

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 April 2014

Public Authority: Surrey Heath Borough Council
Address: Surrey Heath House
Knoll Road
Camberley
Surrey
GU15 3HD

Decision (including any steps ordered)

1. The complainant has requested from Surrey Heath Borough Council ("the Council") information concerning the total monies spent on settling employment disputes which were subject to compromise agreements. The Council withheld this information under section 40(2). It subsequently also applied section 38 during the course of the Commissioner's investigation.
2. The Commissioner's decision is that the sections 38 and 40(2) are not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose to the complainant the information withheld by virtue of section 38 and 40(2).
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 1 May 2013, the complainant wrote to the Council and requested information in the following terms:

"For the years 2012 and so far in 2013 the total monies spent in settling employment disputes within SHBC and which of these were the subject of 'compromise agreements' between the Borough and the individual".

6. The Council responded on 7 June 2013. It stated that the information was being withheld under section 40(2).
7. The complainant subsequently asked for an internal review on 7 June 2013. In her internal review request the complainant disagreed with the application of the exemption.
8. The Council informed the Commissioner that the result of the internal review was sent on 5 July 2013. However the complainant did not receive a copy but subsequently has done during the course of this investigation.
9. In the internal review response the Council directed the complainant to its website in which she could access information on the money spent on settling employment disputes. However it maintained its position that the information relating to total monies spent on compromise agreements was exempt from release under section 40(2).

Scope of the case

10. The complainant contacted the Commissioner 17 January 2014 to complain about the way her request for information had been handled. Specifically she disputed the Council's application of section 40(2) to the requested information concerning total monies spent on compromise agreements.
11. The Council has argued that the complainant is seeking the number of compromise agreements that have been entered into. The Commissioner therefore raised this with the complainant who confirmed her request was seeking two sets of numbers; the total monies spent in settling employment disputes and the total monies of spent in settling employment disputes which were subject to compromise agreements.
12. During the course of the Commissioner's investigation, the Council explained that in the event the Commissioner did not uphold the Council's application of section 40(2), it sought to rely on section 38.

13. The Commissioner will first consider whether the Council was entitled to rely upon section 40(2) to withhold part of the requested information, specifically the total monies spent in settling employment disputes which were subject to compromise agreements. In the event section 40(2) is not engaged, he will then go on to consider section 38.

Reasons for decision

Section 40(2) – Requests for third party personal information

14. Section 40(2) of FOIA specifies that the personal information of a third party must not be disclosed if to do so would contravene any of the data protection principles.
15. The first step for the Commissioner to determine is whether the requested information constitutes personal data, as defined by the Data Protection Act 1998 (DPA). If it is not personal data, then section 40(2) cannot apply.
16. 'Personal data' is defined under section 1(1) of the DPA as data which relates to a living individual who can be identified from that data, or from that data and other information which is in the possession of the data controller or is likely to come into possession of the data controller.
17. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decision affecting them, has them as its main focus or impacts on them in any way.
18. The Council has argued that the disclosure of a total figure for monies spent in settling employment disputes which are subject to compromise agreements is likely to give rise to a breach of the DPA. It further argues that

"Compromise Agreements are usually a confidential agreement between the parties containing binding obligations not to publicise a number of their terms. We say that even a total figure is likely to give rise to a breach. If it is nevertheless possible to work out broadly which employee received which part of a total figure by reason of the number of employees involved and their role within the organisation, given the size of the organisation and information generally provided to all employees about each month's leavers for instance".

19. The Council also explained that it is a small authority where employees are known to each other and departments are small. It therefore believes that if the requested information is released, a mosaic argument might apply. The term "mosaic argument" is often used to refer to the argument that whilst it may not be prejudicial to disclose the requested information in isolation, it would be prejudicial where the requested information can be combined with other information already in the public domain or already known to the requester.
20. The Commissioner returned to the Council on this point. He asked the Council to provide further arguments as to why the requested information if disclosed would result in a mosaic argument being applicable. Specifically he asked the Council to explain what specific information is already in the public domain and explain why it is likely that this and the requested information could be combined to identify particular individuals. He further asked the Council to explain how the identification of individuals is likely to result from the combination of different pieces of information.
21. In its response to this, the Council relied heavily on the fact that the Council is a small authority where employees are all know to each other and departments are small which could result in information being pieced together.
22. He further asked the Council for the number of individuals that entered into a compromise agreement and the number of individuals that left the organisation during the time period stated in the information requested. The Commissioner notes that the two numbers were significantly different. In addition, he notes that it is possible that compromise agreements could be entered into with employees who did not leave the organisation.
23. The Commissioner must also point out that the exact number of individuals that entered into compromise agreements is unknown other than to a few employees at the Council who deal with such matters. He would therefore consider that it is unlikely that an individual, whether a current employee of the Council or a member of the public, could determine which employees entered into a compromise agreement.
24. Having reviewed the withheld information, a copy of which was provided to the Commissioner during the investigation, he considers that it does not identify individuals.
25. In support of this conclusion the Commissioner considered that providing a global figure of total monies which were subject to compromise agreements, does not allow an individual to be identified from it. He notes that the Council provided no strong arguments as to

why the information could be linked together to identify individuals, other than that it is a small authority and everyone is known to each other. He is therefore not satisfied that there is evidence to suggest that there is information available which is in the possession of, or is likely to come into the possession of, a member of the public that can be combined with the withheld information to identify living individuals. As a consequence, the Commissioner has determined that section 40(2) is not engaged.

26. The Commissioner notes that the Council did provide him with further arguments concerning fairness, reasonable expectations of the individuals concerned and the harm and distress that would occur if the information was disclosed. However, as he found the requested information is not personal data, he has not discussed these arguments in the decision notice.
27. As the Commissioner has determined that section 40(2) is not engaged he will now consider the Council's application of section 38.

Section 38 – health and safety

28. Section 38(1) of the FOIA provides that:

"Information is exempt information if its disclosure under this Act would, or would be likely to –

- (a) Endanger the physical or mental health of any individual, or*
- (b) Endanger the safety of any individual"*

29. For the exemption to be engaged it must be at least likely that the prejudice identified would occur. Even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
30. In this case, the Council considers that section 38 applies to the withheld information as the release of the information would go beyond 'distress' to any individual as set out in section 40(2). The Council's arguments were based on that if the information were disclosed, it would cause danger to the health of individuals.
31. Section 38 states that it applies if the disclosure of information would or would be likely to endanger the physical or mental health of any individual or endanger the safety of any individual. The Commissioner notes that as he has determined that the requested information is not personal data, if the information is disclosed, it is difficult to envisage how it can endanger the physical or mental health of any individual or endanger the safety of any individual. As a consequence of this he has determined that section 38 is not engaged.

Conclusion

32. As the Commissioner has determined that section 40(2) and section 38 are not engaged, the Council must disclose the information withheld under these sections to the complainant.

Right of appeal

33. 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

34. 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.
35. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF