

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 October 2016

Public Authority: Sheffield City Council

Address: Town Hall
Pinstone Street
Sheffield
S1 2HH

Decision (including any steps ordered)

1. The complainant has requested information on the non-payment of council tax by councillors at Sheffield City Council (the council). The council confirmed that it held some of the requested information, but stated that it was exempt from disclosure under section 40(2). With regard to the remaining information, the council stated that even to search for it would breach the Data Protection Act 1998 (the DPA). Therefore it has not confirmed what, if any, further information it holds.
2. The Commissioner's decision is that the council has failed to comply with section 1(1) in failing to confirm whether or not it held any information on the late payment of council tax information aside from those councillors who were ineligible to vote in the budget setting meetings by virtue of section 106 of the Local Government Finance Act 1992. The Commissioner also finds that the council was incorrect to rely on section 40(2) to withhold the information it had identified within the scope of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - With regard to section 1; issue a fresh response once the council has searched for and identified any information falling within the scope of the request.
 - With regard to section 40(2); disclose the information it had previously withheld under this exemption.

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 April 2016 the complainant requested information of the following description:

"I am seeking some information on the possible non-payment or late payment of council tax by elected members in each of the last two financial years (2014/15 and 2015/16).

Specifically I would like to know if any reminders or notice of arrears were served on any elected members in each year and, if so, which members they were and what the amount involved was in each case.

In addition, I would like to know if any elected members were served with a summons to court and, if so, which members they were and what the amount involved was in each case".

6. On 29 April 2016 the council responded to advise that it held the information and considered that section 40 applied, but that it needed additional time to consider the public interest test, and stated that this would be completed by 27 May 2016.
7. The council responded substantively on 20 May 2016. It confirmed that it held information in respect of council tax payment by councillors and other tax-payers. It advised that the council does not selectively monitor the council tax records of councillors with the exception of the section 106 monitoring it completes in March each year prior to the budget meeting. It stated that it did not have a councillor marker on its records to enable swift collation of the requested information. Therefore, it stated that its position was that to even collate the requested information would breach the DPA. Accordingly, any information, if held, would be exempt under section 40(2).
8. In addition to this, the council responded stating that section 106 applied to one councillor, but it refused to disclose any further information citing section 40.

9. The council states that it sent the outcome of the internal review on 20 June 2016. This was sent again to the complainant again on 11 July 2016. The council upheld its original position.

Scope of the case

10. The complainant contacted the Commissioner on 11 July 2016 to complain about the way his request for information had been handled. He complained that the council had failed to provide any information about councillors' council tax arrears with the exception of confirming that one councillor had been ineligible to vote at a budget meeting within the requested period. He also complained that no additional information regarding this councillor and their council tax arrears was provided.
11. The Commissioner considers the scope of this case to be to determine whether the council has complied with section 1 in terms of not confirming whether it holds any information in respect of councillors' council tax arrears in addition to the section 106 information it has confirmed it holds.
12. The Commissioner will also consider whether the council was correct to withhold the section 106 councillor's information under section 40 of the FOIA.

Reasons for decision

13. Section 1(1) of the FOIA states that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him

14. The complainant is concerned that the council has failed to even search for information falling within the scope of his request as it argues that to do so would in itself breach the DPA.
15. The council has explained that it has split the request into two distinct areas, the general arrears information for council tax payers (in this case details which would include specifically Councillors) and secondly

the specific records on individual councillors' ability to vote on the setting of council tax under Section 106.

16. With regard to general councillor council tax arrears the council explained that it does not actively monitor councillors' arrears information in the manner requested. It stated that it does not have a "Councillor marker" on its records which would enable the simple collation of the requested information. Although it has suggested that this may be more complex for example in cases where a councillor is not the named payer, or may have additional property interests. The council advised that the current section 106 verification process checks and records these situations. The council considers that the processing of personal data in this manner, with the consent of Councillors to enable section 106 compliance, is in accordance with the DPA and in particular that information will be processed fairly and lawfully in accordance with the first principle.
17. The council therefore considers that any processing of councillor's council tax records to collate the wider information that has been requested would cause a breach of the first principle of the DPA, and it does not believe that processing in this manner would be met by any conditions within schedule 2 of the DPA.
18. As a result the council considers that the disclosure of council tax affairs outside of the section 106 verification process and even the collation of such information, if held, is not in the public interest would breach the DPA and Human Rights Act 1998 (HRA) right to privacy. The council considers that the protection of councillors' personal data in this context is valid. Therefore, any information relating to councillors' council tax arrears, if held, is exempt from disclosure under Section 40(2).
19. The Commissioner does not consider that to determine whether the requested information is held would in itself be a breach of the DPA. The council is under an obligation under section 1 of the FOIA to inform the requester in writing whether it holds the requested information.
20. The council has argued that there is no schedule 2 condition for processing the councillors' personal data in order to respond to the FOIA request. However, the Commissioner argues that schedule 2(6) applies as the processing is necessary for the legitimate interests of the council, as data controller, in complying with the FOIA. The Commissioner cannot see that to look for the requested information would be an unwarranted processing of personal data by reason of prejudice to the rights and freedoms of the councillors. Not least because councillors, as holders of public office, must expect a greater degree of scrutiny of their affairs than members of the public, particularly where the affairs in

question impinge upon their ability to fulfil their role and the obligations of that role.

