

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 March 2017

Public Authority: Telford & Wrekin Council

Address: Darby House
Telford
Shropshire
TF3 4LF

Decision (including any steps ordered)

1. The complainant has requested all written correspondence that had taken place between Telford & Wrekin Council and AFC Telford since 1 April 2014 to the date of the request.
2. Telford & Wrekin Council refused to provide some of the requested information it held. It based this refusal on the following exemptions; sections 38 (health and safety), 40(2) (personal data), 41 (information provided in confidence), 42 (legal professional privilege) and 43 (commercial sensitivity).
3. The Commissioner's decision is that Telford & Wrekin Council has not persuaded her that the aforesaid exemptions, save for section 40(2), are engaged.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information that it has withheld by reference to the aforesaid sections. Save it is not to disclose information it has withheld by reference to section 40(2).
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

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6. AFC Telford United (a football club) was formed in the summer of 2004 following the demise of Telford United FC.
 7. On the 18 January 2016 Telford & Wrekin Council ("the council") published a statement regarding its relationship with AFC Telford¹.

Request and response

8. On or about the 21 June 2015, the complainant requested information, from Telford & Wrekin Council ("the council"), of the following description :
 - All written correspondence that has taken place between the council and AFC Telford since June 2011 to date (later changed to 1 April 2014 to date).
 - Minutes of any meetings held between the parties over the same period.
9. On 29 September 2015, the council responded. It provided some information within the scope of the request but refused to provide the remainder. It cited the following exemptions as its basis for doing so:
 - Section 38 Health and safety
 - Section 40: Personal Data
 - Section 41 Information provided in confidence.
 - Section 42 Legal Professional Privilege
 - Section 43 Commercial Sensitive
10. The complainant requested an internal review of the council's decision on 29 September 2015. On 4 December 2015, the council wrote to him with the details of the result of the internal review it had carried out. Whilst it did release some further information, its position remained largely unchanged.

¹ http://www.telford.gov.uk/news/article/3192/afc_telford_united_statement_in_full

Scope of the case

11. The complainant contacted the Commissioner on 16 March 2016 to complain about the way his request for information had been handled.
12. During the course of her investigation, the Commissioner wrote to the council on, inter alia, 21 September 2016. The letter put to the council numerous questions about its reliance on the aforesaid exemptions to withhold requested information. The purpose of the questions was to elicit the council's full reasons and rationale regarding its reliance on the exemptions.
13. The council substantively replied to the Commissioner's letter on 21 October 2016.

Reasons for decision

14. Section 1 of FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:
 - the duty to inform the applicant whether or not requested information is held and, if so,
 - the duty to communicate that information to the applicant.
15. Section 43 provides that information is exempt if its disclosure would, or would be likely to prejudice the commercial interests of any party.
16. Section 38(1)(a) provides that information is exempt information if its disclosure would, or would be likely to, endanger the physical or mental health of any individual.
17. Section 41 provides that information is exempt if it has been obtained by the public authority from another body and its disclosure to the public would constitute an actionable breach of confidence.
18. Section 42 provides that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information
19. Section 40(2) provides that information is exempt from disclosure if it constitutes third party personal data (i.e. the personal data of an individual other than the applicant) and the conditions in section 40(3) FOIA have been met.

20. The Commissioner lays out below a comprehensive summary of the council's submissions to her as mentioned in paragraph 13 above.

Section 43 Commercially Sensitive Information

21. The third parties who provided the information to the council were AFC Telford and New College Telford.
22. The council contacted AFC Telford to ask if they consented for the third party information related to them to be released. AFC confirmed that they did not give consent for any of this information to be released. However, as the council held this information it was clear that the decision as to whether to release would be the council's responsibility. Taking into consideration the third parties' views, the council decided that it only partially agreed with these views and therefore some third party information was released but this did not fall under any FOI Act exemption.
23. Information relating to New College Telford was inextricably linked to the AFC Telford third party data; therefore by default if the council were unable to release AFC Telford third party data then the council could not release New College's data either.
24. There is a further short submission (from the council) that if the Commissioner were to discuss here may cause the very prejudice to commercial interests which section 43(2) is designed to prevent. Consequently, the Commissioner addresses that submission in a Confidential Annex.

