

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 January 2016

Public Authority: Cheshire East Council
Address: Westfields
Middlewich Road
Sandbach
Cheshire
CW11 1HZ

Decision (including any steps ordered)

1. The complainant has requested a copy of a councillor's response to a complaint he made about the councillor. The Commissioner's decision is that Cheshire East Council has correctly applied the exemptions at sections 40(2) and 21 of the FOIA. He does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

2. On 20 March 2015, the complainant wrote to Cheshire East Council ('the council') and requested information in the following terms:

"A copy of [named Councillor's] response to my formal complaint made in August 2014, as despite being found in breach of the Code of Conduct, I am dissatisfied with the outcome."
3. The council wrote to the complainant on 1 April to advise that relevant people would be contacted for their consent. The letter quoted the request as follows:

"You have requested a copy of [named Councillor's] response to your formal complaint made in August 2014; also a copy of any supporting evidence either supplied by [named Councillor] or others in response to your formal request."

4. On 7 April 2015, the complainant wrote to the council to clarify that he has not requested any other person's response and stating that any claims by other persons in response to the incident are hearsay and should not be taken as having any merit. He also specifically said the following:

"It is therefore necessary to have copies of all the evidence supplied in support of [named Councillor's] defence against my complaint, as such evidence may have been influential in causing a miscarriage of justice."
5. The complainant also wrote to the council again on 17 July 2015 to clarify the request and comment on whether there had been a breach of the Code of Conduct. He said that "...the only reliable document requested is that submitted by [named Councillor] in his defence against my complaint..." and repeated the following:

"It is therefore necessary to have copies of all the evidence supplied in support of [named Councillor's] defence against my complaint, as such evidence may have been influential in causing a miscarriage of justice."
6. The council responded on 10 August 2015 and refused to provide the requested information citing the exemption at section 41 of the FOIA. It said that the Code of Conduct Complaint Process advises that any written reply a respondent provides to the authority through this process is done so in confidence, that there is no expectation that the information would be released through a response to an FOI request, and that the councillor complained about in this case has not provided consent for release.
7. The complainant requested an internal review on 14 August 2015. He believes he is entitled to know what the defence against the allegations he made was in order that any miscarriage of justice can be highlighted, due to misrepresentation of the facts by the councillor complained about or any others.
8. On 2 September 2015, the council provided its internal review response in which it maintained its original position.

Scope of the case

9. The complainant contacted the Commissioner on 11 September 2015 to complain about the way his request for information had been handled.
10. In its response to the Commissioner's enquiries, the council said that in addition to the [named councillor's] rebuttal of the complaints against him, the withheld information includes the three Code of Conduct

complaints¹ and Handforth Town Council minutes and its budget for 2014/2015 which [named councillor] provided with his response to the complaint. It said that, having revisited the request, it is also applying the exemption for personal data at section 40(2) of the FOIA and has written to the complainant to inform him of this. It also applied the exemption for information accessible to the applicant by other means at section 21 of the FOIA to the Handforth Town Council minutes and budget for 2014/2015. The council confirmed to the Commissioner that there was no supporting documentation provided from third parties in respect of this complaint. The only documentation from individuals is the original Code of Conduct complaints.

11. The Commissioner notes that two exemptions, namely section 40(2) and section 41, have been applied to the requested information. Given that the Commissioner is also responsible for ensuring compliance with the Data Protection Act 1998, he has first considered the application of the exemption at section 40(2).
12. As the Commissioner has decided that the exemption at section 40(2) applied in this case, he has not found it necessary to also consider the application of the exemption at section 41.
13. The Commissioner has also considered the exemption at section 21 of the FOIA to the Handforth Town Council minutes and budget for 2014/2015.
14. For clarity, the Commissioner does not consider that the three complaints referenced in paragraph 10 fall within the scope of the case as the request is for a copy of the councillor's response to the complaint made by the complainant in this case.

Reasons for decision

Section 40(2)

15. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').
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¹ The Commissioner understands that the complaint made by the complainant was dealt with jointly with two other Code of Conduct complaints on the same issue.

16. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

““personal data” means 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 of, 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 intentions of the data controller or any other person in respect of the individual.”

17. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the data protection principles under the DPA. The Commissioner notes in this case that the council said that disclosure would breach the first data protection principle.

Is the withheld information personal data?

