

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 February 2015

Public Authority: Manchester City Council
Address: Chief's Executive Department
Town Hall
Albert Square
Manchester
M60 2LA

Decision (including any steps ordered)

1. The complainant has requested a copy of a petition, information relating to the management of leisure facilities and consultation papers about the services provided by the management company in Manchester. The council provided copies of the petition but redacted the name of signatories, applying section 40(2) of the Act. The council also provided copies of the petition and associated papers however it said that it does not hold other information which has been requested.
2. The Commissioner's decision is that Manchester City Council has complied with the requirements of the Act, and that it has correctly applied section 40(2) to the information. However the Commissioner has decided that the council did not comply with section 10 of the Act in that it did not provide a full response to the request within 20 working days as required by section 10(1).
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 28 May 2014 the complainant made the following request for information:

"...could you kindly arrange for a copy of the customer petition to be emailed to me. Similarly, could it please be confirmed whether or not Serco have been suspended from retendering for the MAC contract."

5. On 4 July 2014 he made a further request for:

1. Can you please clarify if you are saying these undertakings dated 6.11.13 and 20.2.14 were honoured by some form of "week long" consultation in March 2014?

2. If yes, what is the explanation for the failure by Serco and the Trust to have carried out that survey between 6.11.13 until (your letter says) March 2014? There is nothing in your letter to suggest this inexcusable failure was investigated.

3. Please provide a blank copy of the survey you believe honoured these undertakings and confirm the total number of responses at Manchester Aquatics Centre.

4. You appear to be saying some form of general survey was available if customers noticed it (which neither I nor anyone else I spoke to was aware of. Whereas the Trust promised "All users of the relevant services will be consulted with"). Moreover the glaringly obvious point is, given 100 men and women objected to the sessions, it was Serco's obligation to ensure a direct specific consultation on it took place. That is what they and the Trust promised. Feedback through a survey depends on the questions asked. From what you have written it is implicit, contrary to the undertakings, that no survey let alone consultation specifically on and asking for views on the key issues was carried out, namely whether users agreed with or objected to women-only health suite sessions, discriminatory fees and the impact on disabled users. Nor did it ask if they prefer mixed sessions only. I presume this is agreed but please clarify.

5. Your letter on this being entirely vague, is it Serco or the Council who in substance choose/specify the increasing timetabling of the sporting events which are regularly leading to closure of the Centre either in whole or part to the public-what you call the Event Protocol? Who benefits financially- does the additional revenue for these events go to Serco or the Council?

6. When did the Trust and the Council take the decision to not replace the Jacuzzi/ spa pool. Please confirm neither users of the Centre nor members were consulted.

6. The council responded initially and answered the questions by responding to a complaint which the complainant had made. Subsequently it recognised that the requests should be treated as FOI

requests and responded on 27 June 2014, however it only responded to the request for a copy of the petition. The council applied section 40(2) and (3) to withhold some information which would identify the signatories to the petition.

7. The council did not subsequently answer the remaining questions until 10 September 2014 when it provided the internal review. The review stated that section 40 had been applied correctly.
8. As regards the further questions the council said that as regards parts 1-4 it could not comment on matters as they related to Serco's response to the consultation which had taken place. The council said however it would consider the request under FOI but it did not initially respond to these parts of the request.
9. The council responded to points 5 and 6 on 28 August 2014. It did not however clarify whether any recorded information is held which should have been considered for disclosure.

Scope of the case

10. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
11. The complainant clarified to the Commissioner that he wishes the Commissioner to consider the council's responses. He also asked the Commissioner to consider other matters which have been dealt with separately under The Data Protection Act 1998 (the DPA).
12. The Commissioner considers that the complaint is that the council has failed to respond appropriately to the complainant's requests for information.

Reasons for decision

Background

13. Manchester City Council is the owner of Manchester Aquatics centre, the facility which this request revolves around. The site is leased to Manchester Sport and Leisure Trust, a company limited by guarantee which has members of Manchester City Council and other local organisations on its board. In turn, the Trust hires Serco, a third party contractor to run the facility (and others) on its behalf. The council provides funds to the Trust as part of its contract.

The request of 28 May 2014

Section 40(2)

14. The Commissioner has firstly considered the application of section 40(2) to the request of 28 May 2014 for a copy of the petition. The Council initially redacted the names of signatories from the petition before disclosing it to the complainant. The complainant wishes an unredacted copy.
15. Section 40(2) provides that information is exempt from disclosure 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. The first question is therefore whether the information is the personal data of third parties.

Is the information personal data?

17. 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;'

18. In this case the redacted information is the names and signatures of individuals who have signed a petition expressing an opinion on the management of a leisure centre. The names of the individuals and the fact that they have signed the petition provide biographical details about those individuals (their opinion) and so the information is personal data for the purposes of the DPA.
19. The next question is whether a disclosure of the information would comply with the requirements of section 40(3). In essence, in this case, this revolves around whether a disclosure of the information would breach any of the data protection principles of the DPA.

