

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 June 2012

Public Authority: Shropshire Council
Address: Shirehall
Shrewsbury
SY2 6ND

Decision (including any steps ordered)

1. The complainant requested information from Shropshire Council (the Council) about a telephone call which resulted in an internal investigation into the Council's tender evaluation processes. The Council disclosed some information but withheld the remainder citing the personal information exemption. The Information Commissioner's decision is that the Council correctly applied the exemption and requires no steps to be taken.

Request and response

2. Having participated in a tendering process for the provision of a survey service to Shropshire Council (the Council), the complainant wrote to the Council on 4 July 2011 and requested information about a challenge to that process:

"Additionally, we believe we have a legitimate Freedom of Information Interest in learning the details of how the initial challenge was made, by whom and who, and look forward to receiving this information in due course".

3. In further correspondence with the Council dated 20 July 2011, the complainant told the Council:

"Our 'Freedom of Interest' request must now receive the Council's most urgent attention and include all of the relevant documentation. We need to learn the details of how the initial challenge was made, by whom and why."

4. That correspondence appears to suggest that there was an error in the original request of 4 July 2011, the phrase "by whom and **who**" on the first occasion appearing as "by whom and **why**" on the second occasion.
5. Various correspondences between the complainant and the Council followed: the Information Commissioner (the Commissioner) has set out below a summary of what he considers to be the key elements of that correspondence regarding this complaint.
6. The Council wrote to the complainant on 23 September 2011 explaining that the matter was referred to Internal Audit following an anonymous telephone call. (On 23 December 2011, the Council clarified that an anonymous phone call was made to the Fraud and Corruption Hotline on 21 March 2011).
7. On 28 September 2011, the complainant asked the Council for *"additional information about the call"*.
8. On 26 October 2011, the Council provided the complainant with further information about the telephone call and told him that:

"There was an allegation of corruption around the awarding of [the contract]....a rough note of the telephone conversation was made at the time of the call on the pro forma Hotline call record".
9. With respect to the name and number of the caller, it told the complainant:

"These details were not given and therefore not recorded".
10. The Council provided the complainant with a redacted copy of the notes taken about the call, citing section 40(2) (personal information) to withhold the remaining information which, in the Council's view:

"could potentially be used, with other information, to identify the anonymous caller".
11. On 31 October 2011, the complainant wrote to the Council expressing dissatisfaction with its handling of his request and raising further issues about the telephone call.
12. The Council responded on 14 November 2011 confirming its view that the requested information was exempt from disclosure by virtue of section 40(2).
13. On 23 December 2011 the Council wrote to the complainant and confirmed that:

"this review process cannot add anything further".

14. On 5 January 2012 the complainant told the Council that he wanted full disclosure of the note recording the telephone call. The Council responded on 27 January 2012, upholding its decision that the withheld information is exempt from disclosure under section 40(2) of FOIA (personal information).

Scope of the case

15. The complainant contacted the Commissioner to complain about the way his request for recorded information about the telephone call had been handled:

"In simple terms, you can see that the Council are in possession of a name and other information They refuse to provide this information...They have even ignored their own whistle blowing policy to protect this individual".

16. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA. It is therefore not within his remit to comment on the complainant's concerns about the Council in respect of its whistleblowing policy.
17. The complainant referred to the Council being in possession of the name of the person who made the telephone call. However, the Commissioner notes that the Council advised the complainant on 23 December 2011 that the name of the caller is not recorded:

"I have reviewed the unredacted note and can confirm that the name of the caller was not given or recorded".

18. The Commissioner has seen the withheld information in this case - in the form of a "hotline call record" recorded by an employee of the Council. For the purposes of this decision notice, the Commissioner will refer to that record as "the telephone note".
19. The telephone note records a call to the Council from an anonymous caller. In describing the subject of the call, the Council advised the complainant that the call was about "*flaws in the Council's processes*". It also stated that it appears that the telephone call "*prompted a formal review of the tender*", an investigation that focused on the Council's internal processes for the evaluation of the tenders.

20. The Commissioner considers the scope of his investigation to be the Council's citing of section 40(2) in relation to the withheld information contained in the telephone note.

