

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 December 2012

Public Authority: Broxbourne Borough Council

Address: Borough Offices
Bishops' College
Churchgate
Cheshunt
Waltham Cross
Hertfordshire
EN8 9XQ

Decision (including any steps ordered)

1. The complainant requested information from Broxbourne Borough Council ("the council") concerning the council's remuneration panel. The council provided some information but withheld other information using the exemptions under section 40(2), 36 and 43 of the Freedom of Information Act 2000 ("the FOIA").
2. The Commissioner's decision is that the council correctly withheld all the information using section 40(2). However, he found that the council breached section 1(1)(a), 1(1)(b), 10(1), 17(1) and 17(1)(a) (b) (c) and 17(7)(b).
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 7 October 2011, the complainant requested information from the council in the following terms:

"Please disclose the following information about the council's Remuneration Panel:

- (1) *All instruments establishing or amending the remit or composition of*

- the panel*
- (2) *All agendas*
- (3) *All records of decisions, minutes of proceedings and lists of attendees"*
5. The council responded on 2 December 2011. It said that it had attached the information requested.
 6. The complainant requested an internal review on 22 December 2011. He said that he believed the council had not identified all the information it held relating to his request. He also complained about unexplained redactions in the disclosed material and about the way the request had been handled procedurally.
 7. The council completed an internal review on 2 March 2012. It offered its apologies. It said that it had made redactions under section 40(2) of the FOIA. It disclosed some additional information but said that to disclose further information would exceed the costs limit under the FOIA because of the time it would take to make redactions.
 8. The complainant wrote further to the council again on 5 March 2012. He said that he wanted the rest of the information relevant to his request and that he did not agree that the council had correctly refused to supply this information by referring to the cost limit.
 9. The council wrote to the complainant on 4 April 2012 and it said that it had attached further relevant documents. It said that it had redacted information using section 40(2) and 36(2)(b) of the FOIA.
 10. On 9 May 2012, the complainant replied and queried whether there had been some unmarked redactions. He also asked for the remainder of the information.
 11. The council replied and clarified that there were no unmarked redactions. On 24 May 2012, it said that it had sent all the panel papers prior to 2009 with redactions under section 40(2) and 36(2)(b).
 12. The complainant replied on 24 May 2012 and requested clarification on a number of points, to which the council had not responded when the Commissioner's investigation commenced.

Scope of the case

13. On 28 March 2012, the complainant contacted the Commissioner to complain about the way his request for information had been handled.

He confirmed that he wished the Commissioner to consider the following:

- The fact that the council had still not provided copies of all the panel minutes in question and had not responded to specific queries raised about this in an email dated 24 May 2012
 - Whether the council had correctly sought to withhold information using exemptions
 - Whether the council had breached the FOIA in the way it had handled the request
 - The council's failure to understand the fees regulations relating to section 12
 - The complainant expressed concern about the way in which the council had indicated the physical extent of each redaction and the relevant exemption in each case
 - Whether the council had committed an offence under section 77 of the FOIA by deliberately failing to provide the information requested
 - Whether the Commissioner should issue an enforcement notice because of the way in which the request has been handled
14. For clarity, during the Commissioner's investigation, the council accepted that it did hold additional information that it had not made available to the complainant. This information was provided during the course of the Commissioner's investigation, thereby resolving that part of the complaint.
15. The Commissioner has considered the last four bullet-pointed concerns above in the Other Matters section of this notice below.

Reasons for decision

Was more information held?

16. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request, and if that is the case, to have that information communicated to him.
17. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. He will also consider the actions taken by the authority to check that the information was not held and he will consider if the authority is able to explain why the information was not held. For clarity, the Commissioner is not expected to prove categorically whether the

information was held. He is only required to make a judgement on whether the information was held "on the balance of probabilities".¹

