

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 October 2015

Public Authority: South Northamptonshire Council
Address: The Forum
Moat Lane
Towcester
Northamptonshire
NN12 6AD

Decision (including any steps ordered)

1. The complainant has requested responses from 2 councillors as part of a standards investigation into complaints made about them. The council supplied the information on one of the councillors however it withheld the response of the other under section 40(2) (personal data).
2. The Commissioner's decision is that the council was correct to apply section 40(2).
3. The Commissioner does not require the council to take any steps, however he would draw the council's attention to the comments made in the 'Other Matters' section of this decision notice.

Request and response

4. On 20 May 2015, the complainant wrote to the council and requested information in the following terms:

"I wish to make a formal Freedom of Information request for the information supplied by both (former) Cllr [redacted] and Cllr [redacted] with regards to my complaints against each party. I would also like to know the identity of the independent persons consulted with regards to my complaints."

5. The council responded on 9 June 2015. It provided the information in respect of one of the councillors and identified the individual who had been consulted over the complaint, however it withheld the information in respect of the other under section 40(2).
6. Following an internal review the council wrote to the complainant on 4 August 2015. It upheld its earlier decision for the same reasons.

Scope of the case

7. The complainant contacted the Commissioner 10 June 2015 to complain about the way his request for information had been handled. He considers that the councillor's response should have been disclosed to him.
8. The Commissioner considers that the complaint is that the council wrongly withheld the information under section 40(2).

Reasons for decision

9. Section 40(2) of the FOI Act states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the FOIA would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').

Is the information personal data

10. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information 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, or is likely to come into the possession of, the data controller.
11. The two main elements of personal data are that the information must "relate to" a living person, and that 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, has them as its main focus or impacts them in any way.

12. The withheld information is a councillor's response to allegations made about him. It relates to his actions in his role as councillor and his response to the allegations. The Commissioner is therefore satisfied that the information relates to living individuals who would be identifiable from the information. He is therefore satisfied that the information is personal data relating to the councillor.

Would disclosure breach one of the data protection principles?

13. Having accepted that the information requested constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles. He considers the first data protection principle to be most relevant in this case. The first data protection principle has two components:

- personal data shall be processed fairly and lawfully; and
- personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

Would disclosure be fair?

14. In considering whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has firstly considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations of the individual concerned, the nature of those expectations and the consequences of disclosure to the individual. He has then balanced against these the general principles of accountability, transparency as well as any legitimate interests which arise from the specific circumstances of the case.
15. The Commissioner must bear in mind that a disclosure under the FOI Act is considered to be to the whole world, in the same way that information might be published on the internet or in a newspaper. Whilst the requestor may have a perfectly legitimate interest in receiving the information the question which the Commissioner must consider is not whether it would be fair to disclose the information to the requestor, but whether it would be fair to disclose the information to the whole world.
16. The situation when the personal data was provided to the council is therefore one of the first considerations which needs to be taken into account. In this case the councillor in question was responding to a complaint made about him (by the complainant) as regards his actions regarding a planning matter.

17. The Commissioner notes the monitoring officer will be under an obligation to investigate the complaint, and the councillor would need to respond to the allegations if he wishes to defend himself and avoid sanction. There is little option for the councillor to refuse to provide his response to the allegations in such circumstances, and hence, he has no real choice but to provide personal data about himself to the council if he wishes to defend his position.
18. In such situations, the Commissioner is satisfied that the expectation of the individual would be that the monitoring officer would retain his information in confidence unless and until aspects of that information need to be disclosed by the council to explain the results of the investigation and the actions they have taken in respect of the complaint.
19. The council argues that the following factors are considered by the Council to be particularly relevant to this part of the request:
 - a councillor responding to a confidential request from the statutory monitoring officer for comments on a complaint made against him would have a reasonable expectation of privacy;
 - the disclosure of the information would cause personal distress to the former Councillor who would legitimately expect his confidential response to a complaint that was not proceeded with to remain out of the public domain;
 - the reasonable expectation of privacy and the potential level of personal distress arising from disclosure are increased by virtue of the fact that the individual is no longer a councillor; he lost his seat in the May 2015 elections.
 - there is no significant or legitimate public interest in putting the information into the public domain in the context of a complaint against an individual who no longer holds the relevant public office and which is not being pursued under the Council's adopted arrangements; and
 - the council considered that these factors outweighed any argument that disclosure of the information would promote openness and transparency.
20. The Commissioner notes that the information regarding another councillor was provided because he consented to the disclosure of his personal data, thereby making the disclosure fair for the purposes of the first data protection principle.

21. However as regards the withheld information, the other councillor had lost his seat by the time of the request, and was therefore no longer a serving councillor. The council did not ask him whether he consented to the disclosure of the information. It said that it did not consider this to be an appropriate course of action to take in the light of the factors it outlined which, in its view, meant that there is no overriding public interest which prevails over the data subject's legitimate expectation of privacy especially now that he no longer carries out a public role.
22. The complainant considers that the information is necessary in order to determine that the complaint was treated properly and that the investigation was appropriate. He considers that the complaint was about a serving councillor (at the time of his actions and his response to the monitoring officer) and related to the councillors actions as regards a planning application. The complainant considers that there is a strong argument that the information should be disclosed in order to create transparency over the council's investigation of his complaint given that it chose not to take the investigation forward after the councillor lost his seat.
23. The Commissioner is therefore satisfied that the councillor would not expect that his response to the allegations would be disclosed beyond what was necessary for the monitoring officer to outline his findings to the complainant. For its part the council has done this, however it is noted below that the complainant has concerns about the outcome of the investigation.
24. Although the Commissioner considers that the withheld information in this case relates to the data subjects' public function rather than their private life, he is satisfied that the data subject in this case would have an expectation of confidentiality and privacy in relation to the withheld information. The complaint and the allegations made by the complainant relate to the integrity of the former councillor. Although set in a public context, the information relates to the councillor defending his personal integrity within that role.

Pressing social need

25. Although the former councillor would not expect his data to be disclosed, the Commissioner must consider any wider factors which might outweigh those expectations and lead to a disclosure of the information being fair for the purposes of the first data protection principle. The First-tier Tribunal has previously referred to this as a 'pressing social need' for the information to be disclosed.
26. The complainant would argue that he has made a valid complaint against the councillors which has not been fully investigated by the

council in respect of this councillor. The council did not proceed with the investigation as it considered that there was no public interest in incurring the expense of a full investigation given that the former Councillor was now outside the jurisdiction of the council's standards regime. It said that even in the event of a breach of the code of conduct for councillors being found, no sanction could therefore lawfully be imposed against him.

27. The complainant's argument would therefore be that the council did not actually make a decision as to whether the actions of the councillor were appropriate or not – by failing to proceed with the investigation it failed to address the essential point of the complaint which the complainant had made.
28. From the complainants (and the public's) point of view the question is whether the actions of the councillor were appropriate, however and additional concern is whether the council's decision not to continue the investigation was also appropriate. A disclosure might allow the public to scrutinise whether the monitoring officer's decision was appropriate given the information he had available when reaching his decision.
29. It should be borne in mind that the councillor's response to the allegations has not been disclosed as the investigation ceased when he lost his seat. The complainant has not therefore had allegations fully considered.
30. The councillor was not re-elected in the general elections in May. Any arguments which the complainant (or the public) might have made insofar as the allowing scrutiny of the integrity of the councillor via his actions in this respect are therefore weakened considerably. Under the circumstances however there remains some strength to the arguments because a disclosure might aid in demonstrating how the council dealt with the complaint. The Commissioner is however aware however that the complainant had a right to make a complaint to the Local Government Ombudsman if he felt that the council's decision was wrong or unreasonable in this respect.

Conclusions

31. The Commissioner has considered the above. Whilst he can see reasons why the public would have a legitimate interest in the disclosure of the information, he must also bear in mind that the information would be a disclosure of a private response to a complaint about the integrity of the individual's action in his role as a former councillor. There will be a strong expectation that such investigations are carried out in private, albeit that the result of the investigation might be disclosed to the complainant in order to respond to the complaint.

32. The complainant's argument that the monitoring officer's decision did not effectively address the allegations which were made would provide a strong 'social need' argument that the information should be disclosed if there were no other options available to him to question the failure to continue the investigation. By the council's own admission it did not fully investigate the issue as regards this councillor for the reasons it outlined. However the Commissioner considers that the complainant also has (or had) the ability to take steps to make a complaint to the Local Government Ombudsman if he considered that the council failed to properly address his complaint. The Commissioner is not aware whether he has done so or not. The right to request independent scrutiny of the decision significantly lessens any pressing social need for the information to be disclosed in this case.
33. Under the circumstances this latter argument appears to outweigh arguments relating to transparency. There can be no strong pressing social need to disclose the councillor's personal data given that the council could take no further action against him, and any issues which the complainant may have about the way the council handled the investigation should rightly be addressed via a complaint to the ombudsman.
34. The Commissioner is therefore satisfied that the council was correct to apply section 40(2).

Other matters

35. Although they do not form part of this decision notice the Commissioner would like to note the following matters of concern.
36. The Commissioner notes that although the withheld information is the personal data of the councillor, in respect of 3 paragraphs the information is also potentially personal data relating to the complainant.
37. The complainant may therefore have rights to this to this information under section 7 of The Data Protection Act 1998 (the DPA). This section relates to individuals' subject access rights under the DPA.
38. Although in this case the information would be exempt from disclosure under the Freedom of Information Act under the exemption in section 40(1) of the Act, where a public authority considers that a request for information also encompasses the personal data of the applicant it is under a duty to consider that information for disclosure under the complainant's rights under section 7 of the DPA.

39. The Commissioner would therefore put the council on notice that it should consider whether the following paragraphs should have been disclosed to the complainant under section 7 of the DPA:

- Final paragraph under heading 'General'
- 2 paragraphs under heading 'Conclusions'

Right of appeal

40. 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

41. 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.
42. 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