21. Having regard to the Upper Tier Tribunal case *Haslam v Information Commissioner and Bolton Council* [2016] UKUT 0139 (AAC), the Commissioner notes that the tribunal was considering the steps beyond determining whether the requested information was held. It is clearly to be taken as given that there was no breach of either the DPA or the FOIA in confirming that the council tax arrears information in respect of specific councillors was held. The Tribunal was considering whether, once the information had been identified, the council was correct to withhold any part of it, particularly the identity of specific councillors under section 40(2).
22. The Commissioner is at a loss to understand why the council has not even confirmed that the requested information is held. There can be no section 40(2) detriment in determining whether information is held. Indeed, it could be argued that the council has an obligation to ensure that its councillors are in compliance not only with section 106, but also the obligations they are under in respect of protecting council resources, acting in accordance with the law, and acting in accordance with the trust placed in them by the public.
23. Consequently, the Commissioner finds that the council has failed to comply with section 1(1) in failing to confirm to the complainant whether the requested information is held.

Section 40(2) – personal data

24. 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.

25. 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?

26. 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...

27. In order for the exemption to apply the information being requested must constitute personal data as defined by section 1 of the DPA.

28. The information the council has withheld under section 40(2) is that relating to a specific councillor who it has confirmed was ineligible to vote at the budget meeting in the period requested. The Commissioner is satisfied that information relating to their non-payment of council tax is information directly about them, and therefore is their personal data.

Would disclosure breach any of the data protection principles

29. 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.

30. 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.

Reasonable expectations of the individual

31. When considering whether a 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.

32. The Commissioner recognises that for the general public, it would certainly be beyond their reasonable expectations for information about their council tax arrears to be disclosed to the world at large. However, in view of the Tribunal in Haslam, the Commissioner considers that elected officials should have a greater expectation of scrutiny regarding their payment of council tax.
33. It is clear from the Tribunal's decision that the critical element in balancing the rights of data subject with any legitimate public interest is the councillor's position as an elected official with public responsibilities. The Tribunal observed that *"those who have taken public office should expect to be subject to a higher degree of scrutiny and that information which impinges on their public office might be disclosed."* *"A councillor is a public official with public responsibilities to which non-payment of council tax is directly and significantly relevant"*. *"In my view a councillor should expect to be scrutinised as to, and accountable for, his actions in so far as they are relevant to his public office."*
34. It is also clear that section 106, which bars a councillor from voting on the council's budget if he has an outstanding council tax debt of over 2 months is relevant to this case and will impinge upon a councillor's public office. However, it is not the only consideration to make in determining whether non-payment of council tax impinges on, or is relevant to, the councillor's public office.
35. The Tribunal's position was that whilst *"in the case of an ordinary member of the public, the payment or non-payment of council tax is essentially a private matter"*, *"it is not reasonable for a councillor to expect not to be identified where he is summoned for non-payment of council tax"*. The Tribunal acknowledged that whilst *"the identification of a defaulting councillor involves an intrusion into his private life...it is an intrusion that a councillor must be taken to have accepted when taking office"*.
36. The Tribunal accepted that there might be exceptional cases in which the personal circumstances of a councillor were *"so compelling"* that their name should be protected. However, the Tribunal found that even though disclosure might cause some distress to the councillor, and damage to his reputation, this was not sufficient to outweigh the significant legitimate public interest in disclosure. In short, elected officials are not in the same position as other members of the public when it comes to disclosure of their names. They can expect their

names to be disclosed in circumstances where ordinary members of the public might expect the opposite.

37. The council has provided details of mitigating personal circumstances in relation the councillor. It considers that these circumstances support its position that the name and details relating to non-payment should not be disclosed. Given the nature of the detail of the submissions provided to the Commissioner, which concern the personal circumstance of the individual, disclosure of which could lead them being identified, the Commissioner has not replicated them in full detail here.
38. The Tribunal's states that "*council tax default strikes at the heart of the performance of a councillor's functions*", and as such it is clear that there should be an expectation of disclosure, aside from the requirements of section 106. However, in this case, the consideration of section 106 is directly relevant to the consideration of reasonable expectations as the councillor concerned was identified in the council's section 106 checks as being ineligible to vote.
39. In a situation where a councillor attends a budget setting meeting, section 106(2) requires any councillor to whom section 106 applies to disclose the fact that the section applies to them and shall not vote. Section 106 therefore requires the disclosure of the fact of council tax arrears.
40. In this case the council has stated that section 106 applied to the councillor in question. However, the Commissioner has had regard to the minutes from the budget setting meetings for the period in question, and observes that there were no section 106 declarations were made. It is clear therefore that whilst the council states that section 106 applied to the councillor, that information was not disclosed as part of the budget setting meetings.
41. The Commissioner considers that the councillor in question would have been aware of the council's section 106 checks, and would have been aware that being in council tax arrears at the time of an annual budget setting meeting would require disclosure of that fact.