18. As mentioned in the scoping section of this notice, the complainant complained to the Commissioner about the fact that the council had not responded to specific concerns he had raised with the council on 24 May 2012. In particular, he asked:
- Whether the remuneration panel ever met prior to 10 May 2002.
 - Whether agendas exist for the panel meetings prior to 25 April 2003.
 - Whether information was held on the subject of whether the panel came into being by virtue of any instrument (letter, memo, agenda, invitation, terms of reference, or constitution) other than under the "Finance and Personnel Committee" terms of reference dated November 1999 that had already been provided.
 - Whether any other agendas or minutes have been withheld or inadvertently omitted including in particular: (a) any minutes of 16 August 2005 (b) any agenda of 13 October 2005 (c) any minutes of 13 October 2005 and (d) any agenda of 20 October 2005
19. The council confirmed that it did not hold any extant records of meetings of the remuneration panel prior to 10 May 2002. The council explained that there had been a change to the council's constitution and the remuneration panel had not therefore met prior to that date. It also said that it had not located any agenda for meetings prior to 25 April 2003. The council said that it was possible that these agendas had been deleted given their age. The council also said that it was possible that the agendas had been over-written as a result of the council's practice of using the previous records as templates. The council said that it did not hold any more information relating to the third bullet point above. The council said that the panel continued to be used as a "sounding board" by the Chief Executive although it was no longer included with terms of reference in the council's constitution. In relation to the final query, the council identified, following a further search, that it did hold minutes for the meetings on 16 August 2005 and 13 October 2005, as well as the agenda of 20 October 2005. It indicated that it wished to withhold some information (considered below) and it disclosed the remainder of the information to the complainant. In relation to the

¹ This approach is supported by the Information Tribunal's findings in *Linda Bromley and Others / Environment Agency* (31 August 2007) EA/2006/0072

agenda of 13 October 2005, the council conceded that it is likely that this information existed but it confirmed that by the time of the request, it was not held. It explained that it is likely to have been overwritten accidentally.

20. The council said that senior council officers had searched all the electronic and paper records held by the council in the member services section, the personnel section and the Chief Executive Officer's records. The council also confirmed to the Commissioner that it has no records showing that any relevant records has been deleted, destroyed or mislaid, although it accepts, as already mentioned, that it is likely that some information has been deleted by virtue of having been overwritten accidentally and that some may have been deleted or destroyed due to the passage of time. However, the council said that it believed that the council had acted in accordance with its practice and policy for meetings. The Commissioner has made further comments relating to the council's records management in the Other Matters section at the end of this notice.

Section 40(2) – Third party personal data

21. This exemption provides that third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act 1998 ("the DPA").

Is the withheld information personal data?

22. Personal data is defined by the DPA as any information relating to a living and identifiable individual. The Commissioner considered the withheld information, which consists of various redactions made to agendas and minutes of the panel dating back to 2002 and he was satisfied that it represented personal data. In view of the number of redactions, the Commissioner has not attempted to include within this decision notice an analysis of every redaction on any individual basis. The Commissioner has considered the appropriateness of those redactions that fall broadly within the following categories:
- Information relating to the salaries of individual staff members, for example, percentage pay changes and the reasons for those changes, ad hoc payments and applications for re-grading of job roles.
 - Information relating to redundancies of individual staff
 - Various employment considerations regarding individual staff members
 - Information relating to the performance of individual staff members
 - Information relating to disciplinary matters

23. For clarity, the council has made redactions to the information where it would be possible to identify the individuals concerned. Many of the redactions made are therefore names of council employees.
24. The Commissioner would also like to clarify that although the council sought to rely on additional exemptions under section 36 and 43, the Commissioner considered that it was more appropriate to consider the application of section 40(2) to that information. If section 40(2) is engaged, it will not be necessary to consider the application of the additional exemptions as well.

Would disclosure breach the Data Protection Principles?

25. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations

26. As set out in the Commissioner's published guidance on this exemption, in considering whether a disclosure of personal information is fair it will be important to take into account whether such a disclosure would be within the reasonable expectations of the individuals concerned.
27. In relation to pay in particular, the council told the Commissioner that it does not publish salary pay bands of less senior staff as a matter of routine. However, the Commissioner was satisfied that there is no reason why these staff members would expect the council to disclose more precise details relating to their pay. Although salaries of public sector staff are clearly connected to the use of public funds, in the Commissioner's view, it is appropriate to have regard to the seniority of the individuals concerned when determining the extent to which greater transparency should be expected.
28. In relation to senior staff in particular, it is important to note that in recent years public authorities have published an increasing amount of information about the salaries of officials that has meant the disclosure of more precise salary details for certain staff members. This is a result of the general trend towards transparency, reinforced by the direction of government policy and changes in statutory requirements. These changes are outlined in more detail on page 13 of the Commissioner's

published guidance "Requests for personal data about public authority employees". For ease of reference, that guidance can be accessed via the following link:

http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx

29. In line with the changes referred to above, the council routinely publishes information about the salaries of more senior staff. The council explained to the Commissioner that it publishes annual pay transparency statements, and it provided the Commissioner with an example of such a statement dated March 2012 available on its website at the following link, as well as referring to information published in its annual accounts online:

http://www.broxbourne.gov.uk/pdf/Pay_Transparency_Statement_2011.pdf

30. The above developments, and the practical impact this has had on the council's routine disclosures, would have affected the reasonable expectations of the council's senior staff members in the Commissioner's view. However, the Commissioner notes that the withheld information in question covers a broad time frame, dating back to 2002. It is clear that in relation to the older information, the expectations of staff would not have been as they are now. At that time, the Commissioner was satisfied that the expectation would have been that more precise information about senior salaries would not be disclosed. A more reasonable expectation at that time would have been that a more specific scale may be published but not the exact salary or more precise details in the absence of any more routine practices.
31. Turning now to the more recent minutes that correspond to the changes in the reasonable expectations of senior staff. The Commissioner has not considered any further information that is already known to the public because of the disclosure of salary information as a matter of routine by the council. In relation to information that is more revealing than that, the Commissioner is satisfied that the disclosure of this information would not have been within the reasonable expectations of the staff concerned. It is likely that the disclosure of information beyond that necessary to satisfy the legitimate public interest in knowing the precise salary paid would be seen as an unwarranted and unexpected intrusion into the relationship between an employee and their employer.
32. In relation to information about financial settlements at the end of an individual's employment, again, an employee's reasonable expectations in this regard would have changed over time. As noted in the

Commissioner's published guidance, the Accounts and Audit (Amendment no 2) (England) Regulations 2009 require local authorities to publish in their annual accounts the amounts paid to employees in connection with the termination of the employment, if their total remuneration is over £50,000. The amounts are published by job title if the total remuneration is between £50,000 and £150,000 and by name if it is over £150,000. In relation to any redundancies discussed before these regulations took effect, the Commissioner does not consider that disclosure of any information, including the amount paid, would have been within the reasonable expectations of the staff concerned. In the absence of clear, routine disclosure, this information would have been regarded as confidential in accordance with well-established practices at the time, particularly if a compromise agreement was in place.

33. In relation to redundancies discussed after the regulations took effect, the Commissioner has not considered any further information that is already known to the public through the routine disclosure of the amounts paid in the council's accounts. In relation to information that is more revealing than that, the Commissioner is satisfied that the disclosure of this information would not have been within the reasonable expectations of the staff concerned. It is likely that the disclosure of information beyond that necessary to satisfy the legitimate public interest in knowing the precise payment paid would be seen as an unwarranted and unexpected intrusion into the private relationship between an employee and their employer.
34. The Commissioner has had regard to the nature of the remaining information. The Commissioner notes that the withheld information includes various discussions relating to terms and conditions of individual employees and other general employment matters. These include details about, for example, changes to working hours and training and development needs. The Commissioner was satisfied that an employee would not generally expect that details of their employment, to such a precise level, would be disclosed on an individual basis.
35. The Commissioner also considers that there is generally a strong expectation that information about performance will be kept confidential between the employer and their employee. In the Commissioner's view, there are no circumstances that would suggest the employees in question would have had any other expectation. The same strong expectation of privacy also applies to information that relates to disciplinary matters or grievances. Indeed, the expectation of confidence in relation to that sort of information is generally even stronger. In the case of *Rob Waugh v Information Commissioner and Doncaster College* (EA/2008/0038; 29 December 2008), the Information Tribunal

specifically recognised the expectation in relation to disciplinary matters. It said the following:

"...there is a recognised expectation that the internal disciplinary matters of an individual will be private. Even amongst senior members of staff there would still be a high expectations of privacy between an employee and his employer in respect of disciplinary matters".

Consequences of disclosure

36. Given that the Commissioner was satisfied that disclosure of the level of detail requested by the complainant would not have been within the reasonable expectations of the individuals concerned, he considered that the disclosure could cause distress to the employees concerned. The Commissioner considers that this is particularly so in relation to comments regarding performance issues or other criticisms of employees, some of which were disciplinary matters, because of the potential for that information to be harmful to an individual's reputation or career.

