

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 May 2012

Public Authority: Sheffield City Council
Address: Town Hall
Pinstone Street
Sheffield
S1 2HH

Decision

1. The complainant requested a copy of an independent review (the "Newton Report") into the circumstances of the fraud committed by the former manager of the South Yorkshire Trading Standards Unit.
2. Sheffield City Council (the "council") refused to provide the information on the grounds that it was intended for future publication and because it considered that the information was 'commercially sensitive'.
3. The Commissioner's decision is that the public authority has failed to demonstrate that the exemptions are engaged. The Commissioner has decided that a small quantity of information contained within the Newton Report should be withheld because it constitutes an individual's sensitive personal data.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information, subject to the redactions identified in the confidential annex.
5. 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

6. When South Yorkshire County Council was established in 1974, responsibilities for trading standards or 'weights and measures' was transferred from the 4 existing local authorities – Barnsley, Doncaster, Rotherham and Sheffield to the new county council. The South Yorkshire Trading Standards Unit (the "Unit") was set up at the same time.
7. In 1986, following the abolition of the metropolitan counties, the four local authorities took on responsibility for running the Unit and a joint committee, comprised of members from each authority was established to oversee its operation. The Unit was headed by Mike Buckley, general manager of the Unit since 1976¹.
8. Following the death of Mr Buckley in 2005 it emerged that the Unit had, for a number of years, been incurring substantial losses. The losses accruing to the 4 local authorities amounted to some £14 million. It transpired that the Unit head had been concealing the losses via fraud and false accounting. The police and then the Serious Fraud Office investigated and a number of third party agents involved in the fraud were prosecuted on false accounting charges². At the time the request was made, the 4 authorities were engaged in negotiations regarding the proportion of each party's culpability for the losses.
9. An independent review of the circumstances which gave rise to these matters has been conducted and the final draft of the resulting report – the "Newton Report", was completed in late 2010.

Request and response

10. On 13 October 2011, the complainant wrote to the council and requested a copy of the Newton Report.
11. The council responded on 24 October 2011 and stated that the information was being withheld because "...it is commercially sensitive

¹ See: <http://modern.gov.rotherham.gov.uk/mgConvert2PDF.aspx?ID=12169>

² For further details, see here: <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/three-sentenced-after-pleading-guilty-to-false-accounting-at-south-yorkshire-trading-standards-unit.aspx>

at the moment and its disclosure would undermine the negotiations currently being undertaken.” The council confirmed that, in withholding the information it was relying upon the exemption in section 43 (commercial interests) of the FOIA. It confirmed that the Newton Report would be published in “due course” and that it was also relying on section 22 (information intended for future publication) in refusing the request.

12. The council conducted an internal review and on 18 December 2011 it advised the complainant that it was maintaining its original position. A further review, which again upheld the original handling of the request, was sent to the complainant on 16 March 2012.

Scope of the case

13. The complainant contacted the Commissioner to complain about the way his request for information had been handled. They specifically asked the Commissioner to consider:
 - whether the council had correctly withheld the requested information and;
 - the time taken by the council to conduct its internal review.
14. The Commissioner has confined the scope of his investigation to these matters.

Reasons for decision

Section 43(2) – Prejudice to Commercial Interests

15. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.
16. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. “Likely to prejudice” means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. “Would prejudice” places a much stronger evidential burden on the public authority and must be at least more probable than not

17. The council has confirmed that it considers that disclosure of the information *would* result in the prejudice proposed.
18. In applying the exemption, the council explained that negotiations between Sheffield, Rotherham, Barnsley and Doncaster relating to the proportion of each authority's liability for the losses were ongoing. It explained that the discussions were at a "commercially sensitive" stage and they remain confidential.
19. In support of its decision to withhold the information, the council explained that the matters under discussion had been the subject of much public and press speculation. According to the argument put forward by the council, these negotiations would be prejudiced if ill-informed speculation causes pressure and anxiety to politicians.
20. In accordance with the code of practice issued under 45 of the FOIA, the council confirmed that it contacted the 3 other authorities involved in this matter. The council confirmed that the outcome of this consultation was an agreement amongst all parties that the information should not be disclosed until negotiations are complete. The Commissioner has confined his considerations to the arguments as represented by the council.
21. The Commissioner's guidance defines commercial interests in the following way:

*"A commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services. The underlying motive for these transactions is likely to be profit, but this is not necessarily the case, for instance where a charge for goods or the provision of a service is made simply to cover costs."*³
22. The interests identified by the council relate to negotiations between the 4 authorities responsible for the Unit regarding the distribution of financial culpability for the losses. The parties whose interests would be affected are, therefore, each of the 4 authorities. However, beyond stating that disclosure of the Newton Report would have an impact on

³ Published on the ICO website

here: http://www.ico.gov.uk/for_organisations/guidance_index/~//media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.ashx

these negotiations, the council has not provided any explanation of the specific nature of the prejudice which would be caused, the commercial nature of the prejudice and the causal link with disclosure of the Newton Report.

