

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 June 2013

Public Authority: Essex County Council
Address: County Hall
Market Road
Chelmsford
Essex CM1 1QH

Decision (including any steps ordered)

1. The complainant has requested information about pension strain contributions from Essex County Council (the "Council"). The Council refused to provide this information citing section 40 (Unfair disclosure of personal data) as its basis for doing so. Following the Commissioner's intervention, it made a partial disclosure to the complainant who remained unhappy with the extent of this.
2. The Commissioner's decision is that the Council is not entitled to rely on section 40 as a basis for withholding the requested information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information described in the complainant's request of 7 October 2012.
4. 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. The Commissioner understands that pension strain relates to payments that need to be made to a pension fund where members of a pension scheme receive payment from their pension entitlement

before the standard age of retirement, for example, where early retirement is offered to certain eligible employees.

6. On 7 October 2012, the complainant wrote to the Council and requested information in the following terms:

"1. How much money was contributed by Thurrock Council to the Pension Fund in March 2012 in terms of pension strain? How many individuals did this relate to?
2. How much money was contributed by Thurrock Council to the Pension Fund in April 2012 in terms of pension strain? How many individuals did this relate to?
3. How much money was contributed by Thurrock Council to the Pension Fund in May 2012 in terms of pension strain? How many individuals did this relate to?"
7. There followed an exchange of correspondence between the parties where the Council argued that it did not hold the information for the purposes of the FOIA.¹ The complainant brought this to the attention of the Commissioner who wrote to the Council about it on 20 February 2013.
8. Following the Commissioner's intervention, the Council then revised its position and accepted that it did hold the requested information for the purposes of the FOIA. However, in a letter of 8 March 2013, where the Council wrote to the complainant to explain its revised position, it argued that the information was exempt from disclosure under section 40 of the FOIA. It argued that the numbers to whom the data related were so low as to mean that individuals could be identified from the requested information. It said "any release that identifies a living individual through releasing their personal data, even third party personal data is exempt".
9. On 16 April 2013, following a further exchange of correspondence with the Commissioner, the Council made a further disclosure to the complainant. It provided her with a total monetary figure for the March to May period described in the request.

¹ In certain circumstances, for example, in relation to internal correspondence of a locally recognised trade union, information may be located on the public authority's premises or on its electronic data systems. However, this information cannot be made available under the FOIA because the public authority does not hold it for the purposes of the FOIA. In the example given, the information would be held by the trade union privately for its own purposes.

Scope of the case

10. As noted above, the complainant had been in correspondence with the Commissioner about this matter following her FOIA request. On 21 April 2013, the complainant confirmed that she wished to pursue access under FOIA to all the information she had requested on 7 October 2012.
11. The Commissioner has therefore considered whether the Council is entitled to rely on section 40 as a basis for withholding all the information described in the complainant's request of 7 October 2012. He sought the Council's further arguments about this and received them in a letter dated 16 April 2013.

Reasons for decision

12. Section 40(2) of FOIA states that personal data is exempt if its disclosure would breach any of the data protection principles contained within the Data Protection Act ("DPA"). Section 40(2) can only apply to information that is personal data. This term is defined specifically in the DPA.²

Is the requested information personal data?

13. In determining whether information is personal data, the Commissioner has referred to his own guidance and considered the information in question.³ He has looked at whether living individuals can be identified from the requested information and whether that information is biographically significant about them.
14. In this case, the answer to each of the three requests is a single monetary amount and a figure representing the number of individuals to whom the monetary amount relates. In all but the case of the last request, the number of individuals to whom the monetary amount relates is more than one. As noted above, the Council has already disclosed the total monetary amount to the complainant in an effort to satisfy her request.

² <http://www.legislation.gov.uk/ukpga/1998/29/contents>

³

http://www.ico.org.uk/for_organisations/data_protection/the_guide/~/_media/documents/library/Data_Protection/Detailed_specialist_guides/PERSONAL_DATA_FLOWCHART_V1_WITH_PREFACE001.ashx

15. This Notice will now focus on the first two requests which were for the amount of money contributed by Thurrock Council to the Pension Fund for the months of March and April 2012 in terms of pension strain and, for each month, how many individuals the monetary amount related to.
16. The Council has argued that, because the numbers of individuals for each month are so small (although more than one), the individuals to whom the monetary amount relates can be readily identified and conclusions readily drawn about their individual financial situations. The Commissioner's guidance explains that when considering whether an individual can be identified from information such that it becomes personal data about that individual, it is necessary to consider what a determined person, particularly with local knowledge, would be able to deduce from the information in question. Would that determined person be able to work out who the information was about? If so, what would they learn from the information about the individual that they have identified?
17. In the Commissioner's view, a determined person with detailed local knowledge may already know the identity of individuals who retired from Thurrock Council in 2012 and even what month they retired. However, this is not information that can be learned from the withheld information. It would be local knowledge that a determined person with an interest in this subject might already have.
18. The Commissioner has already explained that the amount of money contributed by Thurrock Council for the months of March and April 2012 relates to more than one person for each month – "£x" relates to "y" individuals. While the requested figures give the number of people that each monetary figure relates to, it does not show how that figure breaks down per individual. A determined person with detailed local knowledge would need to know the exact salary of each person at retirement to make an educated guess as to how that figure breaks down per individual. Even then, in the Commissioner's view, an educated guess may not be sufficient to determine what pension strain figure (from the monthly total) relates to which identifiable individual. Furthermore, if a determined person with detailed local knowledge already knew the salary at retirement of each individual, the withheld information would add little, if anything, to that detailed local knowledge.
19. The Council has focussed its arguments on the fact that the figures for March and April 2012 relate to small numbers of individuals. The thrust of its argument is that this, of itself, means that the information is personal data. The Commissioner accepts that in some

circumstances, single individuals can be identified from information which applies to small numbers of individuals. However, in light of the above, and having received no clear explanation from the Council as to how individuals can be identified from the requested information, the Commissioner has concluded that the information described in the first two requests is not personal data. No individuals can be identified from it. If a determined person with local knowledge already knew to whom the monetary amount related, he or she would not be able to break that figure down without further detailed local knowledge from elsewhere in order to relate each sub-total to an identifiable individual. If the determined person already had that detailed local knowledge about the salary at retirement of each individual, the Commissioner cannot see how they would learning anything more by accessing the requested information.

20. The information described in the first two requests is therefore not exempt under section 40 of the FOIA. Section 40 only applies to personal data, the disclosure of which would be unfair or otherwise in contravention of one of the principles of the DPA.

The third request

21. As noted above, the last monthly figure relates to a single individual. If the figures for the two previous months are disclosed either separately or combined, the figure for the final month can be deduced from subtracting the sum of these two figures from the total monetary amount already disclosed by the Council.
22. It would be meaningless to disclose the information for the first two months and not for the third month. A straightforward calculation would yield the amount paid in pension strain for the third month. The Commissioner is satisfied that the figures for the first two months could be disclosed but if he concludes that the figure for the third month is exempt, the figures for the first two months must be withheld in order to protect ready calculation of the figure for the third month.
23. As noted above, the figure for the final monthly figure relates to one individual. The Council provided separate arguments about the information described in the third request and these will now be considered in this Notice.
24. The Commissioner is satisfied that a determined person with local knowledge would be able work out to whom the information described in the third request relates. Given that it relates to that individual's financial situation at retirement, the Commissioner is satisfied that the information is biographically significant about that

identifiable individual. As such, the Commissioner agrees that it is personal data about that individual and the requirements of the DPA apply to it.

25. The next question for the Commissioner to consider is whether disclosure of that information under FOIA would contravene any of the data protection principles of the DPA.
26. The data protection principle that is normally considered in relation to section 40 is the first data protection principle which states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
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 also met.'

27. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, eg established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
- The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor, the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so, the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?

28. Furthermore, notwithstanding the individual in question'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.
29. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such 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 individual in question, it is also important to consider a proportionate approach, ie 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.
30. In this case, the Council explained that the individual to whom this information relates was a senior employee. It commented that

"We believe that release of this individual's payment details would have been in line with expectations of privacy in relation to their senior role and in line with Thurrock's policy of publishing salaries for its senior officers, from which a monthly pension payment estimate could be deduced".
31. However, it argued that it would not be appropriate to release it in this case because the complainant had not "requested data relating to named individuals or those of a certain level of seniority".
32. The Commissioner accepts that the complainant did not make such a specific request. However, he is not clear as to how this is a compelling argument against disclosure in this case. If the Council acknowledges that disclosure of the information described in the third request would be within the reasonable expectations of the individual to whom it relates, the Commissioner considers that it can be disclosed in this case.
33. In light of the above, and having particular regard to the Council's view on the reasonable expectations of the individual to whom the information described in the third request relates, the Commissioner is satisfied that disclosure would not be unfair and would not contravene any of the data protection principles of the DPA. As such, the information described in the third request is not exempt from disclosure under section 40 of the FOIA.

Conclusion – all three requests

34. The Commissioner has concluded that the information described in all three requests is not exempt under section 40 of the FOIA. The information described in the first two requests is not personal data and the provisions of the DPA do not apply to it. The information described in the third request is personal data but it would not contravene any of the data protection principles of the DPA to disclose it.

Right of appeal

35. 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

36. 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.
37. 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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