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

37. There is always some legitimate public interest in the disclosure of information held by public authorities. This promotes the general aims of improving transparency and accountability. This in turn helps the public to understand more about the decisions made by public authorities. Furthermore, it is important for the public to be reassured as much as possible that sensible and fair decisions are being taken in respect of public sector pay and in relation to the employment of staff in the public sector.
38. The complainant argued that there was particular merit in disclosing details about the operation of the remuneration panel in the precise circumstances of this case. He pointed out that although agendas and minutes of the meetings were prepared, they were not public documents and were not made available to other councillors. The complainant also pointed to the outcome of a complaint to the Audit Commission dated 4 July 2012. That information can be accessed via the following link:

[http://www.broxbourne.gov.uk/pdf/AppendixD-Decision and Statement of Reasons.pdf](http://www.broxbourne.gov.uk/pdf/AppendixD-Decision%20and%20Statement%20of%20Reasons.pdf)

39. The auditor's report revealed that there were some procedural problems with the status and role of the remuneration panel. In particular, it had no up to date terms of reference after 1999. The council provided the following explanation to the auditor in relation to this concern:

"The Constitution in place prior to the change to executive arrangements in May 2011 made no reference to the Remuneration Panel because that panel is not constituted to make staff management decisions..."

40. However, the auditor found that the panel had not merely acted as a "sounding board" as suggested by the council. The auditor found that it had acted outside its remit in being the determining body for the 2009/10 headline pay award for senior staff and in respect of the later years' awards to lower paid staff. He also found that officer appointments had been made contrary to the council's constitution and that the panel had no remit to authorise redundancies in the way that it had in relation to two senior officers.
41. However, the Commissioner was not satisfied that disclosure of the level of detail being pursued by the complainant in this case would be fair and proportionate in all the circumstances. In respect of the auditor's report, the Commissioner notes that the concerns have now been investigated and publicly highlighted. He also notes that the auditor decided not to apply to the court for a declaration that an item of account was unlawful and decided instead to deal with the issues raised as part of his normal reporting processes. Amongst the reasons for not taking any further action was that the council had already addressed some of the issues since the remuneration panel no longer exists and has been replaced by a properly constituted employment panel. Furthermore, the Commissioner also notes that although the report highlighted procedural problems with the council's constitution, the auditor nevertheless found no evidence of unreasonable payments.
42. Furthermore, the council has advised the Commissioner that it has spent a significant amount of time dealing with the request, resulting in a large amount of material being disclosed dating back to 2002 regarding the workings of its remuneration panel. This provides a significant amount of information about the decisions taken, albeit that it does not generally identify the individuals concerned. The council explained that it considered that it had struck a fair balance between the public interest in transparency about how the remuneration panel operated and the need to protect the private interests of its employees. Having considered the withheld information, the Commissioner was persuaded that this was the case. There was no evidence available to the Commissioner indicating that disclosure of more details about these issues would be in the public interest to the extent that it outweighed the individual's reasonable expectations of privacy.
43. In relation to information about disciplinary matters and performance in particular, the Commissioner was mindful of the harm that disclosure of this information in response to the request could cause to the individual's concerned. As highlighted by the council, it is often not clear

who made the comments, using what source and evidence, or whether the comments were made as part of a formal appraisal process. It is also not apparent that the individual's concerned have had an opportunity to comment or appeal. Publication in these circumstances would cause an even greater level of injustice and distress in the Commissioner's view. Furthermore, the Commissioner was satisfied that protecting the right of an employee to maintain a confidential relationship with their employer in relation to the finer details of the terms of their employment, for example details of changes to terms and conditions or training needs, outweighs the legitimate public interest in disclosure.

44. Remuneration meetings will inevitably include a large amount of material that is confidential and sensitive in nature. Disclosure of all of that detail, in relation to individuals, would, in the Commissioner's view, be an unwarranted intrusion into the legitimate expectations of privacy that these employees reasonably expected. The primary legitimate public interest in understanding public sector pay and the use of public money can be satisfied to a reasonable extent in less intrusive ways as has been demonstrated by the council on this occasion through the disclosure of redacted material, and other information that is now routinely made available about pay and the use of public money. In view of this, the Commissioner decided that section 40(2) had been correctly engaged on this occasion and that disclosure of the agendas and minutes in full would not be proportionate.

