

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 October 2011

Public Authority: London Borough of Bexley
Address: Bexley Civic Centres
Broadway
Bexleyheath
Kent
DA6 7LB

Decision (including any steps ordered)

1. The complainant has requested the London Borough of Bexley ('the Council') to release the details of any non contractual payments made to two Assistant Directors or Directors of the Council who he believes have resigned since 1st January 2010.
2. The Commissioner's decision is that the Council incorrectly relied on sections 40(5)(b)(i) and 41(2) of the Act in this case.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation:
 - The Council should confirm or deny whether it holds information of the description specified in the request and if it does, either release this information to the complainant or issue a fresh refusal notice in accordance with section 17 of the Act.
4. The Council 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 13 December 2010, the complainant wrote to the Council and requested information in the following terms:

"Apart from salary, choices, health emolument, expenses, annual leave, employers pension, national insurance costs and any other contractual payments, what other financial payments were made to the two Directors or Assistant Directors who have resigned from Bexley Council since 1st January 2010 and what was the total cost to Bexley Council?"

6. The Council responded on 12 January 2011. It stated that it had refused the complainant's request under sections 41(2) and 40(2) of the Act.
7. The complainant requested an internal review on 20 January 2011
8. Following an internal review the Council wrote to the complainant on 11 February 2011. It stated that it remained of the opinion that sections 41(2) and 40(2) of the Act applied in this case.

Scope of the case

9. The complainant contacted the Commissioner on 21 February 2011 to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider whether the Council had acted appropriately by refusing his request under sections 41(2) and 40(2) of the Act.
10. During the Commissioner's investigation the Council clarified that it wished to rely on sections 40(5) and 41(2) of the Act for the refusal of this request. This Notice will therefore focus on the application of these exemptions and whether the Commissioner agrees that they are engaged.

Reasons for decision

Section 40(5)(b)(i) – personal data and the exclusion from the duty to confirm or deny

11. Section 40(5)(b)(i) provides that a public authority is not obliged to confirm or deny whether requested information is held if to do so would:
 - constitute a disclosure of personal data, and
 - this disclosure would breach any of the data protection principles or section 10 of the Data Protection Act (DPA).
12. The Commissioner's analysis of whether the above criteria would be satisfied follows.

Would confirming or denying that the requested information is held constitute a disclosure of personal data?

13. The DPA defines personal information 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 his guidance on the section 40 exemption¹, the Commissioner expanded on what constituted personal data:

"Whether information is personal data will often be obvious. The two main elements of personal data are that the information must "relate to" a living individual, and that individual must be identifiable. Information will "relate to" an individual if it is:

- about them;
- linked to them;
- has some biographical significance for them;
- is used to inform decisions affecting them;
- has them as its main focus; or
- impacts on them in any way."

15. The Commissioner considers that the way in which the request is worded clearly indicates that the complainant is seeking information which he believes can be linked to two Council employees who he again believes resigned from the Council since January 2010. He considers that to comply with section 1(1)(a) of Act (i.e. to either confirm or deny holding the information) would put into the public domain information

¹http://www.ico.gov.uk/for_organisations/guidance_index/freedom_of_information_and_environmental_information.aspx

which would confirm whether or not any Director or Assistant Director who had resigned from the Council since January 2010 had received any other payments on leaving the Council's employment to those they were entitled to contractually. Information relating to an employee's resignation is information which relates to them in a working capacity and such information has the ability, in some cases depending on the circumstances, to impact on their working lives and careers going forward. The Commissioner considers it may be possible to identify the two employees concerned from other information in the public domain or other information in the applicant's possession or may become available to him through other FOI requests. The Commissioner therefore considers that to confirm or deny whether the requested information is held would in itself constitute a disclosure of personal data.

Would disclosure of this personal data breach a data protection principle?

16. The first data protection principle requires that personal data is processed fairly and lawfully and that:

"at least one of the conditions in Schedule 2 is met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met".
17. The Commissioner will first consider whether disclosure would be unfair to the individuals concerned.
18. The Council has provided very limited arguments to support its application of section 40(5)(b)(i) of the Act. The only argument it did present was that it considered the mere confirmation of whether a compromise agreement exists or not is the personal data of the individuals concerned and that this mere confirmation would release information into the public domain about the individuals' employment history.
19. It is important to highlight that the Commissioner is only considering whether the duty to confirm or deny arises in this case. For the information that has been requested here, this would simply be confirmation as to whether or not the Council holds any recorded information which contains whether or not the two employees concerned received other non contractual payments on resignation. The issue here is not whether the specific details of those payments, if indeed any were made, should be released i.e. the amount and why such payments were made only whether the Council should confirm whether or not it holds recorded information of the nature specified in the request.

