

## Freedom of Information Act 2000

### Decision notice

**Date:** 18 May 2015

**Public Authority:** Taunton Deane Borough Council  
**Address:** The Deane House  
Belvedere Road  
Taunton  
Somerset  
TA1 1HE

#### Decision (including any steps ordered)

---

1. The complainant submitted a number of requests to Taunton Deane Borough Council (the Council) relating to a grave as well as the Council's Senior Bereavement Manager. The Council disclosed some information but withheld some under exemptions in the Freedom of Information Act 2000 (the Act): section 40(2) – third party personal data, and section 42(1) – legal professional privilege.
2. The Commissioner's decision is that Council has correctly withheld information under sections 40(2) and 42(1). No steps are required.

#### Request and response

---

3. The Commissioner has kept the number ordering used by the Council in its internal review for ease of reference, despite it not being in chronological order.
4. Item 1 of the request was made on 15 September 2014. The complainant wrote to the Council and requested information in the following terms:

*"Please will you supply me with and/or add as a FOIA request if necessary, the other/all corresponding emails between [three named*

Council employees] *subjected as 'Illegal memorial' / 'RE: Illegal memorial' and any email discussing the issue."*

5. The Council responded on 8 October 2014 and provided the complainant with a copy of the emails, with four parts withheld under section 40(2) of the Act. This was upheld in the Council's internal review of 23 October 2014.
6. Item 2 of the request was made on 23 July 2014. The complainant wrote to the Council and requested information in the following terms:  
  
*"I wish to obtain hard and digital copies of TBDC's working contract agreement for the crematorium manager, which clearly states that access into crematorium offices to perform work during closed periods/out of hours/weekends is permitted? Please include any additional information within the contract relating to this i.e. requirements, procedures etc?"*
7. The Council responded on 12 August 2014 and refused to provide the entire document under section 40(2) of the Act. This was upheld in the Council's internal review of 23 October 2014.
8. Item 3 of the request was made on 17 July 2014. The complainant wrote to the Council and requested information in the following terms:  
  
*"I wish to receive hard and digital copies of the document, which shows the signing in/clocking in of the crematorium manager on the memorial inscription application and permit approval date of 'Sunday 3 March 2013.'"*
9. The Council responded on 12 August 2014 and stated that it did not hold the information as the Senior Bereavement Manager was not on the Council's flexi-clock system. The Council confirmed that it did hold an overtime card for the date in question.
10. The complainant requested a copy of this document, which was disclosed to the complainant at the internal review stage. The complainant has made it clear to the Commissioner that he does not wish to appeal against this, and this has only been included for completeness.
11. Item 4 of the request was made on 27 August 2014. The complainant wrote to the Council and requested information in the following terms:  
  
*"I wish to obtain hard and digital copies of all records/documentation relating to the barristers/counsels opinion on the transferring document between Mary Jennings and Cyril Chapman."*

12. The Council responded and refused to provide the information as it considered it to be exempt under section 42(1) of the Act. This was upheld in the Council's internal review of 23 October 2014.

## **Case background**

---

13. The complainant has been in dispute with the Council for a number of years about his aunt's grave. It is not necessary to go into detail about the chronology of this dispute, but it is important to stress that both the Council and the complainant have different views about how this matter has been handled.

## **Scope of the case**

---

14. The Commissioner accepted for investigation the complainant's appeal against the Council on 6 November 2014. The Commissioner considers the scope of the request to be whether the Council is correct to withhold information under section 40(2) of the Act for items 1 & 2 of the request, and whether it is correct to refuse item 4 of the request under section 42(1) of the Act.

## **Reasons for decision**

---

### Item 1 – emails between Council employees

15. Section 40(2) of the Act provides an exemption for information which is the personal data of an individual other than the applicant and where one of the conditions at either s40(3) or s40(4) is satisfied. The condition at s40(3)(a)(i) concerns the disclosure of information to the public which would contravene any of the data protection principles in schedule 1 to the Data Protection Act 1998 (DPA).
16. In order to reach a decision on whether the withheld information can be released, the Commissioner will consider whether the information is personal data and then whether disclosure of the information would contravene any of the data protection principles.

### *Is the information personal data?*

17. Personal data is defined in the DPA as being information that relates to a living individual, and that individual must be identifiable. The DPA also contains a definition for sensitive personal data, which is reserved for identifiable information relating to sensitive issues such as an individual's physical health or political opinions.

18. In the emails disclosed by the Council there were four pieces of information that were redacted. The first is a sentence about a Council employee's physical health and so is sensitive personal data. The second and third are the mention of a Council employee's name. The Commissioner considers that this could be used to identify the individual as he is the only person with that name in his department, and anyone who has dealings with the department – such as the complainant – would be able to identify him. The fourth is an opinion on a third party who does not work for the Council; he is referred to by his profession and as this profession is not a common one it would be likely the individual could be identified from the information.
19. The Commissioner considers that all four pieces of redacted information are personal data, and the first is sensitive personal data as it relates to an individual's health.

