

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **1 September 2014**

Public Authority: **Bath and North East Somerset Council**

Address: **The Guild Hall
High Street
Bath
BA1 5AW**

Decision (including any steps ordered)

1. The complainant has requested information concerning the circumstances surrounding the departure of Bath and North East Somerset Council's former Divisional Director of Tourism, Leisure and Culture.
2. The Commissioner's decision is that Bath and North East Somerset Council ("the Council") has correctly applied the exemption to disclosure provided by section 40(2) of the FOIA.
3. The Commissioner does not require the Council to take any further action in this matter.

Request and response

4. On 3 February 2014, the complainant wrote to the Council and requested information in the following terms:

"I am writing to request information under the Freedom of Information Act 2000 regarding the following activity by Bath & North East Somerset Council:

B&NES council investigation of David Lawrence, divisional director of tourism, leisure and culture, during his period of absence from his office between July 2012 and his retirement in September 2012

Can you tell me the reason for David Lawrence, divisional director of tourism, leisure and culture, being absent from his office between July 2012 and his retirement in September 2012?

What was the matter the council was investigating regarding David Lawrence during his absence?

Was it connected with an alleged misuse of Council charge cards?

Can I see the council's data record of council charge card use by David Lawrence and his office for the period May to September 2012?

How much was David Lawrence's severance package when he left B&NES in September 2012?"

5. On 13 March 2014 the Council responded to the complainant's request by issuing a refusal notice under section 17 of the FOIA. In its notice, the Council withheld information in respect of the first, second, third and fifth items of the complainant's request and did so in reliance of section 40(2) – personal data and section 41 – information provided in confidence. In respect of the fourth item, the Council confirmed to the complainant that it did not hold any relevant information.
6. The complainant wrote again to the Council on 15 March 2014. In his email he asked the Council to undertake an internal review of its handling of his information request.
7. The Council concluded its internal review on 22 April 2014 and advised the complainant of its conclusions. The Council confirmed the application of section 40(2) of the FOIA to the information sought but withdrew its reliance on the section 41 exemption.

Scope of the case

8. The complainant contacted the Commissioner on 29 April 2014 to complain about the way his request for information had been handled. He informed the Commissioner of his belief that the departure of Mr Lawrence is one of the utmost public interest. He asserted that Mr Lawrence was employed by the taxpayer and the tax payer has the right to know why he was suspended from his senior management role where there was an investigation about alleged financial wrong-doing and where Mr Lawrence was allowed early retirement.

9. In this notice the Commissioner considers whether the Council is entitled to rely on the provisions of section 40 to withhold the information requested by the complainant.

Reasons for decision

Section 40 – Personal information

10. The council has relied on section 40(2) of the FOIA to withhold information relevant to the complainant's request.
11. Section 40(2) provides an exemption from disclosure, for information which is the personal data of any third party and where disclosure would breach any of the data protection principles contained in the Data Protection Act 1998 ("the DPA") or section 10 of that Act.
12. In order to rely on the exemption provided by section 40, the information being sought must constitute personal data as defined by the DPA. The DPA defines personal data as:

'...data which relate to a living individual who can be identified

- a) From those data, or
- b) From those data and other information which is in the possession or, or is, likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect to the individual.'

13. The Commissioner is satisfied that the information sought by the complainant is the personal data of Mr Lawrence.
14. The Commissioner must now consider whether disclosure of the requested information would breach any of the data protection principles contained in Schedule 1 of the DPA. He considers that the first data protection principle is the one most relevant in this case.

The first data protection principle

15. The first data protection principle has two components:
 1. Personal data must be processed fairly and lawfully, and

2. Personal data shall not be processed unless one of the conditions in Schedule 2 of the DPA is met.
16. The Council assert that an employee would have a reasonable expectation that specific details of a personnel matter would not be made available to the public. It also informed the Commissioner that the Council has entered into a confidential agreement with Mr Lawrence. This would give rise to Mr Lawrence having a reasonable expectation that the details of that agreement would be kept confidential and that disclosure would be unwarranted.
17. In the Commissioner's view, the right to access official information and the right to agree terms when an employee leaves a public authority's employment are not mutually exclusive. A balance has to be struck between the public authority's obligation to be transparent and accountable for its decisions, including the expenditure of public money, with its duty to respect its employee's reasonable expectation of privacy.
18. The Commissioner considers that Mr Lawrence would have different expectations about the disclosure of details of the severance payment he received and any other information held by the council in respect of his leaving its employment. He has therefore considered disclosure of the severance payment details separately from the analysis about the remainder of the information.
19. The Commissioner recognises that there is a widespread and general expectation that the details of a person's employment should be considered confidential. However he also considers that the seniority of the employee should be taken into account when personal data is requested under the Freedom of Information Act.
20. In his view, the Commissioner considers that the more senior a person is it will be less likely that to disclose information about him or her, acting in an official capacity, would be unfair.
21. Mr Lawrence held the position of Divisional Director Tourism Leisure and Culture within the council and as such was a senior council employee. It is commonly held that the employment details of similarly placed individuals are routinely put into the public domain. In this instance the requested information relates to any reasons for Mr Lawrence's absence, any severance payment he received and what (if any) did the Council investigate during his absence?
22. In the Commissioner's view, the information which the complainant seeks consists of material which is not usually available to the public.

23. The expectation of privacy in respect of the termination of a person's employment has been affirmed in the Tribunal case of *Trago Mills (South Devon) limited v Information Commissioner and Teignbridge District Council*¹. The Tribunal upheld the Commissioner's decision that disclosure of the details of a severance agreement would be unfair and therefore contravene the first data protection principle. The Tribunal stated that:

"Even without an express confidentiality provision, an individual would have a reasonable expectation that the terms on which his employment came to an end would be treated as confidential. The question we have to consider is, not whether X's severance package was a private transaction (it clearly was), but whether the factors in favour of disclosure would not have represented an unwarranted interference with that right."

24. The Commissioner has considered the seniority of Mr Lawrence within the council. He recognises that even amongst senior members of staff there would still be a high expectation of privacy between the employee and his employer in respect of disciplinary matters. He considers that the disclosure of the information sought by the complainant would represent a significant invasion of Mr Lawrence's privacy. For this reason the Commissioner agrees with the council that the disclosure of the requested information could result in reputational damage and distress to Mr Lawrence and would be unfair.

25. The Commissioner notes that the Council has entered into an agreement with Mr Lawrence. This agreement includes provisions which relate to the obligation placed on both parties to keep the circumstances of Mr Lawrence's leaving the Council's employment confidential.

26. Paragraph 6 of the agreement states that, "The Council agrees to issue a statement to work colleagues and to the press if requested in the terms set out in Appendix Three".

27. The Commissioner has noted the contents of Appendix Three – the Press Release. He is assured that the Council is content that the matter of Mr Lawrence's departure was resolved effectively and efficiently; and further, that the Press Release contained the outcome and necessary information to explain the change in staff and to give confidence to the

¹ Appeal number EA/2012/0028

community at large that the Council's services would continue to be delivered to a high standard.

28. The Commissioner is satisfied that the agreement between the Council and Mr Lawrence would also set a reasonable expectation that no further information would be disclosed to the public.
29. The Commissioner has seen no evidence which suggests that Mr Lawrence has put details of his departure from the Council into the public domain. If he had sought to gain publicity about the termination of his employment, it may have been possible to argue that he would not have a reasonable expectation that the investigation information would remain private. This is not the case in this instance.

The 'severance payment'

30. The Commissioner's guidance on requests for personal data about public sector employees² states that:

"Employees' expectations as to what information will be released will have to take account of statutory or other requirements to publish information. For example, the Accounts and Audit Amendment no 2) (England) Regulations 2009 require local authorities, fire and police authorities and certain other bodies in England to publish in their annual accounts the amounts paid to employees in connection with the termination of their employment, if their total remuneration is over £50,000. These 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. However, this legislation only directly affects reasonable expectations regarding the actual amounts of money paid out, and only for those particular authorities. Reasonable expectations in other contexts may differ, but it should be recognised that there is an increasing public expectation of transparency regarding the expenditure of public money and the performance of public authorities. This is especially the case if there is any evidence of mismanagement by senior staff in a public authority."

31. Mr Lawrence's position within the council was such that details of any severance payment he received are subject to the requirements of the

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http://www.ico.org.uk/~//media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx

regulations stated above. In this case the Commissioner is satisfied that any severance payment made to Mr Lawrence was properly accounted for in the total figures for severance payments.

32. The Commissioner considers that Mr Lawrence would have a reasonable expectation that the payments he received would be accounted for in the manner that such payments were published in the Council's annual accounts.
33. The Commissioner considers that disclosure of the details any specific payment made to Mr Lawrence would be unfair and would not satisfy the sixth condition of Schedule 2 of the DPA which concerns the processing personal data:

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

34. The Commissioner's decision in this case is that the Council is entitled rely on section 40(2) of the FOIA to withhold the information sought by the complainant.

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

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

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