Reasons for decision

Section 40 personal information

21. 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".

22. The exemption provided by section 40(2) is an absolute exemption in combination with section 40(3)(a)(i) or 40(3)(b). This is where disclosure of information which falls under the definition of 'personal data' contained in section 1(1) of the Data Protection Act 1998 (the "DPA") would breach any of the data protection principles.

23. In order to decide whether or not this exemption is engaged, the Commissioner has first considered whether the requested information is the personal data of one or more third parties and whether the release of that information would be fair and lawful.

Is the information personal data?

24. Personal data is defined in section 1(1) of the Data Protection Act (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 intention of the data controller or any other person in respect of the individual.'

25. In other words, section 1(1) of the DPA provides two criteria that must be fulfilled for information to constitute 'personal data'. The information must relate to an individual, and that individual must be identifiable either from that information directly, or from that information combined with other information available to the holder of that information.

26. The Commissioner is satisfied that the withheld information does not include the name of an individual. However, while a name is the most common means of identifying someone, in the Commissioner's view, simply because the name of an individual is not known, that does not mean that that individual cannot be identified.

27. The Council told the complainant:

"It is not clear to the Council whether it would be possible to identify the anonymous caller if all the information included in the hand-written note was disclosed to you..... The analogy I would use would be an individual's postcode. On its own it might not be sufficient to identify someone, but the postcode combined with other information, might be sufficient. That is the situation here."

28. In this case, the Commissioner considers it plausible for those who have some knowledge of the individual to identify them either directly or indirectly as a result of the information and the context in which the information was recorded. In his view, the information is sufficiently detailed that the identity of the third party to whom the information refers could be deduced from it.

29. As he has concluded that the identity of the data subject could be established, the Commissioner is satisfied that the requested information constitutes the personal information of a living individual other than the applicant.

30. The Council told the complainant on 14 November 2011:

"We consider that information contained within the referral, whilst not identifying the caller from information we hold, could potentially be used with other information held by someone else to identify the caller".

31. On 27 January 2012 the Council told the complainant:

"We do NOT know the identity of the caller".

32. In that correspondence, the Council also told the complainant:

"The note does reveal some details about, not the caller, but the person who seems to have precipitated the allegation".

33. The Commissioner notes that the complainant asked the Council whether the problem that was reported was due to first or second hand knowledge. The Council responded saying that this was not known as the call was made anonymously.
34. In the Commissioner's view, the correspondence between the complainant and the Council, and the submissions provided by the Council during his investigation, provide a somewhat confusing picture as to the number of people considered to be involved in raising the matter with the Council. He accepts that, to a greater or lesser extent, this may be due to the fact that the call was made anonymously.
35. The Commissioner considers there could potentially be two roles involved – the person making the allegation and the person making the telephone call. He will refer to these as "the third party source" and "the anonymous caller".
36. In the Commissioner's view, having viewed the withheld information, it cannot be stated with sufficient certainty whether or not the anonymous caller and the third party source are one and the same person. He has therefore considered both scenarios.
37. The question in this case, therefore, is whether disclosure of the requested information contained within the telephone note - which the Commissioner accepts is personal data - either on its own or in conjunction with other available information, would itself give rise to the identification of either, or both, the anonymous caller or the third party source. If it would, then, in the Commissioner's view, disclosure will amount to a disclosure of personal data for the purposes of the FOIA.

Would disclosure breach one of the data protection principles?

38. Having accepted that the requested information constitutes the personal data of a living individual, other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles. He considers the first data protection principle to be most relevant in this case.

The first principle

39. The first data protection principle states that:

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

(a) at least one of the conditions in Schedule 2 is met..."

Would it be fair to disclose the requested information?

40. In determining whether a disclosure is fair under the first principle of the Data Protection Act 1998 for the purposes of section 40 of the FOIA, the Commissioner considers it appropriate to balance the consequences of any disclosure and the reasonable expectations of the data subject with general principles of accountability and transparency.

