

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 16 February 2017

**Public Authority:** South Tyneside Council  
**Address:** Town Hall And Civic Offices  
Westoe Road  
South Shields  
NE33 2RL

### Decision (including any steps ordered)

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1. The complainant has requested information about monies paid to two individuals, a barrister and a Learning Support Assistant. South Tyneside Council (the "Council") contravened a number of its FOIA procedural obligations in handling the complainant's FOIA requests but eventually refused to provide the information citing section 40 (unfair disclosure of personal data) and section 43 (prejudice to commercial interests).
2. The Commissioner's decision is that the Council is entitled to rely on section 40 as its basis for refusing to provide the requested information. However, it contravened provisions of section 1, section 10 and section 17 when handling the requests.
3. No steps are required.

### Request and response

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4. On 24 September 2015, the complainant made a request for information to the Council for information of the following description:

"I write to you after our conversation on 16 September 2015, I have set out below the information I require on [name of child] [date of birth of child].

[1] The full cost of a barrister [name supplied] to attend SEN Tribunal hearings in March 2013, November 2013, December 13, and January 2015.

[2] The full cost of LSA<sup>1</sup> [name supplied] to go into [named school] for [name of child] from April 2011 - December 2013.

[3] The full cost of physiotherapy care from [name supplied] of [name of school] Newcastle from October 2011 - January 2014.

[4] The full cost of occupational therapy care from [name supplied] – NHS therapist from 2009 - 2012.

[5] The full cost of speech and language therapy by programs in school and in NHS clinic from 2008 - 2014."

5. Strictly speaking, these are five separate requests and the Commissioner has numbered each for ease of future reference.
6. In a response dated 18 December 2015. The Council treated this correspondence as a request for their child's personal data under the Data Protection Act ("DPA") and sought proof of identity and proof of parental responsibility in respect of their child. However, it also provided reasons under FOIA as to why the complainant could not have this information.
7. In respect of request 1, it said that the information was exempt under FOIA section 40 (unfair disclosure of personal data) and FOIA section 43 (prejudice to commercial interests). In respect of request 2, it said that the information was exempt under FOIA section 40. It gave the complainant a figure in response to request 3. In respect of requests 4 and 5 it explained it did not hold this information and directed the complainant to make the request to "the NHS".
8. Although it apparently considered the matter under FOIA, it did not offer the complainant an internal review of this response. In the absence of any information about how to submit an internal review, the complainant reiterated their request on 15 January 2016.
9. The Council replied on 18 January 2016. It argued that this further correspondence constituted a vexatious request and that it was exempt from its obligation to respond under section 14(1)<sup>2</sup>. In the same letter, it also reiterated its reliance on FOIA sections 40 and section 43. The

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<sup>1</sup> LSA stands for "Learning Support Assistant". The Commissioner will use the term "LSA" in the rest of this Notice.

<sup>2</sup> The vexatious request provision of FOIA is section 14(2). Section 14(1) applies where the request is a repeated request.

Commissioner is treating this letter as setting out the Council's final position after internal review.

## **Scope of the case**

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10. The complainant contacted the Commissioner on 18 July 2016 to complain about the way their request for information had been handled. They had previously been in correspondence with the Commissioner on DPA matters.
11. The Commissioner has considered whether the Council is entitled to rely on FOIA sections 40 and 43 as its basis for withholding the information described in requests 1 and 2. The Commissioner has also considered the extent to which the Council complied with its procedural obligations under the FOIA.

## **Reasons for decision**

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### **Section 40(2) – Third party personal data**

12. This exemption provides that any third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act ("DPA").

### **Is the withheld information personal data**

13. Personal data is defined by the DPA as any information relating to a living and identifiable individual which is biographically significant about them.
14. In this case, the information is the cost for the employment of two individuals in a particular matter. Request 1 refers to a named barrister and Request 2 refers to a named LSA. The barrister is self-employed, the named LSA is not.
15. The Commissioner is satisfied that the fees are clearly the personal data of the named barrister and the named LSA. The figures represent the amount they have cost the Council on a particular task and relate to those individuals' domestic income. This is clearly biographically significant information.

### **Would disclosure breach the Data Protection Principles?**

16. 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.

17. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual, the potential consequences of the disclosure and whether there is legitimate public interest in the disclosure of the information in question.

### **Reasonable expectations**

18. The Council said that it "considers that such disclosure would be comparable to the publishing of an individual's exact salary or income, and would represent an intrusion into the individual's private life and privacy. As such the council considers the disclosure of the information would not be within their expectations."
19. In the Commissioner's view, it is comparable in both cases but not exactly the same as disclosing precise salary information, particularly in the case of the LSA. That said, in the case of the barrister it is a clearer comparison. Barristers are self-employed and the amount paid to a named individual for a particular job is income they have generated personally as sole traders. For an LSA, the figure in question may well include some costs to the Council beyond their salary but the majority of the figure will relate to their salary. In any event, the Commissioner is satisfied in these circumstances that the information in question is about both individuals' private lives because it reveals detail about their personal income.
20. The Commissioner also notes that, as part of the Council's Transparency Agenda, it discloses sums paid out over £500. The individual recipient of that amount is not always disclosed but the area to which the expenditure relates is made public.<sup>3</sup> Local taxpayers and any other interested persons therefore have the opportunity to challenge the Council if they are unhappy about its expenditure using detail available online.
21. Given that the Council already makes a certain amount of information available online about its areas of expenditure, it is reasonable for the two individuals in this case to expect that more specific information about amounts paid to them, would be withheld. In the case of the LSA, the information is, to all intents and purposes, salary information. They

