is nevertheless associated with potential concerns about an individual and which may lead to disciplinary action being taken pending the outcome of the investigation.

22. At the time of the request the investigation was under way and no decision as to the outcome had been taken. Disciplinary action was a possibility pending the outcome of the independent reviewer. Disciplinary action being taken against an employee by an employer would normally occur in private, outside of public view.
23. The Commissioner must therefore consider whether there are any countering arguments which would outweigh the officers' expectations and make a disclosure of the information fair; whether there is a pressing social need for that information to be disclosed.
24. The Commissioner notes that the individual was a senior manager within the authority. The Commissioner and the First-tier Tribunal have previously placed a strong weight on the disclosure of personal information where this is necessary in order for senior public or civil servants to be held accountable for their actions. The decisions in these cases have reflected the seniority of the post, together with the public rather than the private nature of the information to be disclosed. Effectively if the information relates to a senior public official carrying out his role in an official capacity then the Tribunal has placed a strong weight on that information being disclosed. This is on the basis that senior officials working within public authorities should have some degree of expectation that their actions in carrying out their role must be transparent and that information pertaining to this may be disclosed.
25. The Commissioner notes that the contract considered by the Audit Commission was a large contract which outsourced council functions to an outside company to carry out public services. The Audit Commission report suggested that some actions carried out by the individual may have been inappropriate and led to a council department failing to win the bid to carry out the work. There is therefore a legitimate public interest in information on this being provided to the public to explain what occurred and what actions the council has taken in response to this.
26. The independent reviewer's investigation was ongoing at the time of the complainant's request. His findings were published in December 2012 and found that the individual had no case to answer. The council published the findings and made it available on the internet. In publishing the review the council was transparent about the actions it had taken in response to the Audit Commission's findings and in explaining the reasons why it was reinstating the individual in December 2012.

27. The complainant has alleged to the Commissioner that the reviewer was biased in his approach when carrying out the investigation. He suggested that the review was in fact intended only to clear the individual rather than to carry out a full and transparent investigation into his actions. The Commissioner places no weight on this accusation. The reviewer is an independent professional and the findings of the review and the reasons for his findings have been published by the council.
28. In any event, the Commissioner notes that the information in question is not about the actions of the officer which led to the suspension. Nor is it about the reasons for the suspension. He considers that there would be much stronger arguments for information on this to be disclosed, a much greater pressing social need to show that action had been taken to ascertain whether inappropriate behaviour had occurred. This information was published both in the Audit Commission report and in the subsequent independent review however. The analysis of the actions which would affect the public and the public purse have therefore already been disclosed by the council, lessening any pressing social need for the correspondence which the complainant has asked for to be disclosed.
29. The information requested by the complainant relates more to personnel matters and is of a far more intrusive and private nature. The requested information is personal information relating to the individual's suspension from duty.
30. The Commissioner therefore considers that there is a distinction between this type of information and the information which the public would have pressing social need. In response to the Audit Commission findings the public interest requires an explanation of the actions taken by the individual, how this might have affected the award of the contract and what actions the council has taken in respect of that to ascertain if any inappropriate behaviour did occur. This has been disclosed.
31. The Commissioner therefore considers that there is much less of a pressing social need for the disclosure of this information and that the council was therefore correct to apply section 40(2). A disclosure of the information would breach the fairness requirement of the first data protection principle.

Procedural Matters

32. The Commissioner notes that the complainant requested the information from the council on 2 May 2012. He did not receive a full refusal notice under the Act from the council until the 7 September 2012.

33. Section 10(1) requires that an authority responds to a request under the Act within 20 working days. In this case the council's response falls outside of this period.
34. The Commissioner's decision is that the council therefore breached section 10(1).

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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