Consequences of disclosure

42. The council has argued that given the personal circumstances, disclosure would be unfair and would not best serve the public interest. The council has also explained that it considers the councillor's request for the information not to be disclosed to be a section 10 request under the DPA.

43. Section 10 of the DPA gives individuals the right to give written notice to a data controller to require it to cease, or not begin processing their personal data if to do so would cause unwarranted substantial damage or substantial distress.

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

44. In this case, the Commissioner recognises that under schedule 2 of the DPA, the main condition for processing that may apply in this case is condition six, which states that the processing will be fair where it is for the legitimate interests pursued by the data controller or a third party, and is not unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
45. It is always the case that senior employees of a public authority, and elected officials would have a greater expectation that personal data about them may be disclosed. This is due to the responsibilities they have for public money and decision making and also to fairly and honestly represent the public. These are the considerations at the heart of this decision. To balance the rights of the data subjects with the legitimate interest in disclosure, the Commissioner has considered whether the disclosure warranted in the circumstances of a councillor's obligations to protect the council's resources, to act in accordance with the law, and to act in accordance with the trust which the public has placed in them.
46. In balancing the rights and freedoms of the individual, the Commissioner has had regard to the Tribunal decision. It is clear that by virtue of section 106, and by virtue of the fact that they are an elected representative, the individual in question should expect a greater level of scrutiny than an ordinary member of the public.

The Commissioner recognises that public figures must expect a high degree of scrutiny particularly in regard to their functions in office. Whilst recognising an individual's Article 8 rights to a private life under the Human Rights Act 1998, there may be occasions (as in the circumstances of both the Tribunal case, and this case) when what happens in a public figure's private life impairs their ability to satisfactorily perform their public duties.

47. In this case the Commissioner considers that the councillor must have had a reasonable expectation that information about their council tax arrears was disclosable as they were in arrears at the time of an annual budget setting meeting and the section 106 check. In addition to this,

the council has confirmed that the section 106 checks are carried out with the consent of the councillors.

48. However, having regard to the mitigating personal circumstances submitted by the council, it is also clear that there are personal reasons for being in the situation of council tax arrears at the time of a budget setting meeting. It is also relevant that no section 106 declaration was made by this, or indeed any councillor in a budget setting meeting in the period in question.
49. The council has accepted that disclosure is clearly in the public interest for the reasons advanced in by the Tribunal in the case of Haslam. In addition it has stated that it recognises that disclosure would improve public awareness and accountability of Councillors and their arrears status supporting the democratic process. It also stated that disclosure would support the transparency agenda allowing public scrutiny of those in elected office. Finally it said that disclosure would allow for the review of the voting ability of councillors under section 106 during the setting of council tax. The council added that disclosure would provide greater public debate relating to a councillor who has been publicly elected, and would also greatly support transparency.
50. With regard to factors in favour of withholding the information, the council has indicated that it considers that the councillor in question has exercised their rights under section 10 of the DPA, and that there are exceptional circumstances surrounding the non-payment of council tax. The council has also argued that although the individual is an elected official, they still have rights relating to privacy as afforded by the DPA and the HRA.

The council has explained that it is not able to compare the mitigating circumstances in this case with those in the Tribunal case, as these were considered in a closed element of the Tribunal. However, it remains of the view that the mitigating circumstances in this case are exceptional, and the information should therefore remain withheld. It refers to the Tribunal's comments that there may be exceptional cases in which the personal circumstances of a councillor were "*so compelling*" that their name should be protected.

51. In relation to this point, the Commissioner observes that the Tribunal also stated that even though disclosure might cause some distress to the councillor, and damage his reputation, the balance was still in favour of disclosing the information.

Conclusions

52. In balancing the rights of the individual with the legitimate interests of the public, the Commissioner has had regard to the mitigating circumstances of the councillor in accruing council tax arrears, and acknowledges that in those circumstances, some distress is likely to be caused by disclosure of the requested information. However, the Commissioner also considers that whilst there are mitigating circumstances surrounding the accrual of arrears, the complainant has not specifically requested these, and it is for the councillor to decide whether or not to provide some reasoning for being in arrears.
53. The Commissioner has also had regard to the reasonable expectations of the councillor in the circumstances of the request, particularly in view of the section 106 check. It is clear to the Commissioner that a councillor would reasonably expect disclosure of information in respect of council tax arrears at the very least in relation to a section 106 check for the purposes of determining eligibility to vote in budget setting meetings. However, whilst the council has stated that section 106 applied to the councillor, no disclosure occurred.
54. Finally, the Commissioner has considered the strong public interest in the requested information. This is highlighted by the Tribunal in Haslam as ensuring that councillors are able to fulfil the obligations of their office to protect the council's resources, to act in accordance with the law, and to act in accordance with the trust which the public has placed in them.
55. On balance, the Commissioner finds that the legitimate interests in disclosure outweigh the rights and freedoms of the individual in the circumstances of the case.
56. The Commissioner therefore finds that the council was incorrect to rely on section 40(2) to withhold the requested information.

Right of Appeal

57. 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

58. 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.
59. 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

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