

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 25 September 2013

**Public Authority:** London Borough of Croydon  
**Address:** Taberner House  
Park Lane  
Croydon  
CR9 3JS

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about payments made to senior members of staff on the cessation of their employment with London Borough of Croydon ("the Council"). The requested information was held in compromise agreements and the Council considered it exempt from disclosure under section 40(2). The Information Commissioner's decision is that the Council was entitled to withhold the information on the basis of section 40(2). He requires no remedial steps to be taken by the Council.

#### **Background**

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2. The Commissioner has noted in previous decision notices on the subject (for example, FS50267298) that compromise agreements play an important role in employer/employee relationships. They avoid the time, expense and stress of litigation in an Employment Tribunal when an employer/employee relationship comes to an end. Such agreements provide the opportunity to conclude the relationship in private and allow both parties to make a fresh start if they choose. The Employment Rights Act 1996 established the opportunity for parties to reach a compromise agreement and has built safeguards into the process to ensure employees receive independent and accountable legal advice before entering into such agreements.

## Request and response

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3. On 1 July 2012, the complainant made a request for information about payments made to senior members of staff on the cessation of their employment with the Council. His request presumed that most of these employees, if not all, had left the Council in circumstances which did not give rise to a claim for compensation for loss of office (for example, because they had resigned or retired). In respect of several named and unnamed individuals, he asked for the following information.

*"1. Copies of the individual recorded decisions (with reasoning) to make the additional payments to the two members of the Corporate Management Team during 2008/09*

*2. Copies of the individual recorded decisions (with reasoning) to make any additional payments to the 11 members of staff who received exit packages in excess of £60,000 during 2010/11*

*3. Copies of the individual recorded decisions (with reasoning) to pay 'Compensation for Loss of Office' to the four members of the Corporate Management Team during 2011/12*

*4. Copies of the individual recorded decisions (with reasoning) to make any additional payments to the other 10 members of staff receiving exit packages of over £60,000 during 2011/12".*

4. The Council responded on 25 July 2012. It stated that it held information which was covered by the request "*within Compromise Agreement, personal files and related documents*" but that it was exempt from disclosure under section 40(2) of the FOIA.
5. Following an internal review the Council wrote to the complainant on 22 August 2013. It concluded that section 40(2) had been applied correctly.

## Scope of the case

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6. After a delay of a few months, during which the complainant tried to resolve his concerns with the Council via its complaints procedure, he contacted the Commissioner on 11 February 2013 to complain about the way his request for information had been handled. He stated that he considered he was entitled under the FOIA to receive the requested information.
7. The Commissioner has therefore considered whether the Council was entitled to rely upon section 40(2) to withhold the information. He believes that the right to access official information and the right to

reach an equitable compromise in private when an employer/employee relationship comes to an end are not mutually exclusive. However, where a compromise agreement has been reached between a public authority and a senior employee, a balance has to be struck between the public authority's duty to be transparent and accountable about how and why it decided to spend public money in a particular way, and its duty to respect its employee's reasonable expectations of privacy. The Commissioner's investigation considered how this balance should be struck.

## Reasons for decision

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### Interpretation of the request

8. The complainant's request asked the Council for information relating to payments made to 27 departing members of staff. He had calculated this to be the number of employees in receipt of generous exit packages from viewing the Council's accounts. The Council stated that the complainant appeared to have misinterpreted its accounts, and that the total number of individuals in receipt of the exit packages described in points 3 and 4 of the request was in fact just six, including the four former Corporate Management Team members specified in point 3. It supplied a table of the exit packages for 2011/12, as recorded in the accounts, which corroborates this.
9. The Council also clarified that it interpreted the request for information about "*additional payments*" as seeking information about payments made over and above an employee's standard entitlement. Many exiting staff received their standard redundancy and pension entitlements and no more. It considered that such staff fell outside the scope of the request. The Commissioner considers this to be a reasonable interpretation of "*additional payments*".
10. The above being the case, the Council explained that there are a total of eight former members of staff in receipt of the exit packages described in the request.

