

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 April 2014

Public Authority: North East Lincolnshire Council
Address: Municipal Offices
Town Hall Square
Grimsby
North East Lincolnshire
DN31 1HU

Decision (including any steps ordered)

1. The complainant has requested from North East Lincolnshire Council (the "Council") a copy of an Independent Person's Report that was presented to a standards referral panel when investigating a complaint. The Council refused the request by relying on the exemption set out in section 40(2) of FOIA. Whilst the Commissioner found that the section 40(2) was engaged he also found that the correct approach would have been for the Council to have refused to confirm or deny if it held the requested information in accordance with section 40(5)(b)(i) of FOIA.
2. The Commissioner requires the public authority to take no steps.

Request and response

3. The complainant wrote to the Council and requested information in the following terms:

"a copy of the independent persons report presented to the standards referral panel on the 8 July 2013 regarding complaint ref [redacted information]."
4. The Council responded on 18 October 2013. It stated that the information requested was exempt from release under section 40(2).

5. Following an internal review the Council wrote to the complainant on 25 October 2013. It upheld its previous decision.

Scope of the case

6. The Commissioner received a complaint from the complainant on 29 October 2013.
7. The Commissioner has had to consider whether the Council has correctly applied the exemption set out under section 40(2).

Reasons for decision

Section 40(2) – Requests for third party personal information

8. Section 40(2) of FOIA specifies that the personal information of a third party must not be disclosed if to do so would contravene any of the data protection principles.
9. 'Personal data' is defined under section 1(1) of the DPA as data which relates to a living individual who can be identified from that data, or from that data and other information which is in the possession of the data controller or is likely to come into possession of the data controller.

Personal data

10. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, had them as its main focus or impacts on them in any way.
11. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of the FOIA are met. The relevant condition in this case is section 40(3)(a)(i), where disclosure would breach any of the DPA principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first DPA principle. This states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in schedule 2 should be met and (in circumstances involving the processing of sensitive personal data) at least one of the conditions of schedule 3 should be met.
12. In this case the Council has explained that the information requested is the personal data of the Councillor who is the subject of the

Independent Person's Report. The Commissioner has reviewed the withheld information and it is clear that the information identifies the individual. Therefore the Commissioner is satisfied that the requested information is personal data.

13. As the Commissioner is satisfied that the requested information is personal data he has gone on to consider whether disclosure would contravene the first data protection principle. In assessing whether disclosure would be unfair, and thus contravene the first principle, the ICO takes into account a number of factors such as:

- What reasonable expectations does the individual have about what will happen to their personal data?
- Has the individual named been asked whether they are willing to consent to the disclosure of their personal data?
- What are the consequences of disclosure?

14. The Council explained that

"Where a complaint is made the individual being complained about (data subject) will have a legitimate expectation that the data controller will fairly investigate the complaint and ensure that their personal information is treated confidentially. And that their privacy is respected and disclosure to third parties is done only where relevant and in accordance with the Data Protection Act".

15. The Council further explained that

"the data subject will also have the expectation, that whilst the individual who made the complaint about them will be informed of the outcome of the complaint, they will not be entitled to receive all the information collated in the investigation of the complaint".

16. The Council also confirmed that where a complaint is about an individual at the Council, it does not publish information about the complaint where no action has been taken. However, it explained that where it felt a breach had occurred, the matter would be progressed to a Hearings Panel which would be held and reported in public. The Council also stated that

"Where it is decided that a complaint is not to be progressed, the complainant has a right of appeal to the Local Government Ombudsman. Disclosing information concerning unsubstantiated complaints, would be prejudicial to both the data subject in relation to whom the complaint was made and the appeal's process for considering the complaint".

17. It further explained that

"If the precedent was set that unsubstantiated complaints are disclosed on request, it may prejudice the effectiveness of the established complaints processes and reduce the willingness of individuals to engage with them as they do not believe their personal information would be fairly and lawfully processed breaching the first Data Protection principle.

18. The Commissioner would consider that it would be within the reasonable expectations of the Councillor for the requested information to not be put into the public domain.
19. The Commissioner understands that the Councillor did not give consent to the release of the Independent Person's Report. It is important to note that consent is not a determining factor. However it is a factor that will be considered when taking into account the reasonable expectations of the data subject.
20. The Council argued that disclosure of the Independent Person's Report concerning an unsubstantiated complaint would be an unwarranted intrusion of privacy for the Councillor and it would potentially cause unnecessary and unjustified distress.
21. The Commissioner would generally expect information of this nature to be confidential. Therefore he is satisfied that the disclosure of this information would cause damage and distress to the named individual.
22. However, the Commissioner's approach to cases like this is that, notwithstanding the data subjects' reasonable expectation or any damage or distress cause to him or her by disclosure, it may still be fair to disclose requested information if it can be argued that there is a more compelling public interest in releasing the information. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in disclosure.
23. The Commissioner would stress that this is a different balancing exercises than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protection an individual's personal data the Commissioner's 'default position' is in favour of protection the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure; that is to say any public interest in disclosure must outweigh the public interest in protecting the rights and freedoms of the data subject.

24. The complainant raised a number of arguments as to why he considered the Independent Person's Report should be released. The Commissioner has acknowledged all arguments advanced by the complainant, although not all are referred to in this notice.

25. That complainant argued that

"The independent persons report is just that, a report by an independent person to ensure that the complaint is fairly considered. It is not acceptable nor in the interests of justice to deny access to an 'independent persons report' for without such access, there is no proof that 'colleagues and peers of the accused' will take a balanced judgement given that some of them are members of an elite group with shared views and interests. Given this imbalance in the assessment process, it is even more important that access to the independent persons report is made available so that full scrutiny of the panels judgement can be made".

26. The complainant further argued

"the legitimate public interest far outweighs the reasonable expectations of the data subject in that without such scrutiny and given that the scrutiny panel does not consist of a group of unbiased judges, the general public loses faith in the transparent and oneness of the democratic process".

27. The complainant also argued that taking into account the job role of the Councillor, the information should be released.

28. In this case the Commissioner is satisfied that any public interest in releasing details of the Independent Person's Report, given that no action was taken on the complaint, would not outweigh the public interest in protecting the rights and freedoms of the Councillor. In the Commissioner's view there is little to be gained from releasing details of an investigation where the Council found that no action was required.

Section 40(5) – Neither Confirm nor deny

29. Section 40(5) sets out the following:-

'The duty to confirm or deny –

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either-

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).'

30. The Commissioner would consider that even confirming or denying whether the Independent Person's Report was held would reveal personal data about the individual that the request focuses on. The Commissioner has explained that in relation to section 40(2) that this would be unfair because the Councillor has a reasonable expectation that information about the investigation will not be made public unless a breach has occurred. Given the distress that is likely to be caused if the Independent Person's Report were to be released, and the lack of any compelling reasons for disclosure the Commissioner is satisfied that confirming or denying if the Independent Person's Report is held would be in itself unfair.
31. Whilst recognising the reasons why the Council decided to rely on section 40(2) to refuse the request, the Commissioner considers that the correct approach would have been to refuse to confirm or deny if it held any information which would reveal the existence of a complaint made against the Councillor by relying upon section 40(5)(b)(i). This subsection refers to giving the confirmation or denial "to a member of the public". This reflects the fact that, in general terms, FOIA is concerned with disclosure to the world, and not to the particular individual who submitted the request.
32. The Commissioner finds that in accordance with section 40(5)(b)(i) the Council were not obliged to confirm or deny if it held the Independent Person's Report.

Right of appeal

33. 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

34. 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.
35. 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

Rachael Cragg
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