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<sup>3</sup> <https://www.southtyneside.gov.uk/article/38545/Council-spending-over-500>

are not of a sufficiently senior position to expect greater detail about their salary to be disclosed. In the case of the barrister, this information constitutes their personal income as well. It is certainly reasonable for the Council to disclose information about legal fees that it incurs (see Footnote 3). However, it would be unreasonable to name the individual barristers to whom each fee is paid because the information is, as outlined above, personal information about that individual's income.

### **Balancing the rights and freedoms of the individual with the legitimate interests in disclosure**

22. Given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
23. The complainant has raised concerns about how their child's educational needs are being addressed. They have been in correspondence with the Council about this and the requests in this case form part of a concern about value for money spent by the Council as well as other concerns.
24. The Commissioner accepts that there is a legitimate interest in overall transparency in the way the Council spends its money, particularly in relation to education. However, there is no presumption that this should automatically take priority over personal privacy. The Commissioner considers each case on its merits.
25. In this case, the Commissioner is not convinced that the specific information requested, while of significant interest to the complainant, is of sufficient wider public interest to warrant overriding the protection of the third party personal data of the named barrister and the named LSA.
26. Having considered the positions of both parties, the Commissioner is satisfied that the complainant's arguments for disclosing the specific information in this case are not as compelling as those that the Council has put forward for protecting the individuals' personal data.
27. The Commissioner is satisfied that on balance, the legitimate public interest in disclosure does not outweigh the interests of the named individuals in this case. In short, it would not be fair to disclose the requested information in this case.

### **Conclusions**

28. In light of the above, the Commissioner is satisfied that the named individuals would have no reasonable expectation that the information in question would be disclosed to the world at large.
29. The Commissioner is satisfied that the withheld information is personal data and that disclosure would breach the first data protection principle as it would be unfair to the individual concerned. The Commissioner upholds the Council's application of the exemption provided at section 40(2) of the FOIA. She has not gone on to consider the application of section 43 because of her conclusion as regards section 40(2).

### **Procedural failings**

30. Section 1(1)(a) states:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request,"

31. Section 10(1) states:

"Subject to subsections (2) and (3) [where further information is needed but not applicable here], a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

32. Section 17(1) states:

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1) [in this case, 20 working days], give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

33. Section 17(7) states:

"A notice under section [17] (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”
34. The legislation can be accessed in full via the following weblink: <http://www.legislation.gov.uk/ukpga/2000/36/contents> .
35. While the Commissioner upholds the Council's use of section 40(2) in this case, she is extremely disappointed with the way the Council handled this request. Had it adhered to its obligations under FOIA, the complainant would have been better served. The complainant may have disagreed with the reasons that the Council had for withholding the information (and may still do so). However, in this case, the request was not processed until the complainant provided identification. This is not a requirement of the FOIA. The complainant was also not given any information about how to request an internal review. The Council appeared to conflate its obligations under DPA and FOIA to the detriment of the complainant. This created further delay and misunderstanding which would not, in any way, benefit communication between the two parties on such a sensitive topic.
36. Even if the Council was giving a response which was not welcomed by the complainant, it should have done so in accordance with the time limits of the FOIA and it should have given the complainant a clear explanation about how they could complain about the response. It added insult to injury by treating the complainant's request for internal review as a repeat request (although it cited the FOIA incorrectly when it did so). This put the complainant at considerable disadvantage when they were trying to deal with the substantive matter of their child's care and education.
37. In failing to provide a response, particularly to request 1, within 20 working days, the Council contravened the requirements of section 1(1)(a), section 10(1) and section 17(1) of the FOIA.
38. Arguably, the Council would be entitled to refuse to confirm or deny under FOIA section 40(5) whether it held information in relation to the complainant's child's educational provision (request 2) because that is not a subject which could fairly be disclosed to the public. When a public authority provides confirmation or denial or discloses information under FOIA, it is doing so to the world at large, not to individuals. It is only in specific circumstances, which are not applicable here, that it can take the identity of an FOIA requester into account. The Commissioner recognises that the Council took the complainant's identity into account

in order to try and be helpful to them and to answer their information access requests under FOIA and DPA. However, doing so proved to be detrimental to the complainant for reasons outlined above.

39. In failing to offer an internal review or provide information about how to complain to the Information Commissioner, the Council contravened the requirements of section 17(7).
40. The Commissioner is pleased that the Council has expressed willingness to address the procedural issues raised. It also explained that its failure to provide internal review information was an oversight.



## Right of appeal

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41. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

42. 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.
43. 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** .....

**Gerrard Tracey**  
**Principal Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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