

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 7 November 2011

**Public Authority:** Nottinghamshire County Council  
**Address:** County Hall  
West Bridgford  
Nottingham  
NG2 7QP

### Decision (including any steps ordered)

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1. The complainant has requested information about investigations and disciplinary hearings involving employees in Nottinghamshire County Council's Building Cleaning Service.
2. The Information Commissioner's decision is that Nottinghamshire County Council correctly applied the exemption at section 40(2) of the Freedom of Information Act to the requested information (personal information).
3. The Information Commissioner does not require any steps to be taken.

### Request and response

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4. On 21 June 2011, the complainant wrote to Nottinghamshire County Council (the Council) and requested information in the following terms:

*"Under the Freedom of Information Act can you please supply the following:*

*A copy of Nottinghamshire County Council's staff disciplinary procedure.*

*For staff employed within Nottinghamshire County Council's Building Cleaning Services including schools since 1 February 2011 to date:*

1. *How many staff have been subject to management and/or audit investigations as regards potential disciplinary proceedings;*
2. *Copies of any management and/or audit investigations, suitably redacted;*
3. *How many formal disciplinary hearings have been held and the reasons why eg theft, unauthorised use of council vehicles etc.*
4. *The result of those formal disciplinary proceedings eg written warning, dismissal etc.*

*Can you please supply information requested at 2 for staff employed within the Ashfield area and, separately, for staff employed within the Bassetlaw area”.*

5. The Council responded on 4 July 2011. It disclosed the number of disciplinary cases in the requested timeframe, together with the reason and result of those cases. It refused to provide any copies of management/audit investigations relating to those cases, citing section 40 of FOIA (personal information).

6. The complainant wrote back on 4 July 2011, telling the Council:

*“I asked for how many investigations not how many disciplinary procedures had been held. I would therefore ask if there have been any management/audit investigations that may not have resulted in disciplinary procedures, the thrust/reason for the investigation and the reason why a disciplinary hearing was not held”.*

7. The Council responded to this new request on 6 July 2011, relying on section 40 (personal information) as its reason for refusing to provide the requested information.

8. The complainant appealed this decision, telling the Council:

*“similar information has already been given where the investigation resulted in disciplinary action. I am only asking for the same level of information...”.*

9. Following an internal review the Council wrote to the complainant on 25 July 2011. It upheld his appeal in part, releasing the fact that there had been one audit investigation in the time period specified in his request. It also disclosed information about that investigation, insofar as it related to operational matters. However, it told him that it would neither confirm nor deny whether that investigation led to any disciplinary

proceedings and that it was withholding any further information in response to his request under section 40 of FOIA (personal information).

## Scope of the case

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10. The complainant contacted the Information Commissioner to complain about the way his request for information had been handled. Having been asked to clarify the nature of his complaint, he explained that it was specifically in relation to:

- the Council's failure to say if a disciplinary hearing was held in respect of the audit investigation;
- the Council's refusal to provide the result of the hearing, if a disciplinary hearing was held; and
- its refusal to provide the reason(s) why no hearing was held, if no disciplinary hearing took place.

11. The Information Commissioner asked the Council to clarify its internal review response, in particular its statement:

*"The Council will neither confirm nor deny whether this investigation led to any disciplinary proceedings".*

12. The Council confirmed that it was relying on section 40(2) (personal information). It argued that, in its view, whether or not anyone in its employment has been subject to disciplinary procedures is personal information.

13. As a result of this explanation, the Information Commissioner is satisfied that the Council holds information within the scope of the request but is withholding it on the basis that disclosure would be in breach of the first principle of the Data Protection Act 1998 (DPA).

14. Accordingly the Information Commissioner considers the scope of his investigation to be with respect to the Council's citing of section 40(2).

## Reasons for decision

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15. Section 40(2) of FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles.
16. In order to reach a view on the Council's arguments in this case, the Information Commissioner has first considered whether the withheld information is personal data.

### *Is the requested information personal data?*

17. Section 1 of the DPA defines personal data as data which relates to a living individual, who can be identified:
  - from that data, or
  - from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
18. The Information Commissioner is satisfied that all of the withheld information falls within the definition of personal data as set out in the DPA because it 'relates to' information about one or more identifiable living individuals who have been the subject of an audit investigation.

