

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 September 2017

Public Authority: Doncaster Metropolitan Borough Council
Address: Civic Office
Waterdale
Doncaster
DN1 3BU

Decision (including any steps ordered)

1. The complainant has requested the acknowledgement of racism and racist acts allegedly made by a specific Doncaster Metropolitan Borough Council Director. The Commissioner's decision is that Doncaster Metropolitan Borough Council has correctly applied the exemption for third party personal data at section 40(2) of the FOIA. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

2. On 29 September 2016, the complainant wrote to Doncaster Metropolitan Borough Council ('the council') and requested information in the following terms:

"...I respectfully ask that you ensure that I have access to the:

1. Hazel Salisbury report
2. The acknowledgement of racism and racist acts made by apparently DMBC Director [name redacted].

I am genuinely grateful to [name redacted] for confirming that the above information can be released. [Name redacted] has also gave [sic] his consent to the release of the acknowledgement of racism and racist acts within his file."

3. On 11 October 2016, the council supplied the complainant with a redacted copy of the Hazel Salisbury report.
4. The council responded on 27 October 2016 in relation to part 2 of the request as follows:

"Having reviewed the request the Council are clear that a number of exemptions exist within the Freedom of Information Act to refuse the request. Notwithstanding the consent which has been given by a third party to the release of information contained in a file about their own grievance, we are satisfied that the information sought is not solely the personal information of the individual. We take the view that we would be correct to refuse the information sought based on exemptions contained in the Act in sections 36, 41 and 42.

Nonetheless, in the interest of transparency we have decided to give you an extract of the information contained in the file as follows:

A Union Representative said that in the report it says that the decision about black history month was attributed to [initials redacted]. The Union Representative asked if the Director felt that a senior officer saying the decision should be attributed to [initials redacted] was a racist act. Would it be regarded by you as institutionally racist? The Director replied she felt it was it was a blatantly racist act.

For clarity the Director responding to the Union representative at the Grievance hearing was not the same Director that the Union Representative was referring to in his question. Both Directors no longer work for the Council.

It is important to note that in the recent Tribunal proceedings it was clarified that the events referred to in this part of the Grievance were not actually about the Black History month decision, but were in fact about the later FOI release (which contained [initials redacted] name in stylised font against his wishes). It is quite possible that the Director at the hearing would have given a different response had the question asked been accurate. As it is, the Director's view expressed in answer to the question is not relevant as it relates to something that never actually happened."

5. On 1 November 2016 the council supplied the complainant with a copy of the redacted paragraph from the grievance file.
6. The complainant expressed dissatisfaction with the response on 1 November 2016.

7. Following the intervention of the ICO, the council provided an internal review on 1 March 2017. It said the following:

"...the Council would have been able to have refused the request under both sections 40 and 41 of the Freedom of Information Act. Information contained within grievance files would not generally be supplied in relation to a request by a third party. There is a confidential nature to employee grievance proceedings which is expected and recognised by all participants within the process.

On this occasion the employee in question did give his consent to the release of the notes. However, whilst the notes may be about his grievance, the notes themselves are not solely his personal data and his consent is only one matter to take into consideration.

Having reviewed this further I am satisfied that it is appropriate not to release the information requested. It would have been in order to refuse this request in its entirety under appropriate exemptions contained within the Act. The fact it was decided in the interests of transparency that it was possible to release a redacted version of the paragraph in question does not justify the release of the further information. In my view it is appropriate to continue to maintain the redactions contained in the document on the basis that such information is both personal data which is contained within grievance proceedings to which there is an inherent confidential nature and an expectation that matters provided in confidence would remain confidential."

8. The Commissioner is aware that there has been further correspondence between the council and the complainant regarding this issue. However, only the correspondence which appears to be most relevant to the handling of the request dated 29 September 2016 is detailed above.

Scope of the case

9. The complainant contacted the Commissioner on 8 December 2016 to complain about the way his request for information had been handled.
10. In its response to the Commissioner's enquiries, the council confirmed that it is not seeking to rely on the exemption for information provided in confidence at section 41 of the FOIA. The Commissioner has therefore considered the application of the exemption at section 40(2) to part 2 of the request.

11. For clarity, the Commissioner has not considered part 1 of the request as this has not been complained about.

Background

12. The council provided the following information as background to this request:

"It is important to understand the context and (extremely lengthy) background to the events the subject of the request. The underlying matter relates to a decision made by the Council in March 2009 relating to the withdrawal of funding for Black History Month and the role of a former council employee and the extent of his involvement in the decision making process.

The employee in question, [name redacted], initiated a grievance concerning his treatment by the Council, which included a complaint that a letter concerning the Black History Month decision had been sent out in his name, without his agreement. This was not the only aspect of [name redacted]'s grievance.