Would the disclosure of the information contravene any of the data protection principles?

20. 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.

21. The relevant principle in this case is the first data protection principle.

The first data protection principle

22. The first data protection principle states:

'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....'

23. The Commissioner considers that fairness aspect of the first principle first. 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, i.e. what damage or distress would the individual suffer if the information was disclosed?

24. Even if a disclosure would fall outside of the expectations of the individual and would cause him or her detriment it may still be fair to disclose the information if it can be demonstrated that there is a pressing social for the information to be disclosed.

25. In this case the individuals submitted their names to a petition to the council demonstrating against the use of the pool for female only swimming sessions for periods during the week. The signatories to the petition are making representations because the pool is only usable by males for effectively 4 days a week when discounting the times when women only sessions are run. They see this as unfair, particularly as men are charged the same as women for annual membership of the facility.

Individuals signed the petition on the basis that it would be submitted to the council to demonstrate that they do not agree with this practice. They would therefore expect that the petition, with their names, would be disclosed to the council for this purpose. The request for information however envisages that the full unredacted petition, with signatories names included, would be disclosed in response to the request.

26. A disclosure of information under the FOI Act is considered to be to the whole world. Any personal data which is disclosed would be considered to be disclosed to the wider public.

27. The Commissioner has considered whether the individuals would expect that their details would be disclosed to the whole world. When making his decision on this the Commissioner is unable to take into account that the complainant is representing the lobby group which is seeking to overturn the council's practice in this respect. The Commissioner (nor the council) is not able to take into account who the requestor is, nor their reasons for requesting the information when considering the request.
28. Given this, the Commissioner's decision is that the individuals would not expect the council to disclose their names, signatures and the fact that they had signed the petition to the wider public.
29. The Commissioner must therefore consider whether there is a pressing social need for the information to be disclosed in response to the request.
30. The provision of leisure and swimming facilities is a matter of public interest. The disclosure of the petition provides the public with knowledge that a number of members are unhappy with the way in which the pool is being managed.
31. The redacted petition was disclosed by the council. This already establishes that both men and women are unhappy with the situation as it stands. It also disclosed the number of people who signed the petition. The disclosure of the names of the signatories does not therefore add anything additional to this. On the face of it therefore there is no pressing social need for the names and identities of the signatories to the petition to be disclosed.

Section 35(2)

32. The complainant has also argued that there is an exemption to the requirements of the first data protection principle. He argues that section 35(2) provides an exemption to the non-disclosure principles of the DPA which allows the council to disclose the information in spite of fact that its disclosure would otherwise breach the first data protection principle.
33. The complainant argues that section 35(2) dis-applies the requirement that a disclosure must meet with the principles of the DPA. Section 35(2) states that:

"Personal data are exempt from the non-disclosure provisions where the disclosure is necessary—

- (a) *for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or*
 - (b) *for the purpose of obtaining legal advice, or is otherwise necessary for the purposes of establishing, exercising or defending legal rights."*
34. The complainant argued that members who lobbied the council and the leisure trust did not retain a copy of the petition when they submitted it to the council. The complainant argues that a disclosure of the information is necessary in order to provide him with the evidence which he needs to submit a complaint to Local Government Ombudsman about the council. The council has however responded by stating that a disclosure of the information is not necessary for the purposes he has outlined.
35. The Commissioner considers that it is the fact that 100 members signed the petition, and that the signatories included both males and females which is likely to be of primary importance to the complainant's case to the Ombudsman. The names of those individuals are unlikely to be of any great significance insofar as the Ombudsman's investigation is concerned. The important information has therefore already been disclosed for the purposes of the complaint which the complainant intends to make in the redacted copy of the petition.
36. Additionally the Commissioner notes that Ombudsman have their own legal powers to investigate issues, obtain relevant documentation and acquire witness statements. Should they consider that a full copy of the petition is necessary as part of their investigation they have the legal powers to obtain that information from the council themselves. It is not necessary to have a full copy of the petition in order to submit the complaint to an Ombudsman.
37. Given this the Commissioner does not consider that it is 'necessary' to disclose this information for the purposes of section 35(2). The Commissioner does not therefore consider that this section would prevent the disclosure of the information being a breach of the fairness requirements of the first data protection principle.
38. The Commissioner's decision is therefore that the council was correct to apply section 40(2) to this information. He is therefore satisfied that the council was able to withhold the names of signatories to the petition in response to the complainant's request of 28 May 2014.
39. The council also clarified to the complainant that Serco had not been prevented from retendering for the contract, however it did not do so

until its response to him of 12 January 2015. This however is a direct question, to which the answer is that no information is held.

The request of 4 July 2014

Parts 1-4 of the request

40. For ease parts 1 -4 are repeated here

1. Can you please clarify if you are saying these undertakings dated 6.11.13 and 20.2.14 were honoured by some form of "week long" consultation in March 2014?

2. If yes, what is the explanation for the failure by Serco and the Trust to have carried out that survey between 6.11.13 until (your letter says) March 2014? There is nothing in your letter to suggest this inexcusable failure was investigated.

