

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 October 2016

Public Authority: Bolton Metropolitan Borough Council

Address: Town Hall
Civic Centre
Bolton
Lancashire
BL1 1RU

Decision (including any steps ordered)

1. The complainant has requested information from Bolton Metropolitan Borough Council ("the Council") about the departure of the Council's former Chief Executive. The Council withheld some of the information under the exemption provided by section 40(2) of the Freedom of Information Act ("the FOIA").
2. The Commissioner's decision is that the Council has correctly applied the exemption provided by section 40(2). However the Council breached section 17(1) by failing to issue its refusal notice within the time for compliance.
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 13 December 2015 the complainant requested:

Please supply the terms of the agreement made with [redacted name] about his resignation from the Council. Please tell me what money he was paid and why.

5. On 12 January 2016 the Council responded. It withheld the requested information under the exemption provided by section 41.

6. On 12 January 2016 the complainant requested an internal review. On not receiving this, the complainant submitted a complaint to the Commissioner.

Scope of the case

7. The complainant made his complaint to the Commissioner on 21 March 2016.
8. During the Commissioner's investigation, the Council provided an internal review in which it revised its position. It withdrew reliance upon section 41 and applied the exemption provided by section 40(2). In relation to some of the requested information which had since entered the public domain, it advised the complainant where to find this.
9. The Commissioner considers the scope of this case to be the determination of whether the Council has correctly applied the exemption provided by section 40(2), and whether this was done within the time for compliance provided by section 17(1).

Reasons for decision

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

10. 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.*

11. 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?

12. Personal data is defined by section 1 of 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...

13. 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 has reviewed the withheld information, and recognises that it represents the terms of departure agreed between the former Chief Executive and the Council. The information can clearly be related to the former Chief Executive, and therefore represents the individual's personal data.

Would disclosure breach the data protection principles?

14. The data protection principles are set out in schedule 1 of the DPA. The Commissioner considers that the first data protection principle is most relevant in this case. The first principle states that personal data should only be disclosed in fair and lawful circumstances, the conditions of which are set out in schedule 2 of the DPA.

15. The Commissioner's considerations below have focused on the issues of fairness in relation to the first principle. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the data subject and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

The reasonable expectations of the data subject

16. When considering whether the disclosure of personal information 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.

17. In this case the Council considers that such disclosure would not be reasonably expected by the individual. The information relates to the individual's departure from the Council, and forms part of their

personnel record. It is therefore distinct and separate from information about the individual's public duties as the former Chief Executive.

The consequences of disclosure

18. The Council considers that disclosure of the information would have an unjustified adverse effect on the individual, who would not expect information deriving from personnel records to enter the public domain. The Council considers that disclosure would clearly breach the first principle of the DPA, as none of the legitimising conditions provided by Schedule 2 of the DPA are met.
19. The Council further considers that disclosure may also be unlawful through causing a breach of the duty of confidence.

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

20. 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.
21. In the circumstances of this request, the Commissioner has noted that the severance payment made to the former Chief Executive has already been publically disclosed, and the complainant has been referred to where this can be publically accessed. The Commissioner understands that this severance payment has been disclosed in accordance with the Accounts and Audit (Amendment No. no 2) (England) Regulations 2009. It has also been noted that the Council has referred the complainant to contextual information about the individual's departure on the webpages of a local newspaper.
22. The Commissioner has therefore reviewed the information withheld under section 40(2). It is evident to the Commissioner that this information derives from the individual's personnel records, and contains the exact terms of the individual's departure from the Council. The Commissioner recognises that such information is likely to be held by the Council with a clear expectation of confidence on the part of the individual, who would not expect such information to be disclosed to the public. In the First-tier Tribunal case of *Gibson v Information Commissioner and Craven District Council (EA/2010/0095)*, the Tribunal found that the legitimate interest of the public only outweighed the prejudice to the rights, freedoms or legitimate interests of an individual to the extent that the information concerned related to the use of public funds. In the circumstances of this case the public cost of the former

Chief Executive's departure has already been disclosed, and it is evident to the Commissioner that the disclosure of the settlement agreement would interfere with the individual's rights and freedoms as a data subject.

The Commissioner's conclusion

23. Having considered the above factors the Commissioner is satisfied that disclosure would not be fair under the first principle of the DPA.
24. On this basis the Commissioner upholds the Council's application of section 40(2).

Section 17(1) – time for compliance

25. Section 17(1) specifies that a refusal notice must be provided no later than 20 working days after the date on which the request was received.
26. In this case the Council provided its refusal notice citing section 40(2) outside of this time frame, and therefore breached section 17(1).

Other matters

27. The Commissioner has identified that the Council provided the outcome of its internal review outside of forty working days following this being requested.
28. Under the FOIA, there is no obligation for a public authority to provide a complaints process. However, it is good practice (under the section 45 Code of Practice¹) to do so, and the Commissioner recommends that an internal review outcome be provided within twenty working days, or forty working days in exceptional circumstances. In circumstances where a public authority is found to consistently fail to follow good practice, the Commissioner may issue a practice recommendation.

¹ <https://www.gov.uk/government/publications/code-of-practice-on-the-discharge-of-public-authorities-functions-under-part-1-of-the-freedom-of-information-act-2000>

Right of appeal

29. 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

30. 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.
31. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF