

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 September 2015

Public Authority: Leeds City Council

Address: Civic Hall
Calverley Street
Leeds
LS1 1UR

Decision (including any steps ordered)

1. The complainant requested information about the Head of Internal Audit and information with regards to staff suspensions. Leeds City Council (the council) provided some information and initially refused the remaining under section 40(5) of the FOIA – to neither confirm nor deny – and section 21 of the FOIA - information reasonably accessible by other means. It later amended its refusal under section 40(5) to instead rely on section 40(2) of the FOIA – third party personal data. During the Commissioner's investigations, the council amended its refusal back to section 40(5) of the FOIA and no longer sought to rely on section 21 of the FOIA, providing the information to that part of the request. The complainant asked the Commissioner to determine the council's reliance on section 40(5) of the FOIA.
2. The Commissioner's decision is that the council has correctly relied on section 40(5) of the FOIA.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 5 December 2014, the complainant requested the following information from the council:

*"I have some queries about the head of internal audit position which I would like to ask under FOI.
I understand the head of internal audit is [name redacted] but that he has not been at work for over a year.
If he does not still officially hold that role I would be grateful if*

the council would confirm and clarify when he left.

I point out head of internal audit is a senior position and [name redacted] position as head of internal audit is a public role and publicly recorded as such.

On the presumption that [name redacted] remains officially head of internal audit, who is currently 'running' internal audit, ie who effectively holds the position now, whether in an acting capacity or by some other description?

I would also like to know the salary for the position of head of internal audit.

Separately, I would like to know:

The number of staff suspended by the council (not including teaching/school staff) since April 2012;

How long each member of staff was or has been suspended for and the reason for each individual suspension (eg alleged sexual harassment, theft, bullying, fraud, misuse of council property such as computers/phones and so on);

The amount of salary/wage each suspended member of staff received while suspended;

The outcome of each suspension, ie return to work, dismissal, resigned, or remain suspended."

5. The council responded on the 18 December 2014. With regards to the part of the request about the Head of Internal Audit, the council considered it to be a similar request the complainant had made on 2 December 2013 and considered it to be exempt under section 40(5)(b)(i) of the FOIA – neither confirm nor deny holding the information.
6. The council also relied on section 21 of the FOIA to provide the complainant with a link to its senior officer salaries and lastly it provided the complainant with two tables for the part of his request regarding the number of suspended staff since April 2012. The council advised the complainant that the first table does not include the total days suspended or salary paid, where the suspension ceased prior to April 2013, as the system used at the time did not reflect a suspension end date. And the casework files would not give an accurate date because the notice to cease suspension can be given verbally.
7. The second table listed those suspended where a number of days suspended and estimated salary was able to be provided due to the council's system being improved at that time.

8. The complainant requested an internal review on the same day as the response. His review request was for the following reasons:
 - i. He was unable to locate the salary band for the head of internal audit from the link provided.
 - ii. He asked whether the head of internal audit had been missed off the table of suspended officers.
 - iii. He asked the council if all suspended staff are entitled to full pay.
 - iv. With regards to the part of his request that was refused under section 40(5)(b)(i) he stated that given it is now a year later, from his last request in December 2013, there should be a question mark over the progress of any investigation and related costs to the public purse. Also he considered that this is a senior position with very significant responsibilities, so the council should consider the need for greater transparency.
 - v. He also considered that the council should state who is leading the internal audit and carrying out those responsibilities.
9. The council provided its internal review on 9 March 2015. With regards to the Head of Internal Audit, the council amended its response to rely on section 40(2) of the FOIA – personal data of a third party – refusing to confirm if he had left the council and the date he left, if so. It also refused to confirm the names of the officers, if his position was being filled. It advised that it was relying on the same reasons as its response to a previous request made on 27 December 2013 and provided him with a copy of the response to that request, dated 21 January 2014, to reaffirm its reasons for refusal.
10. With regards to the suspended officers tables provided in its initial response to this request, showing suspension dates and payments, the council advised that some information had been redacted under section 40(2) of the FOIA. However, it did not specify what it had redacted under section 40(2) of the FOIA.

Scope of the case

11. The complainant contacted the Commissioner on the 11 March 2015 to complain about the way his request for information had been handled.
12. During the Commissioner's initial investigations, the council provided the complainant with the salary band for the position of Head of Internal Audit, instead of continuing to rely on section 21 of the FOIA, and

confirmed that all suspended members of staff are entitled to full pay in accordance with the council's disciplinary policies and procedures.

13. With regards to one part of the request being withheld under section 40(2) of the FOIA, that being at the date of his request, whether or not [name redacted] held the post of Head of Internal Audit. The council amended its response to no longer refuse this part of the request and instead advise that he was still at the council.
14. Lastly, the remaining parts of the request which were refused under section 40(2) of the FOIA, that being to state:
 - i. who was running internal audit, and;
 - ii. Whether the table of suspended officers was the complete list.

was reconsidered by the council, and it amended its reliance on section 40(2) to instead refuse these two parts under section 40(5) of the FOIA – to neither confirm nor deny holding that information.

15. The complainant has told the Commissioner that he is not satisfied with the council refusing those two parts to his request. The Commissioner therefore considers the scope of the case is to determine whether the council is correct to rely on section 40(5) of the FOIA to neither confirm nor deny the two remaining parts to the complainants request identified in paragraph 14 above.

Reasons for decision

Section 40(5) of the FOIA – neither confirm nor deny

16. Section 40(5) of the FOIA states that:

"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 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)."

17. In order for the Commissioner to determine whether the council are correct to rely on section 40(5) of the FOIA, to neither confirm nor deny this information, the Commissioner will need to determine whether the information, if it were held by the council, would constitute personal data. If it is personal data, then he must decide if disclosure would breach any of the data protection principles.

Is the information personal data?

18. Personal data is defined by the Data Protection Act 1998 (the DPA) as any information which relates to a living individual who can be identified from that data or from that data along with any other information in the possession or is likely to come into the possession of the data controller.
19. The council has advised the Commissioner that confirming or denying whether or not someone else was running internal audit would essentially show whether or not the Head of Internal Audit was suspended or not.
20. It also considers that confirming or denying whether or not the provided table of suspended officers was complete would also show whether or not the Head of Internal Audit was suspended because this table shows a breakdown of salary during suspension and the number of days suspended. If the Head of Internal Audit had been suspended, then this could be determined by combining the positions specific salary band information published on its website with the information that may be in the table. Also if he was not suspended, it would not be shown in the table and this would confirm he was not suspended.
21. The Commissioner considers that the requested information, if held by the council or even not held, would fall within the definition of personal data, as set out in the DPA because it 'relates to' an identifiable living person, as I would confirm whether or not the individual had been suspended.

Would disclosure contravene any of the Data Protection Principles?

22. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The

Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of disclosure against the legitimate public interest in disclosing information.

Reasonable expectations

23. (Analysis has been placed into a confidential annex, which has been provided to the council only, as the analysis could in itself reveal whether or not the information is held.)
24. The council considers that personal data regarding personal matters which includes confirming or denying whether or not there was a suspension of an individual, attracts increased expectation of confidentiality. It quoted the Information Tribunal case of Rob Waugh v Information Commissioner and Doncaster College, EA/2008/0038 when it determined at paragraph 40 that "*there is a recognised expectation that the internal disciplinary matters of an individual will be private. Even amongst senior members of staff there would still be a high expectation of privacy between and employee and his employer in respect of disciplinary matters*". The council considers this also to be the case where no there was no disciplinary or suspension.
25. It also considers that confirming or denying disciplinary and personal matters of an individual, including details of whether or not here was a suspension (albeit not to the same degree as disciplinary matters), attracts a high level of confidentiality and generally this information should remain private unless there is a "pressing social need" to disclose. It is the council's general approach, that personal data relating to whether or not such matters occurred should remain private.
26. The council has acknowledged to the Commissioner that in general, employees of public authorities should be subject to some degree of scrutiny and accountability as their roles are funded by the public purse. It also acknowledges that it is reasonable for employees to expect that the more senior they are the less expectancy they can have over certain information about them being withheld from the public.
27. The Commissioner also considers it reasonable to expect that a public authority would disclose more information relating to senior employees than junior ones. So senior employees should expect their posts to carry a greater level of accountability, since they are likely to be responsible for major policy decisions and the expenditure of public funds. However, the terms 'senior' and 'junior' are relative. The Commissioner recognises that it is not possible to set an absolute level across the public sector below which personal information will not be released. It is always

necessary to consider the nature of the information and the responsibilities of the employee/s in question.

28. The council, on this, has told the Commissioner that whilst the Head of Audit post may in some respects be regarded as a senior position, which carries considerable responsibility for which the council is required to publish salary information under its accounts, this position is only a 5th tier post reporting to 4 more senior levels of management.
29. The council has also told the Commissioner that confirming or denying information of this type, would relate to his professional life but could also have connotations to his personal life.

Consequences of disclosure

30. (Analysis has been placed into a confidential annex, which has been provided to the council only, as the analysis could in itself reveal whether or not the information is held.)

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

31. The complainant considers that the Head of Internal Audit is a senior position with very significant responsibilities, not least for financial matters and propriety, so sees that there is a greater public interest in accountability and transparency.
32. The council has stated to the Commissioner that it acknowledges that there is a legitimate public interest in accountability and transparency. However, it believes that, if there is a suspension, the public interest lies in the assurance that it investigates and addresses allegations of misconduct appropriately, has a disciplinary policy to address such issues, and suspends staff in accordance with its policy where it is appropriate to do so.
33. (Analysis has been placed into a confidential annex, which has been provided to the council only, as the analysis could in itself reveal whether or not the information is held.)
34. The complainant has stated that he does not see how a public authority is able to neither confirm nor deny whether it has provided a full response to a request which specifically asks for a bracket of information or table/ list of cases. The complainant considers that if a public authority could send a response that refused to confirm if the full bracket of information was being provided, then there would potentially be question marks over every list, table or bracketed cases of information provided by public authorities. He asks, what could

therefore stop a public authority from publishing a list or table and then refusing to tell the public whether that was the full list.

35. The Commissioner notes the complainants concerns to this type of scenario occurring. However, for a council to be able to neither confirm or deny to a requester whether it has provided all of the requested information, it would need to apply an exemption to do so, as it has in this case. Then if the requester is not satisfied with the response they can bring it to the Commissioner to make a determination as to whether the public authority was correct to neither confirm nor deny or refuse the request, considering the individual circumstances and reasoning's of each case.
36. The complainant has also stated to the Commissioner that he considers the council has not considered this request as motive or even applicant blind and considers that the response to the request may have been different if it had been requested by another member of the public.
37. The Commissioner on this is unable to determine if the council's response would have been different if requested by another member of the public than himself. However he does consider that a public authority, when responding to a request, which could potentially reveal personal information, needs to consider the fact that this information, if released, would be placed into the public domain for all to see. With that, he would expect the public authority to consider all reasonable possibilities of how or who could use this information once released and the impact that this could have on the individual to who the information relates.
38. After consideration of the above, the Commissioners decision is that, on balance, the individual's rights to privacy outweighs any legitimate public interest in this case and therefore finds that the council was correct to rely on section 40(5) of the FOIA to neither confirm nor deny holding the remaining information in this case.

Right of appeal

39. 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

40. 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.
41. 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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