18. As explained above, the first consideration is whether the withheld information is personal data. The information is a letter constituting [named councillor's] response to the complaints made against him. Having viewed the requested information, the Commissioner is satisfied that it is the personal data of [named councillor].

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

19. As the Commissioner is satisfied that the withheld information is personal data, he now needs to consider whether disclosure would breach the first data protection principle, i.e. would disclosure be unfair and/or unlawful.

20. The first data protection principle states that:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

21. In deciding whether disclosure of this information would be unfair, the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subjects, the consequences of disclosure on those data subjects and balanced the rights and freedoms of the data subjects with the legitimate interests in disclosure.

Nature of the information and reasonable expectations

22. The Commissioner recognises that information relating to complaints against individuals carries a strong general expectation of privacy due to the likelihood that disclosure could cause the data subjects' distress and could also cause permanent damage to their future prospects and general reputation.
23. In his guidance on personal data², the Commissioner states that information relating to an internal investigation or disciplinary hearing will carry a strong general expectation of privacy. This was recognised by the Information Tribunal in the case of *Rob Waugh v Information Commissioner and Doncaster College*³ when it said at paragraph 40 that:
- “...there is a recognised expectation that the internal disciplinary matters of an individual will be private. Even among senior members of staff there would still be a high expectation of privacy between an employee and his employer in respect of disciplinary matters.”
24. The council explained that the complaint was dealt with under the Members Code of Conduct complaint process. It said that such complaints are not subject to normal access to information rules until any subsequent hearing takes place and that this case didn't reach that stage. It explained that the complaint was assessed and the decision of the Monitoring Officer was that no further action would be taken against [named councillor]. It explained that the case was closed at that point and that if the complaint had been accepted then further communications would have taken place regarding publication of all the correspondence relating to the case and ultimately there would have been a public hearing at committee.

² <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

³ Appeal no. EA/2008/0038, 29 December 2008

25. The council submitted that it is important to maintain that the Code of Conduct Complaint process is undertaken in confidence. It said that if for any reason the full details of member complaints are released to the world in response to requests for information, all confidence in the process would be lost. It provided the Commissioner with a copy of its Code of Conduct Complaint process as it stood at the time the complaint was made. The Commissioner notes that the written process does not refer to whether the member's response to the complaint will be kept confidential. However, he also notes that the written process does refer to the investigators report being provided to both the complainant and the member and, where a hearing has taken place, the findings of that hearing to be published. He therefore considers that the omission of information relating to the members response to the complaint, in conjunction with custom and practice, could have shaped the members reasonable expectations as to privacy in relation to his response to the complaint.
26. In support of the belief that the requested information should be disclosed, the complainant's provided the Commissioner with documents provided to him by a third party. The Commissioner notes that such documents relate to the Code of Conduct Complaint process, including the confidentiality of that process, and issues related to the specific complaint in this case, as well as other complaints. Having reviewed the documents provided by the complainant, the Commissioner has not identified any information that would lead [named councillor] to have an expectation that his response to the complaint made against him would be made publically available. Conversely, he notes that the council has stated the following;
- "The council is keen to ensure that spurious and unmeritorious complaints about councillors are not given the oxygen of publicity since such publicity can be damaging to the reputation of the individual concerned and the council they come from. Therefore, the council treats all complaints made as confidential until it has decided what to do with them. If it decides to take no action over a complaint it continues to treat it as confidential. This helps to ensure, as far as the council can, that the making of a complaint which is not going to be investigated does not produce damaging publicity for the councillor or council concerned."
27. The council informed the Commissioner that [named councillor] refused permission to disclose his response both by email and verbally. It said that he explained during his phone call that he did not consider the issue to be trivial and that it was extremely concerning to him. He also said that he considers the matter to be closed and did not wish for it to be reopened which would lead to unnecessary public debate.

28. When considering the issue of consent, the Commissioner's view is that where the data subject consents to the disclosure of their personal data within the time for statutory compliance with the request, then this disclosure will generally be considered fair.
29. However, any refusal to consent is not determinative in the decision as to whether the data subject's personal data will be disclosed. Rather the Commissioner will take the data subject's comments into account insofar as they represent an expression of views of the data subject at the time of the request had the data subject given any thought to the issue at the time. These views help form the analysis of fairness because the data subject may have provided additional and valuable information about any reasonable expectation that the information would remain confidential or the impact of the disclosure on them including any circumstances unique to the data subject.
30. In this case, the objections raised by [named councillor] do not appear to lead to the conclusion that he had a reasonable expectation that the information would remain confidential. Instead, the objections are concerned with the consequences of disclosure and as such, will be taken into consideration when assessing the impact of the consequences of disclosure on fairness below.
31. Although the Commissioner considers that the withheld information in this case relates to the councillor's public function rather than their private life, taking into account all of the above, he is satisfied that [named councillor] would have an expectation of confidentiality and privacy in relation to the requested information.