23. The environment within which commercial interests operate is ordinarily a competitive one in which the disclosure of unique bargaining terms can undermine or result in prejudice to trading positions. The scenario under consideration does not share this feature - the only parties involved in the negotiations and with any influence over their outcome are the 4 constituent authorities, each of which have had sight of the Newton report. So, regardless of the actual content of the Newton Report, the council has not demonstrated that the environment into which the information would be disclosed is one which would produce the outcomes described in the exemption.
24. There is a distinction to be drawn between commercial interests and financial interests. While there will be cases where prejudice to the financial interests of a public authority may affect its commercial interests, the two types of interests cannot always be identified.
25. In this instance, whilst it is clear that the negotiations between the authorities relate to and will have an impact on their financial interests – i.e., the proportion of their culpability for the Unit's losses, the council has not explained how, in this situation, this affects any of the parties' commercial interests.
26. The council has also failed to explain how public and press speculation about the negotiations between the authorities would be "ill-informed" by the disclosure of the information and how this, in turn, would result in prejudice to any of the parties' commercial interests.
27. Having considered the content of the withheld information and the arguments provided, the Commissioner considers that the council has failed to identify how disclosure of the Newton Report would result in prejudice to any party's commercial interests.
28. He also considers that the negotiations referred to by the council relate to financial rather than commercial interests and so that, in any event, the withheld information does not fall within the scope of the exemption. As he has concluded that the exemption is not engaged he has not gone to consider the relevant public interest arguments.

Section 22 – Information intended for future publication

29. Section 22 of the FOIA says that information is exempt if, at the time a public authority receives a request for it:

- the public authority holds it with a view to its publication;
- the public authority or another person intends to publish the information at some future date, whether determined or not; and
- in all the circumstances it is reasonable to withhold the information prior to publication.

30. In reviewing the council's application of this exemption, the Commissioner has considered each of the above requirements and reached the following conclusions. He has also referred to his own guidance⁴.

Information held at the time of the request

31. The Commissioner finds that the information was held at the time the request was received.

Intention to publish at the time request received

32. This exemption only applies when the information is held with a view to publication at the time the request for it is received. In this case, the council has stated that it is its firm intention to publish the Newton Report. The Commissioner finds that this was the situation when the request was received.

With a view to publication

33. The Commissioner interprets the words in section 22 of 'with a view to' to indicate an intention has been made to publish or at the very least that the information is held in the settled expectation that it will be published.

34. Publication requires the information to be generally available to the public. It is not enough if the intention is to make it available to a restricted audience. If during the course of the preparation of the information for publication some material will be redacted, section 22 will not apply to the redacted information. This is because the public authority will no longer hold the information with a view to publication in the future.

⁴ Published on the ICO website
here: http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_22_information_intended_for_future_publication.ashx

35. In this instance, the council has confirmed that the withheld information will be published in its current form and has not indicated that any redactions will be made.

At some future date (whether determined or not)

36. The publication date does not need to be definite for the exemption to apply. As long as a decision has been made that the information requested will be published at some time in the future or there is a settled expectation that this will happen, the exemption can be considered.
37. The council has confirmed that the withheld information is a final draft of the Newton Report and that the intention is for it to be published as soon as negotiations between the 4 authorities (or related litigation) have concluded. The Commissioner has, therefore, concluded that the information falls within the scope of the exemption. He has gone on to consider whether the exemption is engaged.

Reasonable in all the circumstances to withhold the information prior to publication

38. In order to engage section 22 of the FOIA, a public authority must first determine whether or not it is reasonable in all the circumstances to withhold the requested information prior to publication before considering the public interest test.
39. In considering the reasonableness of withholding the information, the Commissioner's guidance states that authorities should first give separate consideration to whether or not such an approach is "...sensible, in line with accepted practices, and fair to all concerned to withhold the information prior to publication."⁵
40. The Commissioner's guidance also advises that, in considering what is reasonable in all the circumstances, authorities may also wish to consider:
- Is it the right decision to manage the availability of the information by planning and controlling its publication?
 - Is it necessary to avoid any advantage that would be obtained by the requester in obtaining the information prior to general publication?

⁵ Ibid.