*Would the disclosure of the information contravene any of the data protection principles?*

20. The relevant principle in this case is the first data protection principle. This states:

*'Personal data shall be processed fairly and lawfully and, in particular shall not be processed unless –*

*At least one of the conditions in schedule 2 [DPA] is met....'*

21. To determine whether or not disclosure would contravene any of the data protection principles the Commissioner will consider whether it is fair for the information to be disclosed. If it is not fair then the information will be withheld; if it is fair then the Commissioner will need to consider other factors before the information can be disclosed. Should the information be sensitive personal data the Commissioner will also need to decide whether any of the conditions in schedule 3 are met, and should that be the case whether any of the conditions in schedule 2 are met. For personal data that is not classified as sensitive under the terms of the DPA, the Commissioner will consider whether any of the conditions in schedule 2 are met, but there is no requirement to consider whether any of the conditions from schedule 3 are met.
22. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:
  - the reasonable expectations of the individual about what would happen to their personal data.
  - the consequences of disclosing the information.

23. Whilst the Commissioner will consider the data subject's reasonable expectations and any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be demonstrated that there is a pressing social need for a disclosure of the information to the public which overrides the expectations of the individual or any detriment that may be caused.
24. As the withheld information is not uniform and relates to different individuals the Commissioner will consider each unique piece in turn, with the second and third pieces of information being viewed together as they are the same name.
25. The first piece of information is sensitive personal data about a Council employee's health, so the information relates to the individual's personal life and not their professional one. The Commissioner considers that the employee would have a strong expectation that this sensitive information about their personal life would not be disclosed into the public domain, and that this is a reasonable view for an employee to have. Therefore the Commissioner does not consider it fair for this information to be disclosed and that the Council was right to withhold the information.
26. The second and third pieces of information are a Council employee's name. When considering the reasonable expectations this employee would have about his name being disclosed, the Commissioner considers it pertinent that the information is being used in his professional capacity, and that the individual does work in a public facing role. The Council argued that the individual was not the "public face" of the service, but the Commissioner does not consider that this affords the individual a strong expectation that the information should be withheld. The individual concerned frequently interacts with members of the public and as such is prominent to a certain degree in his professional capacity. He is also employed as a manager, and whilst he is not a senior manager it would be wrong to suggest he holds an entry-level position within the Council. Whilst he is not the head of his department his role still confers a legitimate interest in the information being disclosed.
27. However, it is also important to give due weight to the responsibility the individual has in his role and in relation to the memorial. The text of the email shows that the individual does not have a high level of authority in the matter, as the author of the email states that "we have not issued a memorial permit for Chapman. [Individual A] still has it on his desk because I told him not to issue it". The Council also explained the individual's role to the Commissioner and from this it does not seem that the individual has a significant amount of responsibility in the decisions at hand. The Commissioner cannot go into detail about the role described by the Council because in his view this information would identify the individual. In the Commissioner's view this shows that in the

circumstances this employee is not senior enough to create a reasonable expectation that his personal data would be disclosed in this context. This similarly reduces the legitimate interest in the information being disclosed when weighed against his right to privacy.

28. The Commissioner has also considered whether there was any consequences to disclosure. The most prominent consequence is that it may impact on the individual's right to privacy. It would also reveal that the individual was involved in a discussion about a memorial that is considered by some to be illegal. In reaching his decision the Commissioner has not afforded either of these two consequences much weight. It is likely that anyone from the public concerned about the memorial would assume this individual would be involved due to his professional duties.
29. Whilst the consequences of disclosure are not severe, the Commissioner's decision is that there is not a sufficient legitimate interest in the information being disclosed. The reasonable expectation of the employee, based on his role within the Council and the circumstances of this case, show that it would not be fair to process this information and it should be withheld.
30. Lastly, the fourth piece of information is an opinion about someone who is not a member of Council staff. The Commissioner considers that this individual would have a reasonable expectation that comments made about him would not be disclosed to the public. The individual is referred to in the email as he has had some involvement in the memorial. Whilst he has worked for the Council he is not responsible for the Council's actions or holds responsibility about the Council's resources. Should the information be disclosed there are no immediately apparent consequences to the individual. However, in the circumstances of this case the Commissioner's view is that the inherent right to privacy is sufficient to ensure that it would be unfair to disclose this information.

#### Item 2 – Senior Bereavement Manager's contract agreement

*Is the information personal data?*

31. There is only one Senior Bereavement Manager at the Council (the complainant accepts that this is the individual to whom 'crematorium manager' relates) so there is only one document within the request, and it consists of seven pages. The majority of the first two pages are the employee's personal data as it provides his name, address, national insurance number, date of birth along with other personal details. From the bottom of page two to the end of the document there is no information which is specific to the job role mentioned in the request. However, the Commissioner considers this to be personal data because there is only one Senior Bereavement Manager, so the information

relates to an individual who is known to the complainant and others in the local area. Whilst the information in isolation would not identify the employee, the fact the employee's job title was mentioned in the request means it is still relates to him.