Reasonable expectations of the data subject

41. The Council told the complainant on 26 October 2011:

"The caller was offered the opportunity to leave their details but declined on two occasions within the call; they expressly wished to remain anonymous".

42. The Council told the Commissioner during the course of his investigation:

"The caller wished to remain anonymous and we consider that we have provided the right balance of information that can be disclosed without risking the potential inappropriate disclosure of personal information".

43. The Commissioner accepts that where a person informs a public authority about their concerns, and expressly states that they wish to remain anonymous, they would not normally expect their identity, or identifying information about them, to be disclosed.
44. With respect to the third party source, in the Commissioner's view there is no evidence to indicate that they are aware that identifying information about them has been provided to the Council.
45. In the Commissioner's view therefore, neither the anonymous caller nor the third party source would reasonably expect information about themselves to be disclosed into the public domain.

Has the data subject consented to the disclosure?

46. In answering the question of fairness, the Commissioner recognises the importance of considering whether the data subject has consented to the disclosure and/or whether the data subject has actively put some or all of the requested information into the public domain.
47. The Council told the complainant that it did not have permission to disclose the identity of the person "*who seems to have precipitated the allegation*".

Consequences of disclosure

48. In looking at the consequences of disclosure on the data subject, the Commissioner has considered what those consequences might be for the person whose personal data is disclosed. In doing so, he has considered the nature of the information itself and the climate in which the information would be disclosed.

The anonymous caller

49. The Commissioner is not satisfied that the Council holds recorded information to enable the anonymous caller to be identified. He therefore concludes that, for the anonymous caller, there is no information to be disclosed and therefore no consequences of disclosure.

The third party source

50. In this case, the Commissioner is satisfied, by cross referencing the withheld information with information already in the public domain, a member of the general public could identify the individual whose personal data is recorded in the telephone record. He therefore considers that one consequence of disclosure could be that the data subject – who may be the source of the allegation - is identified.

51. Where the information constitutes the personal information of an, as yet, unidentified individual, the Commissioner considers it would not be fair to disclose the information due to the plausible risk that they can be identified.

52. In reaching this decision, he has taken into account the specific circumstances of this case. In his view, given the manner in which the requested information exists, namely by way of an anonymous telephone call, the Commissioner considers it plausible that the individual whose personal information is in the telephone note may not be aware that their details are contained therein. Nor is he satisfied that the authority of the source of the information has been evidenced.

53. In light of the nature of the information, and the circumstances of the case, the 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.

54. Although it has not provided any evidence in relation to the wider consequences of disclosing the withheld information, in the Commissioner's view, disclosure could also have significant wider consequences for the Council, namely a loss of confidence that the identity of individuals who relay sensitive information to the Council will

not be disclosed. This could impact on the Council's ability to function effectively, for example if individuals would be less likely to provide information to the Council if they thought their details could be made public.

General principles of accountability and transparency

55. Notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
56. While there may be a general public interest in accountability and transparency – for example, knowing from whom the Council obtains information and how it is used – the Commissioner has not identified any specific public interest in the withheld information being disclosed. The Commissioner acknowledges that the complainant has a personal interest in disclosure of the information but this is not the same as a public interest in disclosure.

Conclusion

57. While he understands the complainant's reasons for wanting access to the withheld information, the Commissioner has taken into account the fact that the identity of the applicant and the purpose of the request are irrelevant to consideration of a freedom of information request. Therefore, he must consider whether or not it is appropriate for the information to be released to the general public.
58. In this case, the Commissioner considers that the general public interest in disclosure for the purposes of furthering accountability and transparency are outweighed by the reasonable expectations of the data subject and the consequences of disclosure. The Commissioner has therefore determined that in this case the disclosure of information that would divulge the identity of the data subject would be unfair and would breach the first data protection principle. As such, he considers that section 40(2) is engaged and that the Council was correct to withhold the information.
59. As disclosure would not be fair, the Commissioner has not gone on to consider whether disclosure is lawful or whether one of the Schedule 2 DPA conditions is met. However, his initial view is that no Schedule 2 condition would be met to justify disclosure.

Right of appeal

60. 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

61. 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.

62. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF