

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 February 2014

Public Authority: Isle of Wight Council
Address: County Hall
Newport
Isle of Wight
PO30 1UD

Decision (including any steps ordered)

1. The complainant requested the amounts paid to two named ex-employees of the public authority as settlement following an employment dispute. The complainant also requested copies of the minutes of employment committee hearings in relation to both ex-employees. The public authority withheld the information on the basis of the exemption at section 40(2) FOIA.
2. The Commissioner's decision is that:
 - On the balance of probabilities, the public authority does not hold minutes of employment committee hearings in relation to [Named Person 2], and
 - The public authority was entitled to withhold the information held on the basis of the exemption at section 40(2) FOIA.
3. The Commissioner does not require the public authority to take any steps.

Background

4. In November 2012, it was reported by the BBC that two council officers had been suspended pending an internal investigation into the delay in the construction of Cowes Enterprise College building.¹
5. It was also reported (in November 2012) by the Isle of Wight County Press that two council officers had been suspended in connection with the Cowes Enterprise College construction project.²
6. On 3 May 2013, the public authority apologised to two named senior staff for issuing a statement which potentially identified them as the officers suspended in connection with the Cowes Enterprise College construction project.³
7. On 31 July 2013, the public authority issued the following press release:
8. *'The council recognises that there were a number of shortcomings in the delivery of the Cowes Enterprise College building. This was because of a range of differing reasons and circumstances. "Two members of staff were suspended in November 2012 as a precautionary measure pending the outcome of an internal investigation into the management of the contract. It has been concluded that, although there were undoubted delays and issues that arose, the two suspended officers were not responsible for the shortcomings in the project or for any wrongdoing. In these circumstances the two members of staff who were suspended are no longer the subject of any further investigation or action. "In addition the council recognises that this has been a long, stressful and protracted process for the two individuals concerned and that issues related to the way the suspension and other matters were handled is likely to result in cases being taken through an employment tribunal process. "There is now a need to bring this matter to an early conclusion and bearing in mind the potential costs of defending the cases at tribunal and the costs of any potentially successful claims for compensation, it has been agreed by the two individuals and the council that a settlement is made. "The council has devoted considerable efforts to ensuring that the Cowes Enterprise College building is fit for purpose and that it is available to handover to the Trust as soon as practicable. This will happen in September this year. "The council will need to learn*

¹ <http://www.bbc.co.uk/news/uk-england-hampshire-20449338>

² <http://www.iwcp.co.uk/news/news/staff-suspended-over-cowes-college-problems-47079.aspx>

³ <http://www.iwcp.co.uk/news/news/council-apology-to-suspended-staff-49274.aspx>

from what has happened in this case and will be reviewing its processes and procedures.”`

Request and Response

9. On 31 July 2013, the complainant wrote to the public authority and requested information in the following terms:

'Following the statement issued.....today, please can you provide the following information under the FOI Act:

- 1) The amount paid to [Named Person 1] and [Named Person 2] by way of settlement.*
- 2) Whether a 'gagging clause' has been included in the settlement to prevent [Named Person 1] and [Named Person 2] from speaking publicly following the conclusion of the investigation.*
- 3) Copies of the minutes of all Employment Committee hearings relating to [Named Person 1] and [Named Person 2].*
- 4) A copy of the contract for the new Cowes Enterprise College building, which was awarded to Pihl UK.*

Please treat these as separate FOI requests and respond to each one individually.'

10. The public authority responded on 27 August 2013. It confirmed that it held information within the scope of item 1 of the request but claimed that the information was exempt from disclosure on the basis of section 40(2) FOIA. With regards to item 3, it explained that it publishes all employment committee papers. However, it claimed that minutes for the employment committee hearings requested were exempt from disclosure on the basis of section 40(2) because; *'.....information relating to employment sub committees (Part 3) is given in a confidential setting and may also contain personal information relating to data subjects.....If the Council were to release fully copies of the of minutes of items heard by the employment subcommittee when in private session this would be unfair to the person that was subject to the subcommittee and those that may also have provided their own person information....'*
11. With regards to item 2 of the request, the public authority informed the complainant that it did not hold any relevant information *'....as there was no confidentiality clause (as often referred to as a gagging clause) within*

the agreement.' The public authority disclosed a copy of the contract relevant to item 4 of the request.⁴

12. The public authority waived its right to carry out an internal review.

Scope of the case

13. The complainant contacted the Commissioner on 3 September 2013 to complain about the way his request for information had been handled. He challenged the application of section 40(2) to items 1 and 3 of the request on a number of grounds which are addressed further below.
14. The scope of the Commissioner's investigation therefore was to consider whether the public authority was entitled to withhold the information within the scope of items 1 and 3 of the request on the basis of the exemption at section 40(2).⁵

Reasons for decision

Section 40(2)

15. Information is exempt from disclosure on the basis of section 40(2) if it constitutes third party personal data (i.e. the personal data of anyone other than the individual making the request) and either the first or second condition in section 40(3) is satisfied.
16. Personal data is defined in section 1 of the Data Protection Act (DPA) as follows:

'.....data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into possession of, the data controller; and includes any expression of opinion about the individual and indication of the intentions of the data controller or any person in respect of the individual.'

⁴ It is not clear when this was disclosed. The complainant however informed the Commissioner that the contract had been provided to him by the authority.

⁵ However, for reasons explained further below, the Commissioner did not consider the application of section 40(2) to the request for copies of employment committee hearings relating to [Named Person 2].

Is the information within the scope of items 1 and 3 personal data?

17. The public authority explained that it did not hold copies of employment committee hearings relating to [Named Person 2] because no such meeting was convened.
18. The Commissioner is satisfied with this explanation and finds that, on the balance of probabilities,⁶ the public authority does not hold copies of employment committee hearings relating to [Named Person 2].
19. With regards to the copy of employment committee hearings for [Named Person 1], the information clearly relates to [Named Person 1] because [Named Person 1] is identified in the request. It is information from which [Named Person 1] could be identified from if it was disclosed in response to the request.
20. The Commissioner therefore finds that the copy of the employment committee hearings for [Named Person 1] is personal data within the meaning in section 1 DPA.
21. In terms of amounts paid to [Named Person 1] and [Named person 2] by way of settlement, the Commissioner also notes that the request specifically identifies both of them. The amounts they were paid therefore constitute their personal data as it would be linked to them in the context of the request. It also relates to their financial and employment status.
22. The Commissioner therefore finds that the amounts paid to [Named Person 1] and [Named Person 2] constitute their personal data within the meaning in section 1 of the DPA.

Would the disclosure of the information within the scope of items 1 and 3 contravene any of the data protection principles?

23. As mentioned, for section 40(2) to apply, either the first or second condition in section 40(3) must be satisfied. The first condition in section 40(3) states that disclosure of personal data would contravene any of the data protection principles or section 10 of the DPA.
24. The first data protection principle states:

⁶ The Commissioner generally applies the normal civil standard of proof in determining whether or not a public authority holds information, ie he will decide on the balance of probabilities whether the information is held.

'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 [DPA] is met....'

25. 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,
 - The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed?
26. Furthermore, notwithstanding 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 an overriding legitimate interest in disclosure to the public.
27. With regards to the reasonable expectation of the data subjects in relation to the amounts they were paid, the public authority explained that both [Named Person 1] and [Named Person 2] do not consent to the disclosure of information relevant to item 1 of the request. They are aware that the public authority is going to publish the information by virtue of the legal requirement contained in Regulation 7 Accounts and Audit (England) Regulations 2011/817 (the Regulations).⁷ However, given that there is no obligation under the Regulations for the public authority to publish the names of the officers alongside the amounts they were paid, the data subjects have a reasonable expectation that their identities would not be linked to the published amounts.
28. With regards to the consequences of disclosure, the public authority explained that disclosure would be damaging and distressing to both data subjects professionally and personally. It asked for details of its explanation to be treated as confidential. The Commissioner has fully considered details of the public authority's explanation in relation to the consequences of disclosure on the data subjects even though they have not been reproduced in this notice.

