

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 September 2015

Public Authority: Cumbria County Council
Address: The Lonsdale Building
The Courts
Carlisle
Cumbria
CA3 8NA

Decision (including any steps ordered)

1. The complainant has made a request to Cumbria County Council ("the council") for information relating to staff at a primary school. The council subsequently disclosed some held information under the terms of the Freedom of Information Act ("the FOIA") and some in the form of a subject access request under the Data Protection Act 1998 ("the DPA"). It also withheld some information under the exemption provided by section 40(2) of the FOIA. The complainant disputed the application of section 40(2), and that more information was held by the council beyond that so far identified.
2. The Commissioner's decision is that the council has correctly withheld the information under section 40(2), and that no further information is held. However, in failing to provide a response within the time for compliance, the council has breached section 10(1).
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 29 January 2014 the complainant wrote to the council and requested the following:
 1. *A copy of the recent investigation report by [redacted name], dated around September 2013, concerning Milburn Primary School.*

2. *A copy of any investigation reports or findings by [redacted name] concerning Milburn Primary School in 2013.*

5. The council did not provide a substantive response to this.

Scope of the case

Background

6. The complainant initially submitted this complaint to the Commissioner on 17 March 2014, due to not receiving a substantive response from the council.
7. Following advice from the ICO, the council provided a substantive response on 9 June 2014. For part 1 of the request, it disclosed some information under the terms of the DPA (where it represented the personal data of the complainant), some under the terms of the FOIA, and withheld some under section 40(2) of the FOIA. For part 2 of the request the council confirmed that no information was held.
8. The complainant subsequently requested an internal review on 18 June 2014. On the complainant not receiving this, the ICO wrote to the council and requested that it undertook an internal review. The complaint was then closed.
9. The complainant subsequently advised the ICO on 14 January 2015 that the council had not since provided an internal review, and asked for the case to be re-opened. This was confirmed by the council on 18 January 2015, who suggested that the matter would be best served by the Commissioner issuing a formal decision.
10. The Commissioner therefore considers the scope of this case is the determination of whether the council has correctly withheld information under section 40(2) for the first part of the request, and whether the council holds information for the second part of the request.

Reasons for decision

Section 40(2) – the personal data of third parties

11. Section 40(2) provides that:

"Any information to which a request for information relates is also exempt information if–

- (a) it constitutes personal data which do not fall within subsection (1), and
(b) either the first or the second condition below is satisfied."*

12. Section 40(3) provides that:

- "The first condition is–
(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene–
(i) any of the data protection principles..."*

Is the withheld information personal data?

13. Personal data is defined by section 1 of the Data Protection Act 1998 ("the DPA") as:

- "...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 data controller or any person in respect of the individual..."*

14. In order for the exemption to apply the information being requested must constitute personal data as defined by section 1 of the DPA. In this instance the Commissioner is aware that the withheld information has been previously considered by the ICO under case reference number FS50535137.
15. That case related to an identical request that was submitted to a separate public authority (namely a school that is under the jurisdiction of the council as a Local Education Authority) on the same date as that submitted to the council. The Commissioner considered the withheld information for that case and identified that it was clearly related to identifiable individuals, and that no effective anonymization would be possible.
16. For the purposes of this complaint, the Commissioner has further reviewed the withheld information, and has identified that the information is intrinsically related to third party individuals (due to relating to an investigation report into disciplinary matters). As such, the Commissioner is satisfied that no effective anonymization could be undertaken.

Reasonable expectations of the data subject

17. When considering whether the disclosure of personal data is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the data subject. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.
18. In this case the council has advised that it does not consider that the individuals would hold a realistic expectation of their personal data being disclosed into the public domain. This is because the information relates to a disciplinary matter, and contains input provided by a number of individuals. The council has also referred the Commissioner to the context of the request, and the likelihood that even if attempts were made to anonymise information, it is likely that there is sufficient information in the public domain to allow specific individuals to be identified.
19. However, the complainant contests that the majority of the people whose personal data is contained in the withheld information have given consent for the information to be disclosed, and has provided the Commissioner with 6 consent forms signed by different individuals (who are understood to be witnesses). However, the Commissioner has noted that these consent forms only refer to disclosure under the terms of the DPA, and there is no indication that that the individuals have consented to disclosure to the world at large, which disclosure under the FOIA would represent.

