

Freedom of Information Act 2000 ('FOIA')

Decision notice

Date: 17 March 2014

Public Authority: Derbyshire County Council
Address: County Hall
Matlock
Derbyshire
DE4 3AG

Decision (including any steps ordered)

1. The complainant has requested from Derbyshire County Council ('the council') the financial terms and any additional pension enhancements upon which the previous Chief Executive left. The Commissioner's decision is that the council has incorrectly applied the exemption for information intended for future publication at section 22 of the FOIA.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under the exemption at section 22.
3. 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

4. On 2 August 2013,, the complainant wrote to the council and requested information in the following terms:

"I would be grateful if you could let me know the financial terms and any additional pension enhancements upon which [previous chief

executive] left. I would intend to let the Mercury know the details. Please treat this as a request under the Freedom of Information Act 2000.”

5. The council responded on 6 August 2013 and refused to provide the requested information citing the exemption at section 22 of the FOIA to the financial terms of the departure and stating that it has not paid any pension contributions to, or in respect of, the previous chief executive since he left the council at the beginning of June 2013.
6. The complainant requested an internal review on 24 August 2013.
7. The council provided its internal review response on 23 September 2013 in which it maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner on 21 October 2013 to complain about the way his request for information had been handled. He asserted that section 22 should not apply in this case and that the council did not undertake its responsibilities properly in carrying out the public interest test.
9. The Commissioner has considered whether the council was correct to withhold the financial terms of the previous chief executive's departure under section 22 of the FOIA.

Reasons for decision

Section 22 – Information intended for future publication

10. Section 22 of the FOIA says that information is exempt if, at the time a public authority receives a request for it:
 - the public authority holds it with a view to its publication;
 - the public authority or another person intends to publish the information at some future date, whether determined or not; and
 - in all the circumstances it is reasonable to withhold the information prior to publication.

11. In reviewing the council's application of this exemption, the Commissioner has considered each of the above requirements and has also referred to his own guidance on the subject¹.

Information held at the time of the request

12. The council confirmed that the financial terms of the departure was held in its initial response. The Commissioner is therefore satisfied that the information was held at the time of the request.

Intention to publish at the time request received

13. This exemption only applies when the information is held with a view to publication at the time the request for it is received. In this case the council explained that it is required by Regulation 7 of the Accounts and Audit (England) Regulations 2011 to include a note in its statement of accounts of the remuneration of senior employees, including "the total amount of any compensation for loss of employment paid to or receivable by the person, and any other payments made to or receivable by the person in connection with the termination of their employment by the relevant body". It confirmed that such information will be published on its website in or around June 2014 and it was aware of its obligation to publish the information at the time of the request. The Commissioner is therefore satisfied that the council had a duty to publish the information requested in this case at the time the request was received.

With a view to publication

14. The Commissioner interprets the words in section 22 of 'with a view to' to indicate an intention has been made to publish or at the very least that the information is held in the settled expectation that it will be published.
15. Publication requires the information to be generally available to the public. It is not enough if the intention is to make it available to a restricted audience.
16. In this instance, the information, including the identity of the previous chief executive, is intended to be published in the statement of accounts

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_22_information_intended_for_future_publication.pdf

and made available on the council's website. The Commissioner is therefore satisfied that the information is held with a view to publication.

At some future date (whether determined or not)

17. The publication date does not need to be definite for the exemption to apply. As long as a decision has been made that the information requested will be published at some time in the future or there is a settled expectation that this will happen, the exemption can be considered.
18. In this case the council has confirmed that the information requested will be published in around June 2014. It has explained that the full set of accounts is published in around June each year (after the responsible financial officer has signed it and before the commencement of the external audit in July) and the statement of accounts must then be published again by 30 September 2014 after adjusting for any errors found during the audit. The Commissioner is therefore satisfied that, at the time the request was received, there was a settled expectation that the information would be published at a future date.

Reasonable in all the circumstances to withhold the information prior to publication

19. In order to engage section 22 of the FOIA, a public authority must first determine whether or not it is reasonable in all the circumstances to withhold the requested information prior to publication before considering the public interest test.
20. In considering the reasonableness of withholding the information, the Commissioner's guidance states that authorities should first give separate consideration to whether or not such an approach is "...sensible, in line with accepted practices, and fair to all concerned to withhold the information prior to publication."
21. The Commissioner's guidance also advises that, in considering what is reasonable in all the circumstances, authorities may also wish to consider:
 - Is it the right decision to manage the availability of the information by planning and controlling its publication?
 - Is it necessary to avoid any advantage that would be obtained by the requester in obtaining the information prior to general publication?
 - Does the timetable properly require internal or limited consideration of the information prior to its public release?

- Having made the decision to publish the information, are there real difficulties in extracting the information prior to publication?
 - Is this information that should be available through the publication scheme?
22. The complainant has said that a statutory obligation on the council to publish this information in its annual accounts is not sufficient reason for withholding it from the public until that publication is made. He referred to the aforementioned guidance on section 22 and said that the council should consider what the negative effects would be of publication of the information in advance of the anticipated publication date. He submitted that there are no defensible negative effects in this case. Although the term 'negative effects' is not used in the guidance, the Commissioner considers that the points mentioned at paragraph 21 above could be construed to relate to 'negative effects' of release of the information in advance of the intended publication date.
23. The council said that it was reasonable in all the circumstances to withhold the sum paid to the previous chief executive in connection with the termination of his employment prior to the publication of this information in around June 2014 as part of the council's statement of accounts. It explained that the statutory process of publishing information in the statement of accounts allows for a managed process, with the information published in the context of the Council's wider financial situation. The council said that this is fair to all concerned because it ensures transparency within a reasonable period of the termination of employment (in this case the termination took place in early June 2013 and the information will be published in around June 2014) but the publication process meets the reasonable expectation of the individual by ensuring that they are aware in advance of the applicable time-scale and process that will be followed.
24. The council did not specifically address all of the considerations detailed in paragraph 21 above. However, on the basis of its arguments in relation to accepted practice, fairness to all concerned, and managed process of publishing the information in the context of the council's wider financial situation, the Commissioner considers that it is reasonable in all the circumstances to withhold the requested information prior to publication in this case. Therefore the Commissioner is satisfied that section 22 is engaged.

The public interest test

25. As section 22 of the FOIA is subject to the public interest test set out in section 2(2)(b), the Commissioner must decide whether in all the

circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

26. The council said that there is public interest in the information being disclosed only in context of the council's wider finances and within the framework established by Parliament. It said that publication of the accounts will give a full picture of the financial context of the payment made to the previous chief executive.
27. It also said that there is a public interest in respecting the previous chief executive's reasonable expectations of privacy prior to publication of the statement of accounts, and important for ensuring that, in future, the public and individuals trust the council to act in accordance with their reasonable expectations. It said there is an obvious public interest in the council respecting the expectations of the parties to an agreement.

Public interest arguments in favour of disclosing the information

28. The council said that there is public interest in transparency of public sector finances and, in particular, in payments made to senior employees on the termination of their employment.
29. It also said that at the material time, there was some public and media interest in the termination of the previous chief executive's employment which carries significant weight.
30. The complainant has said that it is difficult to see how disclosure of the information now, as opposed to in around June 2014, can be counter to the public interest.
31. He also said that the issue of how authorities in similar situations have behaved must be of considerable relevance to this matter and that following its unsuccessful attempt to obtain this severance payment, the Derby Telegraph published on its website on 6 June 2013 the following:-
 - Cheshire East Council announced last month that its chief executive, Erika Wenzel, had left her role by "mutual consent" and was given a £93,550 payout.
 - Kent County Council revealed last year its managing director, Katherine Kerswell, received a £420,000 payout when she left the authority after only 16 months in the job.
 - Telford and Wrekin Council admitted its departing chief executive received a £125,000 golden handshake after offering to quit the authority in 2011.

32. The complainant said that the impression given by the response from the council is that, upon publication, the information will be buried in one of what will presumably be a number of footnotes to the accounts which he said is totally contrary to any policy of transparency and openness.

Balance of the public interest arguments

33. The council said that the public interest in transparency has significant weight, but this is offset to an extent by the fact that disclosure will take place within approximately one year of the previous chief executive's departure and within a year of the date of the request. It said that the public interest is better served by disclosing all relevant financial information at the intended date of publication in accordance with Regulation 7 of the Accounts and Audit (England) Regulations 2011, although it said it does not give significant weight to the public interest in the information being disclosed within its wider context as part of the accounts. It also reiterated its view that there is a strong public interest in respecting the previous chief executives reasonable expectation of privacy in this period.
34. The Commissioner considers that there is significant weight in transparency of public sector finances, specifically in this case, in payments made to a former chief executive on the termination of his employment. He considers that such transparency and accountability is particularly important in the current climate of austerity and cut backs to council's spending.
35. The Commissioner's aforementioned guidance on section 22 explains that given that the exemption applies only where there is an intention to release information, any harm that might result from the release of the information itself is only relevant if it results from early disclosure ahead of the scheduled release date. The factors to be taken into account in considering the public interest in maintaining the exemption will relate to the timing of the release of the information.
36. In this case the council has focused on the harm that would result to the trust that the public and individuals have in the council acting in accordance with their reasonable expectations. The Commissioner acknowledges that this should be a consideration but does not give it significant weight in the circumstances. The existence of a reasonable expectation of privacy does not preclude information being disclosed under the FOIA and this should be known to an individual who holds the position of chief executive.
37. The Commissioner appreciates that there is a statutory provision for disclosure of this information but does not believe that this counters the

public interest in disclosing the information at this time. The council has said that it does not give significant weight to the public interest in the information being disclosed within its wider context as part of the accounts and the Commissioner notes that the wider context of the council's finances is not particularly applicable when the information in question is the payment made to the person holding the highest position in the council. The council would not be disclosing the full official accounts before they have been approved by relevant bodies, it would merely be disclosing a unique payment to one individual.

38. The Commissioner also does not consider that there would be harm to the council in providing the information in this case ahead of the scheduled publication as there is no advantage that would be obtained by the requester, there should be no difficulties in extracting the information and the council should be able to deal with any queries from the public as to justification of the figure as such justification should have been in place prior to the payment being made.
39. The Commissioner's guidance also states that the public interest in releasing the information will often be stronger if the planned date of publication is far in the future. The Commissioner considers that the fact that the scheduled publication date is some 10 months after the request was made, and 12 months after the previous chief executives employment was cancelled, adds to the weight in favour of disclosing the information in this case.
40. Taking all of the above into account, the Commissioner considers that in all the circumstances of this case, the public interest in disclosing the information outweighs the public interest in maintaining the exemption. He therefore considers that section 22 was incorrectly applied in this case.

Procedural matters

41. The complainant has said that the council did not undertake its responsibilities properly in carrying out the requisite public interest test. He said that the council did not produce a comparison table and that the public interest test undertaken was a purely subjective one, not amenable to analysis or questioning by others.
42. Section 2(2) provides that –

"In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

43. Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case , the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

44. The Commissioner considers that the council carried out an appropriate public interest test and provided sufficient reasons for claiming where it believed the balance of the public interest lies in its responses to the complainant. He therefore does not consider that council breached any provisions of the FOIA in this respect.

45. The Commissioner also notes that there is no requirement on public authorities to produce a comparison table when carrying out a public interest test.

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: 0116 249 4253

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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