⁷ The public authority anticipates publishing the information by approximately June 2014.

29. With regards to the minutes of the employment committee hearings, the public authority explained that these are routinely published.⁸ However, the published minutes are anonymised. Therefore, [Named Person 1] would have a reasonable expectation that a copy of the minutes would not be disclosed in response to a request which identifies [Named Person 1] as the data subject. The consequences of disclosure would be similar to that of disclosing the amount paid in settlement.
30. The public authority therefore submitted that disclosure would be unfair and consequently in contravention of the first data protection principle.

Complainant's arguments

31. The complainant considers that disclosing the amounts paid as settlement to both data subjects would not be unfair or cause an unacceptable level of harm. The disclosure of payments to senior officers is a matter of established public interest.
32. Releasing information regarding a settlement in these circumstances would lead to no greater unfairness or harm than the well established principle of disclosing salaries of senior staff.
33. There could be no reasonable expectation of non-disclosure given the lack of a confidentiality clause in the settlement agreement between the data subjects and the public authority.
34. The public authority has concluded that the data subjects did nothing wrong. The decisions were however made behind closed doors. Details of the investigation which would be included in the minutes of the employment committee hearings should therefore be disclosed. There is a public interest in uncovering what caused the Cowes Enterprise College building to be delivered a year late.

Commissioner's position

35. The Commissioner considers that there is generally a legitimate interest in disclosing payments to senior staff following the settlement of employment disputes for reasons of transparency and accountability. This also applies to the salaries of senior staff. However, in relation to salaries, the Commissioner considers that exceptional circumstances are needed to justify the disclosure of exact salaries when they are not routinely published. More often than not, the legitimate interest will be

⁸ <http://www.iwight.com/Meetings/current/committeeDetail.aspx?cmteId=161>

met by disclosing the salary figures in bands of £5,000. Nevertheless, the amounts paid out in this case were in relation to a settlement, not the salaries of the data subjects.

36. With regards to the settlement figures in this case, the Commissioner considers that the decision to publish the amounts paid to both data subjects in the public authority's accounts by virtue of the requirement in the Regulations satisfies the legitimate interest in transparency and accountability.
37. The Commissioner is mindful of the fact that the data subjects could be easily identified from the information already in the public domain about this case, some of which he has already referred to earlier in this notice. However, given that the data subjects were cleared of wrong doing following an investigation, the Commissioner has given particular weight to their views on the consequences of disclosing the amounts they received in settlement in response to a request which identifies them. To single them out in such a way is likely to be professionally damaging to them. It is also likely to be distressing. In the circumstances of this case, the Commissioner does not consider that there is a sufficient legitimate interest in revealing the identities of the data subjects in response to a request under the FOIA.
38. The position is similar with regards to the minutes of the employment committee hearings. This is essentially information relating to a grievance brought by [Named Person 1] against the public authority. There is a reasonable expectation therefore by [Named Person 1] that the minutes should not be disclosed in response to a request which identifies [Named Person 1] as the data subject. The consequences of disclosure are also likely to be both damaging and distressing. The legitimate public interest has been met by the anonymised disclosure. The Commissioner does not consider it necessary to also reveal the identity of [Named Person 1] in the context of those minutes.
39. The Commissioner is satisfied that disclosing the amounts paid to the data subjects and a copy of the minutes of the employment committee hearings in relation to [Named Person 1] would be unfair and consequently in breach of the first data protection principle.
40. The Commissioner therefore finds that the public authority is entitled to withhold the information described in paragraph 39 above on the basis of the exemption at section 40(2).

Right of appeal

41. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.
43. 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

Alexander Ganotis
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