The Council does not accept, nor is there any evidence to support the view that the Council falsified/forged the signature of [name redacted] and sent out cancellation of Black History month funding letters in his name. [Complainant] has repeated these allegations on many occasions and is seeking to use the 'racist act' part of this FOI request to further those allegations. In reality what happened was that [name redacted] did sign the letter cancelling funding for Black History month as this was part of his job. In a later response to an FOI from [complainant], [name redacted] drafted a reply which in the draft implied that extensive briefing notes had been given to the Mayor to inform his decision on cancelling funding of Black History Month. [Name redacted] believed that this is what had happened. Whilst [name redacted] was absent from work his manager (who no longer works for the Council) corrected the draft to remove reference to the Mayor being given the briefing notes or making the decision, because in fact whilst the Mayor's views were sought, this decision was an officer decision about which the Mayor was merely consulted. In the context of this, which is what the Salisbury report established, it is clear that the union question at the grievance was hypothetical as it did not relate to the events that actually took place.

The mistake the manager made is that, in the Council's view, the revised version of [name redacted]'s draft FOI response that was sent out should probably have gone in the manager's name and not been

sent out in [name redacted]'s name, even though he had substantially drafted it.

[Name redacted] subsequently left the employment of the Council under a compromise agreement which included a confidentiality clause.

During the course of [name redacted]'s grievance process, a hearing was held in which a Director of the Council in attendance, was asked by [name redacted]'s union representative about whether certain (hypothetical) actions could be considered racist. The Director agreed with that."

Reasons for decision

Section 40(2)

13. 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').

14. 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."

15. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she 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?

16. As explained above, the first consideration is whether the withheld information is personal data. The council explained that the information is contained within a grievance file of a particular individual. It said that all the information is the personal data of that employee but also inevitably includes the personal data of the following third parties:

- "1. The names (initials) of the individuals referred to in the paragraph. (Those people will be readily identifiable by a large number of persons if their initials are disclosed to the world)
2. The opinion expressed in the paragraph by an individual who is no longer employed by the authority
3. The person about whom the opinion is expressed (who again is no longer employed by the authority)."

17. Having viewed the requested information, the Commissioner is satisfied that it is the personal data of the above 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.

Nature of the information and reasonable expectations

21. The council said that the information is contained within notes of a grievance hearing and that there is an inherent and reasonable expectation of confidence in all employee grievance proceedings. It explained that all participants would have a reasonable expectation that their involvement within the process, their role and any answers,

opinions and comments that they would give would remain confidential and that this is essential to ensure the effectiveness of the process, which must remain a safe space for employees to air sensitive issues without fear.

22. The council also said that the confidentiality of grievance hearings is a practice well established both within the council and as a matter of good employment practice. It referred to its own grievance policy which states that "all records should be treated as confidential and will be kept no longer than necessary and in accordance with the Data Protection Act 1998" and said that ACAS guidance refers to personnel records being kept confidential.
23. In addition, the council said that one individual is a junior officer whose role was tangential and of not direct relevance either to the information requested or to any wider interest.
24. The Commissioner recognises that information relating to internal 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.
25. In her guidance on personal data¹ the Commissioner states that the expectations of an individual will be influenced by the distinction 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."

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

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

26. Although the Commissioner considers that the withheld information in this case relates to the individuals' professional lives, given the nature of it, she is satisfied that the individuals would have a strong expectation of confidentiality and privacy in this case.

Consent

27. The complainant has informed the Commissioner that the council and the individual who initiated the grievance had agreed to release a different version of the note in the grievance with less redactions.
28. The council has explained to the Commissioner that it has canvassed the views of both the individual who initiated the grievance and the director who allegedly acknowledged racism ('the director').
29. It explained that the individual who initiated the grievance indicated that the council had his consent to release the information, albeit this was expressed in the context of an email which also expressly advised the council that it should consider the position of other third parties and consider what, if any, information can properly be released. It described the consent as 'somewhat less than wholesale'. The council also said that it is worth noting that whilst the individual who initiated the grievance has given his agreement for only the specific part of his grievance relating to the answer given to be released, he has also contacted the council on a number of occasions requesting that information about him is not released.
30. The council said that the director has specifically indicated that the preference would be for the information not to be disclosed. In indicating this, one of the reasons stated was the belief that the information once released would be misinterpreted and used in an inappropriate context to further the widespread allegations and campaign conducted by the complainant against the council and its officers.
31. 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.
32. 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 subjects 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.

33. In this particular case, even if it could be said that the individual who initiated the grievance has consented to disclosure, the withheld information is not solely their personal data and therefore the existence or otherwise of their consent is not determinative in whether the withheld information should be released in this case.
34. The council also explained that contrary to the terms of the request, at no stage during a previous Tribunal appeal hearing did the council consent to this information being released in full or in part. It was agreed that if that was the total of the information requested, the council would be prepared to consider the substance of it rather than apply section 14 (as it had done to the much wider request). The council officer referred to in the request in this case explained that it would need to consider various redactions, and particularly the personal data of third parties. The council explained that it would appear that the complainant wrongly advised third parties that the council had agreed to release all of the information.