Procedural issues

45. The council conceded during the Commissioner's investigation that it held more information that it should have provided to the complainant. The council has now provided this information however the failure to do so at the time of the request was a breach of section 1(1)(a) and (b) as well as section 10(1).
46. When a public authority wishes to withhold information that forms the subject of a request, it must issue a refusal notice in accordance with the obligations under section 17(1). The council failed to provide all the appropriate rationale within 20 working days, and therefore breached this section. Its failure to provide complete rationale by the date of its internal review was a further breach of sections 17(1)(a)(b) and (c).
47. The Commissioner also notes that the council failed to respond to the request within the statutory time limit of 10 working days, which was a breach of section 10(1).
48. The complainant specifically asked the Commissioner to consider whether the council had breached section 17(7)(b). The Commissioner

notes that in the council's initial response to the request, it referred to its own internal review procedure and said that further information about a requester's rights could also be obtained from the Information Commissioner. Section 17(7)(b) states that a public authority should provide particulars of the right conferred by section 50. The Commissioner considers that reference to his office is not specific enough to satisfy this requirement and he has therefore found a breach of this section.

49. The complainant also specifically asked the Commissioner to consider whether the council had breached section 16(1) of the FOIA. This section relates to the duty to provide reasonable advice and assistance to a requester. The provision of advice and assistance to requesters is dealt with in Part II of the Code of Practice under section 45 of the FOIA. The council did not actually rely on section 12 to withhold requested information and therefore the obligation to provide advice and assistance in terms of the costs limit was not triggered in this case. The Commissioner does not consider that any of the other relevant paragraphs of the Code are relevant to the handling of this request. He therefore has not found a breach of section 16.

Other matters

Enforcement action and section 77

50. The Commissioner did not consider that enforcement action beyond a decision notice would be appropriate in this case, although he does note that the complainant experienced excessive delays. He has noted the issues that arose on this particular occasion. He trusts that the council will make improvements when handling requests in the future.
51. The complainant alleged that the council may have committed a section 77 offence by deliberately attempting to conceal information. The standard of proof is beyond reasonable doubt. The Commissioner did not consider that this standard was met in this case.

Indication of redactions

52. The complainant expressed concerns about the clarity of the council's method of making redactions to information. The Commissioner shared those general concerns when information was presented to him by the council during the course of his investigation. As a matter of good practice, the Commissioner would encourage the council to clearly indicate where it has made redactions and ensure that the redactions are appropriately annotated to show why the information has been withheld.

Records management and internal reviews

53. The council said during the Commissioner's investigation that it is likely that the council had overwritten records accidentally. The council explained that this is likely to have occurred as a result of the council's general practice of using the previous record as a template for the creation of a new record. The Commissioner trusts that the council will take appropriate steps to ensure that records are not overwritten in this way in the future and are only deleted in accordance with appropriate retention schedules. It could, for example, ensure that new records are created using a blank template from now on.
54. Although there is currently no statutory time frame for conducting internal reviews, the Commissioner's guidance is that internal reviews should be undertaken promptly and within 20 working days unless exceptional circumstances are involved. The Commissioner also recommends, in line with this, that internal reviews do not consist of more than one stage before an appropriate referral to the Commissioner. The Commissioner understands that the scope of the request was particularly broad in this case however the Commissioner considers that the delays experienced by the complainant were excessive in the circumstances.
55. The Commissioner recommends that the council reviews the guidance available in the Codes of Practice under section 45 and 46 of the FOIA relating to internal reviews and records management and takes appropriate steps to improve its request handling in the future. This information can be accessed via the following link:

<http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/code-of-practice>

Section 12

56. The complainant highlighted that the authority did not appear to understand the factors that it may take into account when considering the application of section 12. For clarity, the Commissioner would like to draw the council's attention to the guidance on his website at www.ico.gov.uk and the details of the activities that may be taken into account as set out in Statutory Instrument no 3244 "The Freedom of Information and Data Protection (Appropriate Limit and Exemptions) Regulations 2004".

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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

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

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