20. The Commissioner has given the matter careful consideration. It is his view that the mere confirmation of whether the Council holds information which details whether or not the two employees received non contractual payments on resignation would not be unfair. The Commissioner understands that the requested information, if it is held, would be held in compromise agreements for each employee. He considers compromise agreements are entered into for many varying reasons often to address issues which can be on either side i.e. issues the employee may have with its employer and issues an employer may have with a particular employee. Agreements of this nature are usually entered into to bring such matters to an end and to reach some form of agreeable permanent solution for both sides.
21. As such compromise agreements are used to address a wide variety of matters the Commissioner does not agree that the disclosure of its mere existence, or not, would be unfair to the data subjects concerned. The mere confirmation of whether such information is held or not does not release any information into the public domain about the underlying issues which resulted in the compromise agreement and non contractual payments being made, if indeed there were any. Confirming or denying whether the requested information is held would not therefore have any significant adverse consequences for the data subjects concerned.
22. The complainant was very specific in his request in that he requested the information for two Assistant Directors or Directors he believed had resigned. When the Commissioner considers the potential disclosure of personal data relating to civil servants acting in their official capacity, he usually considers the data subject's seniority within the public authority concerned and the data subject's likely level of expectation regarding the potential disclosure of their personal data.
23. The Commissioner considers an Assistant Director or Director within a public authority will be a senior member of staff, often responsible for a number of less senior staff and for making and being involved in important decision making processes relating to the overall function of the Directorate they are in charge of and wider issues affecting the day to day running of the public authority. The Commissioner considers the more senior a civil servant is the more accountable they are for the functions they are responsible for and they should have a higher level of expectation than less senior staff that information relating to their public role may be released into the public domain.
24. The Commissioner considers that if a senior member of staff leaves the employment of a public authority on special terms they will have some expectation that very limited information relating to the termination of their employment may be released into the public domain. He accepts that the specific details within a compromise agreement constitute information which is more private to the data subject concerned and

may deserve more protection. But this is not the issue being considered here. Although the complainant asked for the details of any non contractual payments i.e. special terms agreed on resignation, the issue the Commissioner is considering in this notice is whether the Council has a duty to confirm or deny whether it holds this information or not.

25. As stated above, the Commissioner does not consider the simple confirmation of whether the Council holds information of the nature specified in the complainant's request or not would be unfair. If recorded information is held, the Commissioner considers this simple confirmation would not release any information into the public domain concerning the underlying issues which led to the non contractual payments being made. If compromise agreements were entered into, the Commissioner considers senior members of staff would have some expectation that the mere existence of such agreements may be released into the public domain.
26. The Commissioner considers there is a legitimate public interest in knowing whether or not senior civil servants have received other non contractual payments on leaving a particular public authority. Such civil servants have held senior positions within a public authority and have generally received high remunerations for the responsibilities they held. Such non contractual payments, if indeed they were made in this case, would have come from public funds and there is a public interest in knowing how public money is spent. Again, we are not considering whether the details of any payments made should be released in this notice only whether the Council is obliged to confirm whether the information is held or not. The Commissioner considers there is a legitimate public interest in knowing whether compromise agreements do exist in this case or not to promote the overall transparency and openness of the Council.
27. As the Commissioner considers it would not be unfair on the data subjects concerned to confirm whether or not the requested information is held, he is satisfied that disclosure would not cause any unwarranted intrusion into their private lives.
28. It is now necessary for the Commissioner to consider whether any of the conditions in Schedule 2 of the DPA can be met. Condition 6 is the only condition that can apply in these circumstances. This states that personal data can be disclosed if:

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

29. As the Commissioner has already decided that disclosure would not be unfair or an unwarranted intrusion into the rights and freedoms of the data subjects concerned and identified a legitimate public interest in knowing whether or not the requested information is held, he now only needs to consider whether disclosure of whether the information is held or not is necessary to meet the identified legitimate interests of the public in this case.
30. The Council has not provided details of any alternative means of meeting the identified legitimate interests in this case, as outlined in paragraph 26 above. The Commissioner therefore considers disclosure of whether or not the Council holds the requested information in this case under the Act is necessary to meet these identified interests and the overall transparency and accountability of the Council.
31. In terms of lawfulness, the Commissioner does not consider the confirmation of whether the requested information is held or not would breach a statutory bar, an enforceable contractual agreement or a confidence.
32. For the reasons explained above, the Commissioner has determined that to confirm or deny whether the requested information is held or not would not be unfair on the data subjects concerned and that condition 6 of Schedule 2 of the DPA is met in this case. He has therefore concluded that the Council is not excluded from the duty to comply with section 1(1)(a) of the Act by virtue of section 40(5)(b)(i) in this case.

Section 41(2) – information provided in confidence and the exclusion from the duty to confirm or deny

33. Section 41(2) of the Act states that the duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.
34. The Council has not submitted any detailed arguments to support its application of section 41(2) of the Act. It has only stated that it considers even confirming or denying whether it holds the requested information itself would lead to an actionable breach of confidence.
35. For a duty of confidence to exist if the information is held, the information must have been obtained by the Council from another person. The requested information in this case, if it is held, would be held in a compromise agreement between the Council and each former Assistant Director or Director.
36. It is the Commissioner's view that a written agreement between two parties contains mutually agreed terms, not information provided by one

party to the other. The requested information in this case, if it is held, does not fall within this exemption.

37. The Commissioner's view is supported by the Information Tribunal hearing of *Derry City Council v The Information Commissioner (EA/2006/0014)*. In this case the Tribunal concluded that a written agreement between two parties did not constitute information provided by one person to another and therefore a concluded contract between a public authority and a third party does not fall within the definition of this exemption.
38. As the requested information, if it were held, would not fall within the definition of information provided in confidence, to confirm or deny whether it is held cannot in itself constitute an actionable breach of confidence. Therefore the Commissioner has concluded that the Council is not excluded from the duty to confirm or deny whether the requested information is held and therefore from the duty to comply with section 1(1)(a) of the Act by virtue of section 41(2).

Right of appeal

39. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

40. 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.
41. 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