Section 41 Information provided in confidence

25. The information exempt under section 41, the council believes, has the necessary quality of confidence in that information with regards to the lease negotiations and stadium safety were certainly not trivial and could not have been otherwise accessible. The information was worthy of protection from both a commercial and public safety point of view.
26. Third party information withheld under Section 41 related to either the on-going legal lease negotiations and/or the safety of the AFC Telford stadium. Information was provided to the council in both circumstances confidentially with no expectation that this information would be released into the public domain.
27. Legal representation from AFC Telford made it clear that they did not want confidential information in regards to both these matters being made public as they were provided on a confidential basis.

Section 42- Legal Professional Privilege

28. The communications were between the council's legal team and third parties in relation to the negotiation of a lease. These negotiations were being conducted on a confidential basis and were still on-going at the time the complainant submitted his initial request and his subsequent appeal.
29. Legal representation from one of the parties (AFC Telford) involved in the legal negotiation of the lease and its subsequent terms and conditions did indicate that they would consider legal action if the council released correspondence relating to the legal matters of the lease negotiation.
30. The council supplied the Commissioner with four bundles of the withheld information, primarily emails.
31. Having read and considered both the withheld information and the council's submissions, the Commissioner is not satisfied (on a balance of probabilities) that the exemptions provided by sections 38, 41, 42 and 43, are engaged.
32. The onus is on the public authority to show to the Commissioner that the exemptions relied on do allow it not to meet its statutory duty to provide the complainant with the requested information it holds. Mere assertions or poorly conceived submissions are, as is the case here, unlikely to be sufficient. Unless it is plain to the Commissioner, that an exemption is engaged, she cannot fill in the gaps in insufficient submissions or explanations from and for a public authority.

Section 40(2)

33. Section 40(2) provides that information is exempt if it is the personal data of someone other than the applicant and disclosure would contravene any of the data protection principles in the Data Protection Act 1998.
34. In deciding whether section 40 is engaged the first thing to consider is whether the requested information is personal data. Personal data is defined in the Data Protection Act 1998 as:

"... 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;

35. The first consideration is whether this information is personal data. The withheld information (by reference to section 40(2)) is the names and contact details of a diverse group of people. The Commissioner considers that individuals' names and contact details are clearly personal data as such information relates directly to identifiable individuals.

Would disclosure breach the Data Protection Principles?

36. 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.
37. 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. Only if the Commissioner finds that disclosure would be fair will she go on to look at lawfulness or whether a Schedule 2 condition can be satisfied.
38. In assessing whether disclosure would be unfair, and thus constitute a breach of the first data protection principle, the Commissioner takes into account the reasonable expectations of the data subject and the likely consequences of disclosure including any damage or distress that would be caused.
39. The Commissioner has not been shown that the data subjects expected, or consented for their personal information being publically disseminated. The Commissioner is accordingly satisfied that the individuals would have a reasonable expectation that this withheld information would not be placed into the public domain by disclosure under the FOIA. Therefore she considers that disclosure of this information would be an unfair invasion of the privacy of the individuals, and as such may cause them some distress.
40. 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. However the Commissioner has not identified compelling reason to make this personal information public. Accordingly the Commissioner is satisfied that, on balance, the legitimate public interest does not outweigh the interests of the small number of individuals and that it would not be fair to disclose the requested information in this case.

Other Matters

41. In her correspondence (referred to in paragraph 12 above) to the council the Commissioner said, inter alia, as follows;

“This is your opportunity to finalise your position. With this in mind, you should revisit the request. After looking at our guidance, and in light of the passage of time, you may decide to reverse or amend your position. If you do, please notify the complainant and me within the timeframe specified at the end of this letter. This may enable us to close this case informally without the need for a decision notice”.

42. In the context of the preceding paragraph the council appears to have overlooked its own statement of 18 January 2016. Where it has plainly publically disseminated information it continued to maintain (to the Commissioner) should not be so disseminated. The Commissioner examples this in the confidential index.

Right of appeal

43. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. 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
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