- Does the timetable properly require internal or limited consideration of the information prior to its public release?
41. The council has not provided explicit arguments to demonstrate that it is reasonable in all the circumstances to withhold the information prior to publication.
 42. It has, however, argued that disclosure of the Newton Report would undermine the “spirit of openness and engagement” which is necessary to see a successful conclusion to the negotiations between the 4 authorities. It has also argued that the information should not be disclosed whilst these negotiations are at a “commercially sensitive” stage
 43. The Commissioner considers that the council’s arguments for the reasonableness of withholding the information prior to publication are entirely reliant upon the validity of the arguments it has provided in respect of section 43(2). It would, therefore, only be reasonable to withhold the information if it were likely that disclosure would result in prejudice to the commercial interests of any of the parties involved in the negotiations.
 44. As the Commissioner has already found that the council has, in relation to its application of section 43(2), failed to demonstrate that this is the case, he has concluded that it has also failed to demonstrate that withholding the information prior to publication is reasonable in all the circumstances.
 45. As the Commissioner has concluded that the exemption is not engaged he has not gone to consider the relevant public interest arguments.

Section 40 – personal data

46. The Commissioner is under no positive duty to pro-actively consider exemptions or exceptions which have not been referred to by a public authority but may do so if it seems appropriate to him in any particular case and after carefully taking into account his obligations under the Human Rights Act 1998 and his jurisdiction for data protection in assessing the risks associated with disclosure.
47. In this instance, the Commissioner has concluded that the information withheld by the council should be disclosed; however, in view of his obligations under the Data Protection Act 1998 (DPA), he has considered whether the information to be disclosed contains any sensitive personal data and whether it would be fair to disclose this information.

48. Section 40(2) of the FOIA provides an exemption for information which is the personal data of any third party where disclosure would breach any of the data protection principles contained in the DPA.

49. Section 1 of the DPA defines personal data 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.'

50. Section 2 of the DPA defines "sensitive personal data" as personal data consisting of information as to a range of categories, including an individual's racial origin, their political opinions or their physical or mental health.

Does the Newton Report contain 'sensitive personal data'?

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

52. The Commissioner has identified a small quantity of information (specified in the confidential annex to this decision notice) which falls within the definition of personal data as set out in the DPA. The Commissioner is further satisfied that this information is sensitive personal data as it relates to an individual's mental or physical health. He has gone on to consider whether it would be fair to disclose this information.

Would disclosure of the information be fair?

53. The first data protection principle requires that the processing of personal data is fair and lawful 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 met.

54. In deciding whether disclosure of this sensitive personal data would be unfair the Commissioner has taken into account the following factors:
- The individual's reasonable expectation of what would happen to their personal data.
 - What damage or distress would the individual suffer if the information was disclosed?
 - Whether there is a legitimate public interest in disclosure.
55. The Commissioner considers that, in most cases the very nature of sensitive personal data means it is most likely that disclosing it will be unfair. As it is information of the most private and personal nature, the reasonable expectation of the data subject is that such information would not be disclosed.
56. However, regardless of the 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. For example, in a case involving the MPs' expenses the Information Tribunal commented that:
- '79. ...in relation to the general principle application of fairness under the first data protection principle, we find:*
- (..) the interests of data subjects, namely MPs in these appeals, are not necessarily the first and paramount consideration where the personal data being processed relate to their public lives'⁶*
57. 'Legitimate interests' can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.
58. In this instance, the Commissioner considers that the information in question does not relate to the wider public interest which is served by the disclosure of Newton Report, nor does he consider that its disclosure

⁶ The Corporate Officer of the House of Commons v Information Commissioner & Norman Baker MP (EA/2006/0015 & 0016)

would further this public interest or the general principles of transparency and accountability.

59. The Commissioner notes that the information in question falls under section 2(e) of the DPA as it relates to the data subject's mental or physical health. As such, by its very nature, he considers that this is information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information is likely to have a detrimental or distressing effect on the data subject, the Commissioner has concluded that it would be unfair to disclose the requested information. Therefore the Commissioner does not need to consider whether any of the conditions in Schedule 2 or 3 are met.

Other matters

60. Although they do not form part of this decision notice, the Commissioner wishes to note the matters below.

Section 45 code of practice – internal reviews

61. The code of practice issued under section 45 of the FOIA (the "code") recommends that internal reviews should provide a fair and thorough review of decisions and that they should be completed "promptly"⁷. The Commissioner's guidance recommends that reviews should ordinarily be completed within 20 working days, with additional time to be taken only in complex cases⁸.
62. The Commissioner notes that, in this instance, the council's internal review took 40 working days. Having viewed the content of the review, the Commissioner does not consider that the additional time taken by the council was warranted. In future, the Commissioner expects that the council will conduct reviews in accordance with the code and with his own recommendations.

⁷ The code is available online here:

<http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/foi/reference/impreg/codepafunc.htm>

⁸ Published on the ICO website here:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/internal%20reviewsv1.pdf

Right of appeal

63. 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

64. 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.
65. 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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