Consequences of disclosure

32. In order to assess the impact of the consequence of disclosure on whether disclosure would be fair, it is necessary to consider whether disclosure of the withheld information would cause unwarranted damage or distress to the data subject.
33. The council said that the parties involved in this issue are no longer councillors and there is no further recourse of action that can be taken with the complaint. It provided the Commissioner with a log of complaints relating to the actions of various councillors which it believes to be a considerable number in relation to the size of the council. It said that release would be detrimental to [named councillor] and would lead to unnecessary conversation and reignite ill-feeling.
34. The complainant has said that the refusal has been based on the possibility of the response being publicised and therefore damaging the councillors reputation and has submitted that given that the councillors

Constituency Office formally apologised for his behaviour on his behalf and that the Monitoring Officer found that he was not guilty of a breach of the Code of Conduct, he cannot see how disclosure would damage his reputation further, other than the fact that he has either made false statements and/or has sought to pervert the course of justice.

35. The Commissioner considers that disclosure would amount to an infringement into the privacy of [named councillor] which has the potential to cause damage and distress, particularly as he has found that disclosure of the information requested would not have been within the councillor's reasonable expectations and because the process was not concluded by way of a hearing and that instead it was decided that no further action would be taken against [named councillor]. He has taken into account the complainant's submission as detailed in the above paragraph but considers that release of the requested information would provide further detail which would cause unwarranted damage or distress to the data subject.

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

36. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for its own sake along with specific interests which in this case is the legitimate interest in the handling of a complaint against a councillor. He acknowledges that councillors should be open to scrutiny and accountability because they are elected members of local government.
37. It is clear to the Commissioner that the complainant considers his complaint has not been dealt with properly. It is not within the remit of Commissioner to consider the merits of the complaint. The Commissioner notes that the Code of Conduct Complaint process provides that a complaint can be made to the Local Government Ombudsman if it is felt that the complaint has not been properly dealt with and considers that this goes some way to satisfying the legitimate interest in the handling of a complaint.
38. Although the Commissioner can appreciate why the information is of particular interest to the complainant, he is mindful of the fact that the FOIA is request and motive blind and has not seen any evidence to indicate that there is sufficient wider legitimate public interest which would outweigh the rights and freedoms of [named councillor] in this case.

Conclusion on the analysis of fairness

39. Taking all of the above into account, the Commissioner concludes that it would be unfair to [named councillor] to release the requested information. Disclosure would not have been within his reasonable expectations and the loss of privacy could cause unwarranted distress. He acknowledges that there is a legitimate interest in knowing that a complaint against a councillor has been handled appropriately but does not consider that this outweighs the individual's strong expectations of, and rights to, privacy. The Commissioner has therefore decided that the council was entitled to withhold the information under section 40(2), by way of section 40(3)(a)(i).
40. As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, he has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

Section 21 - information accessible to the applicant by other means

41. Section 21 of the FOIA provides that a public authority does not need to provide information under section 1 of the FOIA if that information is reasonably accessible to the applicant by other means. This is an absolute exemption so not subject to the public interest test under section 2.
42. The purpose of the exemption is to ensure that there is no right of access to information via FOIA if it is available to the applicant by another route. The Commissioner's guidance on the subject⁴ explains that, unlike consideration of most other exemptions in FOIA, a public authority can take the individual circumstances of the applicant into account. In order for section 21 to apply there should be another existing, clear mechanism by which the particular applicant can reasonably access the information outside of FOIA.
43. The council applied this exemption to Handforth Town Council minutes and budget for 2014/2015. It said that the minutes are published on the Handforth Town Council website and explained that both the minutes

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http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf

and the budget would have been provided to the complainant in his role as a councillor at the time the request was made.

44. Taking into consideration the above explanation from the council, the Commissioner is satisfied that section 21(1) of the FOIA is engaged in this case.

Right of appeal

45. 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

46. 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.
47. 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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