### Section 40(2)

11. Section 40(2) of the FOIA provides an exemption to the disclosure of personal data as defined by the Data Protection Act 1998 ("the DPA") where a disclosure of that information would breach any of the data protection principles.

*Is the information personal data?*

12. The first question for the Commissioner to consider is whether the information is personal data for the purposes of the DPA or not. Personal data is defined at section 1(1) of the DPA.
13. The Council provided the withheld information to the Commissioner which consisted of compromise agreements for the eight named former senior members of staff. The agreements set out the terms under which both parties agreed to end the period of employment.
14. The Council had commented in its letter of 25 July 2012 that information was held in compromise agreements, "*personal files and related documents*", and so, mindful that the complainant had requested reasons for decisions, the Information Commissioner queried whether the Council held any information pertinent to the request which was not included in these compromise agreements. The Council said that it did not and confirmed that all the information it held which fell within the scope of the request was contained in the compromise agreements. The Commissioner has no reason to dispute this.
15. Having considered the definition at section 1(1) of the DPA, the Commissioner is satisfied that the information the Council has identified as being covered by the request is the personal data of the former staff members named in the agreements.
16. The Commissioner must therefore consider whether the information should be disclosed, taking into account that any information disclosed would be a disclosure of personal data.

*Would disclosure breach any of the data protection principles?*

17. Under section 40(2), having decided that the information is personal data, the next question which the Commissioner must consider is whether its disclosure would breach any of the data protection principles of the DPA.
18. The relevant data protection principle in this case is the first data protection principle. It requires that personal data is processed '*fairly and lawfully*'.
19. For a disclosure of personal data to be fair the data subject should have an expectation that the information held about them may be disclosed (because they have been told that disclosure might occur or because the possibility would have been obvious at the time that they provided their information). In the case of a disclosure made under the FOIA, the expectation would need to be that the data subject's personal data might be disclosed to 'any member of the public'. This is because a

disclosure under the FOIA is considered to be made to the world at large rather than just to the applicant.

20. When deciding whether a disclosure is fair the Commissioner can also consider whether any of the other circumstances of the case would make a disclosure of the information fair in spite of the expectations of the individual. The First-tier Tribunal has referred to this in terms of a 'pressing social need' for that information to be disclosed.
21. The Commissioner therefore needs to consider whether the data subjects would expect that detailed information about the terms under which they left the Council's employment would be disclosed to any member of the public. If that is not the case, he must consider whether, in the particular circumstances of the case, there is a pressing social need for that information to be disclosed, which would nevertheless make a disclosure of the personal data fair.
22. In general, employers are under an implied duty of confidence to keep personnel information about employees confidential and this will extend to the terms under which an individual leaves an employer's employment. Such information will only usually be disclosed in specific circumstances, such as in response to requests for references where the employee has given consent for the disclosure to occur.
23. Having considered the withheld information the Commissioner is of the view that in the main the data subjects would have no expectation that detailed information about the terms under which they left the authority would be disclosed to any member of the public in response to an FOIA request.
24. There are, however, some circumstances in which there should be an expectation of disclosure, relating to details about severance payments. Specifically, under the Accounts and Audit (England) Regulations 2011 ("the Regulations"), certain information about 'senior officers' must be published in the accounts of the authority, with a note referring to the salary and any "*compensation for loss of employment paid to or receivable by the person, and any other payments made to or receivable by the person in connection with the termination of their employment by the relevant body*".
25. The Council has demonstrated that, for the purposes of the Regulations, the senior officers are the Corporate Management Team (who number six of the eight compromise agreements). The amount of their annual remuneration and the compensation they received for loss of office has been identified in the annual accounts, in line with the requirements of the Regulations, and the complainant is aware of this. In view of this, the Commissioner has not considered the disclosure of the amounts of these payments further within this decision notice.

26. The two remaining former employees were not senior officers for the purposes of the Regulations and so the Council did not have a duty under the Regulations to include information about payments made to them individually. Instead, this information has been presented in the accounts in an anonymised, cost-banded form.
27. When considering the disclosure of information about these payments, and the remainder of the personal data requested, the Commissioner must consider whether there are any countervailing arguments which are sufficiently strong to outweigh the individuals' expectations and make a disclosure of the personal data fair. As set out in paragraph 20, where there is a pressing social need for the information to be disclosed, this may shift the balance towards a disclosure of personal data under the FOIA being fair where otherwise it would not be.
28. The Commissioner notes that, although they were not all senior officers for the purposes of the Regulations, the data subjects were nevertheless all fairly senior employees within the Council. The Commissioner and the First-tier Tribunal have previously placed a strong weight on the disclosure of personal data where this is necessary in order for senior public or civil servants to be held accountable for their actions. The decisions in these cases have reflected the seniority of the post, together with the public rather than the private nature of the information to be disclosed. Effectively, if the information relates to a public official carrying out his role in an official capacity then the Tribunal have placed a strong weight on that information being disclosed. This is on the basis that senior officials working within public authorities should have some degree of expectation that their actions in carrying out that role must be transparent and that information pertaining to this may be disclosed.
29. The Commissioner notes, however, that the personal data in this case is not about how the data subjects carried out their role. It is about the terms under which they left the employment of the Council. He considers that there is a distinction between this personal data and personal data about how the data subjects carried out their role within the authority, and that the former merits more protection.
30. The complainant views the exit packages afforded to the data subjects as overly generous in the context of the Council's overall financial position, and the Commissioner has considered whether this constitutes the sort of pressing social need for information to be disclosed which might shift the balance towards a disclosure of personal data being fair.
31. The complainant claims that by January 2011 (that is, towards the latter end of the four year period covered by the request), the Council faced a revenue budget overspend of nearly £7 million and that, as a direct

result, local services and Council staff pay and conditions were adversely affected.

32. However, the Commissioner notes that audits for the period covered by the requests reported no undue cause for concern, and that the Council's efficient use of public money was generally described in positive terms. The Audit Commissioner's Annual Audit and Inspection Letters for the years 2008/09 to 2011/12 each reported that the Council had in place adequate arrangements to secure economy, efficiency and effectiveness in its use of resources. The Commissioner therefore has not attached significant weight to the complainant's claims in this regard.
33. Turning to the complainant's contention that some or all of the data subjects left the Council in circumstances which should have precluded them from receiving compensation for loss of office (for example, because they resigned, retired or were dismissed), the Council has explained that their departures came against a backdrop of significant organisational change. In 2008 it commenced a programme of restructuring, which involved extensive changes to the structure of Council departments, including the abolition of several posts and the amalgamation of departments. Over the following years there have been further restructures which have similarly resulted in the abolition of posts and the consequent reordering of services.
34. The Commissioner acknowledges that some of the press releases issued by the Council imply that the data subjects left voluntarily, for their own reasons, and that this apparently contradicts the Council's statement. However, the Commissioner accepts that senior members of staff might prefer not to have the fact of their redundancy widely broadcast. Presenting their departure in the context of a positive move to new employment outside the Council is therefore a discreet way in which to manage the redundancy of senior members of staff sensitively.
35. The Council says that none of the individuals left as a result of wrongdoing, and the Commissioner can confirm that there is nothing within any of the compromise agreements which contradicts this. As such, the Commissioner considers there is not the same public interest in the contents of the agreements being disclosed as there would be if wrongdoing was evidenced.

### *Conclusion*

36. Having found that disclosure would not be within the expectation of the data subjects, the Commissioner has considered whether any pressing social need would nevertheless render the disclosure fair. He has examined the concerns raised by the complainant about the Council's supposedly parlous financial state and that payments were made

inappropriately, but he has not found them borne out by the evidence he has viewed.

37. Taking this against the reasonable expectation of privacy that data subjects are entitled to have about the confidentiality of information relating to their employment, the Commissioner considers that it would be unfair (and, given the implied confidentiality of employer/employee information, unlawful) for the purposes of the first data protection principle for that information to be disclosed.
38. The Commissioner therefore considers that the Council was entitled to apply section 40(2) to the information requested by the complainant.



## 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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