### *Would disclosure breach one of the Data Protection principles?*

19. The Council has argued that the withheld information is exempt under section 40(2) because disclosure would breach the first data protection principle.
20. The first data protection principle has two components:
  - personal data shall be processed fairly and lawfully; and
  - personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

### *Would disclosure be fair?*

21. In considering whether disclosure of the information requested would comply with the first data protection principle, the Information Commissioner has first considered whether disclosure would be fair. In assessing fairness, he has considered:
  - the nature of the information itself;

- the reasonableness of the expectations of the individual(s) about what would happen to their information; and
- the possible consequences of disclosure - whether disclosure would cause any unnecessary or unjustified damage or distress to the individual(s) concerned.

22. He has then balanced against these the general principles of accountability and transparency, as well as any legitimate interests which arise from the specific circumstances of the case.

*The nature of the information*

23. The withheld information in this case relates to an audit investigation and whether disciplinary proceedings followed.

*Reasonable expectations of the data subject(s)*

24. Disclosure of information under FOIA is disclosure to the public at large and not just to the complainant.

25. The Information Commissioner recognises that people have an instinctive expectation that a public authority, in its role as a responsible data controller, will not disclose certain information and that they will respect its confidentiality. For example, he considers that information relating to an internal investigation or disciplinary hearing will carry a strong general expectation of privacy.

26. In this case, the Information Commissioner is satisfied that the data subject(s) would have had a reasonable expectation that their personal information would be kept confidential and not passed on to third parties without their consent.

27. In response to the Information Commissioner's question about whether or not it had sought consent to disclosure, the Council confirmed that consent had not been sought: it told him that it had been assumed that it would not be given. In this respect, the Information Commissioner notes that, although he considers it good practice to do so, there is no obligation on a public authority to seek a data subject's consent to disclosure.

*The consequences of disclosure*

28. Arguing in favour of disclosure, the complainant said in correspondence with the Council that:

*"redaction should be sufficient to protect any personal information".*

29. The complainant also argued that he had been provided previously, in response to a different request for information, with information of the type requested in this case. The Information Commissioner notes, however, that in the circumstances of that disclosure there had been multiple audit investigations in the timeframe specified in the request.
30. In this respect, the Information Commissioner accepts the Council's explanation that, depending on the circumstances, where a request for information relates to more than one disciplinary hearing, that makes it:

*"more difficult to identify, with any certainty, a particular individual with a particular case".*

31. Arguing in favour of withholding the requested information in this case, the Council told the Information Commissioner that if the withheld information was released into the public domain it may be possible for someone with local knowledge to determine who was involved in the investigation, even if the information was redacted. It also explained to the Information Commissioner why it considered that disclosure in this case could result in harassment *"causing unnecessary and unjustified stress or damage"*.
32. In considering the opposing views in this case, and taking into account the fact that the information at issue relates to a specific audit investigation, the Information Commissioner considers that disclosure of any information about the investigation and its outcome is likely to lead to the identification of the individual(s) concerned. In this respect, he accepts the Council's argument that disclosure may have an unjustified adverse effect on the individual(s) concerned.

#### *The legitimate public interest in disclosure*

33. Notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, depending on the circumstances of the case it may still be fair to disclose requested information if there is a more compelling public interest in disclosure.
34. In considering 'legitimate interests', the Information Commissioner's view is that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
35. The Council has acknowledged that a balance has to be struck between a public authority's duty to be transparent and accountable and its duty to respect its employees' right to privacy.
36. In this case, the Council told the Information Commissioner:

*"We do not consider that there are any major issues of wider or national importance in favour of release which would ... justify a breach of the Data Protection Principles".*

*Conclusion*

37. In light of the nature of the information and the reasonable expectations of the individual(s) concerned, the Information Commissioner is satisfied that release of the withheld information would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the data subject(s). He considers these arguments are persuasive and outweigh any legitimate interest in disclosure. He has therefore concluded that it would be unfair to disclose the withheld information - in other words, disclosure would breach the first data protection principle. He therefore upholds the Council's application of the exemption at section 40(2).
38. As the Information Commissioner has determined that it would be unfair to disclose the requested information, he has not gone on to consider whether disclosure is lawful or whether one of the conditions in Schedule 2 of the DPA is met.

## Right of appeal

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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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://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** .....

**Jon Manners**  
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