The consequences of disclosure

20. The council has suggested that disclosure of the withheld information, due to relating to disciplinary matters, would result in substantial damage and distress to the individuals whose personal data it is.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

21. In the circumstances of this case, the council has outlined that it considers disclosure would be detrimental to upholding the rights and freedoms of the data subjects, and has elaborated that the information request has been made by the complainant in conjunction with separate grievance proceedings. The council considers that those grievance proceedings are the appropriate manner for the complainant's concerns to be addressed.

22. The Commissioner also appreciates that the withheld information is held for the purposes of managing employment. The issue of disclosure of such information has previously been considered in the First Tier Tribunal case of Gibson v Information Commissioner & Craven District Council (EA/2010/0095). In that case the Tribunal confirmed that information relating to an individual acting in a professional capacity may be held for the purposes of human resources management, and as such attract a strong expectation of privacy on the part of the individual.
23. The Commissioner is further aware from the complainant that the withheld information has been 'leaked' since the date of the original request, with the complainant now holding a copy of the withheld information through this action. As such, the complainant proposes that this adds legitimate interest to public disclosure. However, as the Commissioner's public guidance¹ on this scenario makes clear, the unofficial 'leaking' of information does not equate to the information being in the public domain, and cannot be perceived as adding legitimate interest to official disclosure.

The Commissioner's conclusion

24. There is always some legitimate public interest in the disclosure of any information held by public authorities. This is because disclosure of information helps to promote transparency and accountability amongst public authorities. This in turn may assist members of the public in understanding decisions taken by public authorities and perhaps even to participate more in decision-making processes.
25. The Commissioner has reviewed the withheld information and the circumstances around its creation, and has identified that it is intrinsically connected to disciplinary matters undertaken by a school (with input from the council in its role as a Local Education Authority). As the First Tier Tribunal has previously considered, such information is held with a clear expectation of privacy on the part of the data subjects.
26. While the complainant has contested that the relevant individuals have some expectation of disclosure under the DPA, the Commissioner has identified that there is no evidence that they have consented to public disclosure under the terms of the FOIA. The Commissioner has also considered the complainant's arguments for the information having

¹ <https://ico.org.uk/media/for-organisations/documents/1204/information-in-the-public-domain-foi-eir-guidance.pdf>

already been leaked, but does not consider that this provides legitimate interest in disclosure.

27. Having considered these factors, the Commissioner has concluded that the disclosure of the individuals' personal data would not be fair, and that the council's application of section 40(2) was correct.

Section 1(1) – Duty to make information available on request

28. Section 1(1) of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds the information, and if so, to have that information communicated to them. This is subject to any exemptions or exclusions that may apply.
29. The FOIA provides a right of access to information in recorded form, and only that which exists at the time of the information request. The FOIA does not require a public authority to generate new information, such as in the form of an explanation or opinion, in order to respond to a request.

The council's position

30. In the circumstances of this request, the council has advised the Commissioner that the information sought by part 2 of the request is the same as that sought by part 1. This is because the individual named in part 2 of the request was responsible for commissioning the investigation undertaken by the individual named in part 1. As such, no individual "*investigation reports or findings*" were directly created by the individual named in part 2.

The Commissioner's conclusion

31. In the circumstances of this request, there is no conflicting evidence that suggests the council's position is incorrect. The Commissioner must therefore conclude that all relevant held information has either been disclosed (or alternatively provided under the terms of the DPA where it represents the complainant's personal data), or else correctly withheld under section 40(2).

Section 10(1) – time for compliance

32. 10. Section 10(1) requires that where a public authority has a duty under section 1(1), it must comply with that duty within twenty working days following receipt of the request.
33. The Commissioner has identified that the council did not provide a substantive response to the request within twenty working days of its receipt, and as such breached the requirement of section 10(1).

Other matters

34. Although they do not form part of this decision notice, the Commissioner would draw the council's attention to the following points.
35. In accordance with the Section 45 Code of Practice ("the Code of Practice"), the Commissioner expects all public authorities to offer complainants an internal review. This should mirror the public authority's internal complaints procedure, and be completed within 20 working days of receipt. The Commissioner accepts that the timeframe can be extended up to a maximum of 40 working days, but usually only when the request is particularly complex or voluminous. If additional time is required the public authority should notify the complainant that further time is required no later than the initial 20 working day deadline, and provide some indication of when this task will be completed.
36. In this case, it is apparent that the complainant specifically requested an internal review on 18 June 2014. However, the council confirmed to the Commissioner on 18 January 2015 that this had not been undertaken.

Right of appeal

37. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

38. 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.
39. 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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