3. Please provide a blank copy of the survey you believe honoured these undertakings and confirm the total number of responses at Manchester Aquatics Centre.

4. You appear to be saying some form of general survey was available if customers noticed it (which neither I nor anyone else I spoke to was aware of. Whereas the Trust promised "All users of the relevant services will be consulted with"). Moreover the glaringly obvious point is, given 100 men and women objected to the sessions, it was Serco's obligation to ensure a direct specific consultation on it took place. That is what they and the Trust promised. Feedback through a survey depends on the questions asked. From what you have written it is implicit, contrary to the undertakings, that no survey let alone consultation specifically on and asking for views on the key issues was carried out, namely whether users agreed with or objected to women-only health suite sessions, discriminatory fees and the impact on disabled users. Nor did it ask if they prefer mixed sessions only. I presume this is agreed but please clarify.

41. The council responded to the complainant stating that in its view it does not hold any of the information which the complainant has requested in parts 1-4 of the request. It pointed out that the centre is run by Manchester Sport and Leisure Trust and is managed by a third party company, Serco. It said that the information which he was requesting primarily relates to issues and actions which Serco are involved with, not the council.

42. The council also pointed out that the 'requests' made in parts 1 – 4 required a subjective analysis of the situation, and as a third party to the consultation the council had not made such an analysis and so no information is held by it which can respond to the request.
43. The council's arguments are as set out below.
44. As regards part 1 of the request the council argued that the adequacy or otherwise of the consultation was a matter for Manchester Sport and Leisure Trust (a separate entity from the council), and for Serco. It said that consequently the council had not formed a view as to whether the 'undertakings' referred to in the question were 'honoured' by the 14 March consultation. As such it said that no information is held which could answer this request.
45. As regards part 2 of the request the council argued that as it did not form a view as to the adequacy or otherwise of the consultation (as noted in part 1), because the question was not the council's to form a view about.
46. As regards part 3 of the request the council argued that the council never formed a view on the issue and so no document is held where the council can be said to "*believe [it] honoured these undertakings*". It confirmed therefore that it does not hold a document meeting the description requested nor hold any information about such a document. It did confirm however that it holds copies of 2 surveys that may be relevant to the complainant's concerns and provided them to him in its letter to the complainant of 12 January 2014.
47. As regards part 4 of the request the council said that the adequacy or otherwise of the survey was a matter for Manchester Sport and Leisure Trust, and Serco. Consequently the council never reached a view on the subject matter of question 4, and as such no information would have been recorded. The council confirmed therefore that it does not hold any information in respect of this part of the request.
48. The Commissioner considers that the responses are in part due to the nature of the requests. Where a requestor makes a request under the Act which requires an authority to form or express a view on a particular matter, the risk is that no such view will have been formed and therefore the request will fail as no information is held. An authority is not under a duty to create information, to form a view or to provide an opinion in order to respond to a request. It is only in situations where a view has been formed and recorded that it will fall within the scope of the Act.

49. The Commissioner is satisfied that the requests sought the council's opinions on matters and accepts that under the circumstances it has not formed such opinions. The centre is overseen by a separate legal entity, and is managed by Serco. Hence the council did not have to form a view on the matters expressed in the request and so no record of them exists. The Commissioner therefore considers that on a balance of probabilities no information is not held for the purposes of the Act.

Parts 5 & 6 of the request

"5. Your letter on this being entirely vague, is it Serco or the Council who in substance choose/specify the increasing timetabling of the sporting events which are regularly leading to closure of the Centre either in whole or part to the public-what you call the Event Protocol? Who benefits financially- does the additional revenue for these events go to Serco or the Council?"

6. When did the Trust and the Council take the decision to not replace the Jacuzzi/ spa pool. Please confirm neither users of the Centre nor members were consulted."

50. As regards part 5 and 6 of the request the council confirmed that in its view it responded to these questions in its response to the complainant dated 28 August 2014.
51. In that letter the council outlined the decision making and contractual responsibilities of the council, Serco and the Trust and clarified the financial regime in place. The request is in the form of a direct question, and the council has answered that question. The Commissioner therefore considers that the council responded to this part of the request.
52. As regards question 6 the council clarified that the decision was taken over a period of time but there is no specific date that the decision was made on. It clarified the circumstances under which the decision was made but said that it did not hold information which could provide an exact date on which the decision was made.
53. The Commissioner is again satisfied that the council has complied with this part of the request by providing the information it could but clarifying that no specific date is held which can be provided to the complainant in response to his question.

Section 10

54. The council exceeded the response time requirement of 20 working days set in section 10 of the Act when doing so. The second request was made on 4 July 2014 and the council response was not provided until 28 July 2014 although there had been correspondence between the parties prior to this.
55. The Commissioner has therefore decided that the council breached the requirement of section 10(1) of the Act. This requires that a response is provided to a requestor within 20 working days of receiving the request.

Right of appeal

56. 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

57. 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.
58. 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
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