

Freedom of Information Act 2000 ('FOIA')

Decision notice

Date: 17 May 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 an investigation into the Leader of Cheshire East Council's Twitter account. The Commissioner's decision is that Cheshire East Council has correctly applied the exemption at section 40(2) 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 6 November 2015, the complainant wrote to Cheshire East Council ('the council') and requested information in the following terms:

"I would like to request a copy of the council's investigation into the Leader's Twitter account - @ClrMichaelJones. I believe the inquiry was conducted by the Chief Operating Officer, Peter Bates."
3. The council responded on 27 November 2015 and refused to provide the requested information citing the exemption for third party personal data at section 40(2) of the FOIA.
4. The complainant requested an internal review on 6 December 2015.
5. On 7 January 2016, the council provided its internal review response in which it maintained its original position.

Background

6. The council informed the Commissioner that in 2014, it received a request for information asking for emails between Cllr Michael Jones and various officers in relation to his political tweets. Emails were disclosed in response to the request.
7. Once it was apparent that officers from the council's Communications team had tweeted on behalf of Cllr Michael Jones, an investigation was commissioned into allegations of misconduct by a council officer. The scope of the Human Resources investigation was as follows:
 - "To investigate the facts and prepare a report on the allegations that [council officer] may have;
 - allowed staff to use Council facilities (Twitter) to communicate political content to the public. You may, by doing this, have compromised your position by not respecting that you occupy a politically restricted post and you may have undertaken activities which are not politically neutral. In so doing this has brought the Council into disrepute;
 - demonstrated a poor standard of leadership and management which has included threatening and/or bullying behaviours towards staff and led to a breakdown of trust within the Communications team
 - This will require a review of the initial fact-finding work undertaken by [named individual], a series of interviews and the recording of those interviews and preparation of a report.
 - To reach a prima facie view on whether there is a need to take any action under the Council's disciplinary Policy and procedures."
8. The investigation was commissioned by the Chief Operating Officer, and was undertaken by a senior council officer. The investigation was conducted in line with the council's Disciplinary policy and procedure.
9. The Commissioner notes that there has been media interest in the issue.

Scope of the case

10. The complainant contacted the Commissioner on 8 January 2016 to complain about the way his request for information had been handled.

11. During the course of the investigation, the council informed the Commissioner that it is also applying the law enforcement exemption at section 31(1)(a) of the FOIA because Cheshire Police are conducting an investigation into Misconduct in Public Office and have requested, and been provided with, a copy of the information requested in this case.
12. The Commissioner notes that two exemptions, namely section 40(2) and section 31(1)(a), 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).
13. As the Commissioner has decided that the exemption at section 40(2) applies in this case, he has not found it necessary to also consider the application of the exemption at section 31(1)(a).

Reasons for decision

Section 40(2)

14. 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').
15. 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.”
16. 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?

17. As explained above, the first consideration is whether the withheld information is personal data. The information in this case is a report detailing the findings of a Human Resources disciplinary investigation into one member of staff. The appendices to the report contain records of interviews with council officers who gave evidence. Having viewed the requested information, the Commissioner is satisfied that it is the personal data of these parties.

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

18. The council considers that the disclosure of the information would contravene the first data protection principle.
19. 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.”
20. 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.
21. Turning first to the personal data of the officer being investigated, the Commissioner recognises that information relating to disciplinary investigations 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.
22. In his guidance on personal data¹, the Commissioner states that the expectations of an individual will be influenced by the distinction

¹ <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

between his or her public and private life and this means that it is more likely to be fair to release information that relates to the professional life of the individual. However, 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*² 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.”

23. The council said that the officer concerned is a senior officer within the authority's hierarchy but as the requested information is a disciplinary report relating to her, she had a reasonable expectation that it would not be disclosed.
24. Although the Commissioner considers that the withheld information in this case relates to the officers' professional life, given the nature of it, he is satisfied that the individual would have a reasonable expectation of confidentiality and privacy in relation to the withheld information.
25. Turning now to the personal data of the council officers who gave evidence, the council explained that the interviews were undertaken in confidence with the expectation that the responses would remain confidential. It said that the grades of the officers interviewed vary from junior to more senior roles and that some of those interviewed are no longer with the council. Given the nature of the investigation and the candid content of the information, the Commissioner is satisfied that there would have been a strong expectation of confidentiality and privacy in this case.

Consequences of disclosure

26. 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 information would cause unwarranted damage or distress to the data subjects.

² Appeal no. EA/2008/0038, 29 December 2008

27. In this case, the Commissioner considers that disclosure of the information under the FOIA would be likely to lead to further media interest in the issue.
28. In relation to the officer being investigated, the Commissioner considers that disclosure of information relating to a disciplinary investigation would be an intrusion of privacy, could cause distress, and could also cause permanent damage to the officer's future prospects and general reputation.
29. In relation to the council officers who gave evidence, the Commissioner considers that the potential media interest could be distressing to the individuals' and could impact on their wellbeing. Even without any media interest, the Commissioner considers that disclosure would cause distress due to the nature of the information, particularly as he has found that disclosure of the information requested would not have been within the council officers' reasonable expectations.

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

30. 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 knowing how a disciplinary investigation into the then council Leader's Twitter account has been investigated and the outcome of that investigation.
31. In its initial response to the complainant, the council said that it does recognise the proper interest of the public in understanding what has been done by the council following publication of emails relating to Cllr Jones' Twitter account. It acknowledged that there is a fair and reasonable expectation on the part of the public that they should be made aware of, and given information about, matters relating to the governance of the council and any perceived problems with it, particularly where they involve the use of public funds and regulatory compliance issues and it recognises the place of information in enabling the public to hold the council to account.
32. In his internal review request, the complainant suggested that there is an overwhelming public interest in releasing the information stating that public money was used in a party political way to support the Conservative Leadership in the council. He said that council taxpayers have never been told why this happened, who was responsible or whether any disciplinary action was taken as a result.

33. The complainant also stated that this is one of a series of incidents which has called into question the honesty and integrity of the council. He said that many people believe that the council, including its leadership, is doing its best to avoid public scrutiny and political embarrassment and suspects that is the real reason why the report is not being released. He expressed his opinion that it is unacceptable that council taxpayers are banned from knowing what happened, why public money was used in this way and what, if anything, was done about it.
34. The Commissioner notes that the withheld information has been provided to Cheshire Police as part of its investigation into Misconduct in Public Office by Cllr Michael Jones. This indicates that there are other ways to meet the legitimate public interest in this case.

Conclusion on the analysis of fairness

35. Taking all of the above into account, the Commissioner concludes that it would be unfair to the officer being investigated and the council officers who gave evidence to release the requested information. It is clear that disclosure would not have been within their reasonable expectations and that the loss of privacy could cause unwarranted distress. He acknowledges that there is a legitimate interest in knowing how a disciplinary investigation into the then council Leader's Twitter account has been investigated and the outcome of that investigation but does not consider that this outweighs the individuals' 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).
36. 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.

Right of appeal

37. 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

38. 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.
39. 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

Deborah Clark
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