*Would the disclosure of the information contravene any of the data protection principles?*

32. The first two pages of the contract of employment do contain some information which relates to the Senior Bereavement Manager's role as an employee for the Council. However, it also contains a substantial amount of information that relates to the individual's private life, and so the Commissioner considers that there is a reasonable expectation that this information would not be put into the public domain. The Commissioner also considers that there are possible consequences to this information being disclosed. Releasing an individual's name, address, date of birth and national insurance number could leave them open to identify fraud, which could cause significant problems for the individual concerned.
33. As all the information relates to one individual the Commissioner has viewed the information as a whole rather than going through it line by line to give specific analysis to each piece available. Given the personal data is primarily concerned with the individual's private life and there are clear and apparent consequences should the information be disclosed the Commissioner is strongly of the view that it would not be fair to release this personal data. As such, the information on the first two pages of the contract is exempt under section 40(2) and should not be released.
34. For the remainder of the contract, the Commissioner notes that the information is personal data because it relates to the Senior Bereavement Manager, but that it is not specific to him alone. It is comprised of general information, the like of which can be found in job descriptions on the job page of the Council's website. Therefore whilst disclosing this information would be an invasion of the data subject's privacy (primarily due to the information it details about his terms and conditions of employment), it is not evident that there would be further and specific consequences which were directly linked to the disclosure of this information.
35. However, the Commissioner does not see a legitimate public interest argument to justify the invasion of the data subject's privacy in the circumstances of the case. The Commissioner considers that the complainant's interest in obtaining the information is a private one, rather than a public one. It could be argued that the complainant's desire to see the information is partly to hold a Council employee to account, but the Commissioner does not accept that this has wider

applications beyond the complainant's own concerns. Without a legitimate public interest argument to justify disclosure it is not fair to release the information in the remainder of the contract. Therefore, section 40(2) applies to the contract in its entirety and the Council is justified in withholding the requested information.

#### Item 4 – Counsel's opinion on transferring document

36. The information relevant to this request was refused under section 42(1) of the Act. Section 42(1) of Act provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.
37. There are two categories of LPP: advice privilege, where a client is asking a legal person for advice on a matter; and litigation privilege, where a legal advisor and their client are discussing proposed litigation proceedings. In this instance the information comes under the advice privilege, as the Council was acting as a client and asked a lawyer for advice on a matter. The Council has confirmed that the advice – which is what the withheld information consists of - was provided solely for the purpose of legal advice, and that the advice was provided in the legal adviser's professional capacity.
38. The Commissioner has viewed the opinion and accepts that this is the case. The information is legal advice and so section 42(1) applies. As section 42 is a qualified exemption the Commissioner has gone on to consider the public interest test.

#### *Public interest arguments in favour of disclosure*

39. The Council has used public funds to pay for the legal advice, and with all public expenditure comes an argument for transparency and accountability about how the funding was spent. The Commissioner considers that this applies in this case and provides an argument to support the view that the information should be disclosed.
40. The complainant is of the view that the Council has committed multiple errors with the handling of the memorial and his auntie's grave. Whilst he has been provided with a summary of the opinion and arguments within the opinion he wishes to see the original information so he can determine what the actual advice is. The complainant asserts that it is of significant importance to his case against the Council and would be of benefit to him to obtain the advice in full.

#### *Public interest arguments in favour of maintaining the exemption*

41. There is a strong public interest in protecting communications between lawyer and client to ensure individuals or organisations have access to



uninhibited legal advice, which is fundamental to the administration of justice. The First Tier Tribunal has looked at this exemption on a number of occasions and has remarked in the past that to overturn the exemption would require '*clear, compelling and specific justification*'.<sup>1</sup> The Commissioner's view is that the general principle behind LPP is highly significant and carries a strong weight when considering a public interest test.

42. Furthermore, disclosure of legal advice would likely lead to clients being less candid in their discussions. This in turn would impact on the ability of legal advisers to give the correct advice. It is vital to give the defence of LPP proper weight as disclosure of such information could undermine an important legal principle.
43. The Council has also confirmed that at the time of the request the advice was still recent and a live issue. The Commissioner agrees with that assessment, and that this adds further weight to the argument that the exemption should be maintained.
44. The Commissioner considers that whilst the information is clearly of strong importance to the complainant, the information itself does not have any notable wider public value. The matter is a deeply personal issue but is not one which has a great impact on the public at large. Without wanting to demean the complainant's reasons for requesting the information, there is no evidence that there is a "clear, compelling and specific justification" for this information to be released beyond a private dispute that the complainant has with the Council. This adds weight to the argument that the exemption should be maintained and that the information should be withheld.

#### *Balance of public interest test*

45. The Commissioner's decision is that the public interest test favours maintaining the exemption. He has given due weight to the complainant's concerns about the Council's conduct and the wider arguments for accountability, but he does not view these as providing sufficient weight to overcome the arguments in favour of maintaining the exemption. The principle behind LPP, the threat to client and lawyer discussions, the fact the matter is still live and that the issue relates to a personal dispute demonstrate that there is a much stronger argument maintaining the exemption.

---

<sup>1</sup> [Calland v ICO & the FSA \(EA/2007/0136\)](#)

## 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 123 4504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: <http://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 .....**

**Alexander Ganotis  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**