Consequences of disclosure

35. 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.
36. In this case the council has said that the directors concerns are particularly well-founded given the extensive, and often highly offensive, nature of the complainant's correspondence with the council. It said that any public confirmation of a council employee in connection with the complainant's campaigns is likely to be the subject of a distressing, ceaseless round of complaints and correspondence. It explained that the second Tribunal judgment sets out the nature of the burden posed by the complainant and the tone of his correspondence in which he regularly accuses officers, without evidence, of racism, corruption and bad faith. The council said that despite that judgment, nothing about the complainant's behaviour has altered since and the high probability of distress being caused to the director renders the disclosure of their personal data clearly unfair.
37. The council also said that the above concerns are well founded in the light of the actions of the complainant since release of the redacted paragraph to him on 1 November 2016. It said that he attaches the redacted paragraph to emails he sends to council officers, members and third parties on a variety of subjects and that in the period since the 31 August 2016 he has sent a total of approximately 381 emails (received by 2422 officers and members of the council in spite of having been attributed with a Single Point of Contact). The council explained that

since release of the redacted paragraph on 1 November 2016, this has been specifically referenced by the complainant in 178 of the above emails communicated to 916 officers and members of the council and that on many occasions the redacted paragraph from the grievance file is attached to his email. The council therefore considers that if a further un-redacted paragraph is released, this will only result in much of the same correspondence, but re-invigorated.

38. The Commissioner considers that the disclosure of information relating to a grievance would be an intrusion of privacy, could cause damage to the data subjects' future prospects and general reputation could and cause distress, particularly as she 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

39. 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 case specific interests.
40. The complainant has stated that the council has been allowed to apply its own interpretation of the redacted information which is "irreconcilably inconsistent with one that has been belatedly offered by [individual who initiated the grievance]". He has submitted that "by removing the unnecessary redactions that the public will understand the context of the racism and blatant racist acts within the public authority. This will provide the baseline for addressing the racism and blatant racist acts after years of denial and concealment."
41. The complainant has also asserted that the council is being allowed to hide behind a compromise agreement to circumvent his rights under the FOIA and that he has a basis right to have access to information which will enable "protected groups" to understand public authority decision making process and ultimately compliance with the Public Sector Equality Duty.
42. The council has said that there is no compelling public interest in disclosure of the information which has been redacted and that the information central to the request has been provided. It said that the complainant is able to further his debate around the council's handling of equalities matters by reference to it.
43. It also said that it strongly disputes the complainant's assertion that it has been allowed to place its own interpretation on the redacted information as being inconsistent with that provided by the individual

who initiated the grievance, and that removal of the unnecessary redactions will provide the public with an understanding of the context of racism and racist acts and to give a baseline for addressing such acts. It said that it has addressed many times the allegations made by the complainant, both in correspondence, and within the two tribunals, on this issue. The council explained that the continued reference to a fake signature was found by the tribunal in 2016 to be an "*incorrect and misleading*" description and the tribunal further said that "*emotional references to racial discrimination within the Council were also in our view misplaced and ... emotive and .. improperly raised in the context in which they have been in this appeal*". The council considers the current request to be a continuation of the same theme and should not be taken as justification for release of the redacted information.

44. The council also explained that, moreover, the information which has been released confirms that within the hearing a response was given to a hypothetical question and it does not concern an actual event. It said that the information which was released was done so to be transparent and it is not therefore necessary to disclose the other comments within the paragraph which do not form part of the information sought, and which should remain confidential given the nature of grievance hearings. Furthermore, it said that the circumstances surrounding the funding decisions for Black History Month are discussed in detail in the Hazel Salisbury Report which has been released. The council submitted that the public interest in this matter from almost a decade ago has been very substantially satisfied.
45. The Commissioner considers 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 this involves the allegation of racism. She fully recognises the place of information in enabling the public to hold the council to account. However, in this instance, she does not consider that provision of the withheld information would achieve the complainant's aims of providing 'the baseline for addressing the racism and blatant racist acts after years of denial and concealment'. She also considers that the council's explanation, as detailed in the 'Background' section of this decision notice, enables the public to understand the context of the extract of the grievance notes that have already been released, that being that it was in relation to a hypothetical question.
46. The Commissioner has also considered the complainant's assertion that an Internal Audit Report for the period April 2017 to July 2017 shows that he has 'been right all along' and that 'there is an acknowledgement that even today Chief Officers have been indifferent towards complying with the Public Sector Equality Duty'. Having viewed the Internal Audit

Report, the Commissioner does not consider that this equates to a legitimate interest in disclosure of the specific information withheld in this case.

Conclusion on the analysis of fairness

47. Taking all of the above into account, the Commissioner concludes that it would be unfair to the individuals concerned to release the requested information. It is clear that disclosure of information within a grievance file would not have been within their reasonable expectations and that the loss of privacy could cause unwarranted distress. She acknowledges that there is a legitimate interest in the public being given information involving the allegation of racism but does not consider that the specific information being withheld in this case would enable any racism to be addressed and has taken into consideration the fact that the Hazel Salisbury Report, which was a full independent report into what happened in relation to the cancellation of the Black History month, has been released. Moreover, the Commissioner does not consider that any legitimate interest in this case 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).
48. 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, she has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

Right of appeal

49. 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

50. 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.
51. 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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