

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 December 2017

Public Authority: Hambleton District Council

Address: Civic Centre
Stone Cross
Northallerton
North Yorkshire
DL6 2UU

Decision (including any steps ordered)

1. The complainant has requested information about 'pay-offs' and associated payments to senior officers from financial years 2012/13 to 2016/17, as well as the circumstances surrounding the departure of two particular officers. Hambleton District Council supplied some information, but withheld other details, relying on section 40(2) of the FOIA (information is exempt if it is personal data).
2. The Commissioner's decision is that Hambleton District Council is entitled to rely on section 40(2) of the FOIA in withholding some of the requested information.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 4 January 2017 the complainant wrote to Hambleton District Council and requested information in the following terms:

'I would be grateful if you would provide some information on pay-offs provided to senior staff over the last four financial years and the current ongoing financial year.

Specifically, I would like the individual amounts paid in compensation/redundancy pay-offs to individual officers in each of those five years.

I would also like the amount of pension payment made to and/or on behalf of each individual, in those cases in which staff left prior to retirement age under the pension scheme.

I am only seeking information on senior members of staff which I would identify as those in receipt of a salary of £50,000 and above.

Given these members of staff are senior I would expect they can all be identified unless there are compelling reasons not to do so.'

5. On 1 February 2017 Hambleton District Council responded, supplying financial information about 4 officers between 2012/13 – 2016/17.

6. On 8 February 2017 the complainant queried the accuracy of the information provided, asking for more detail about named individuals:

'As such I would be grateful if, in respect to each of the following you would advise:

- Are they still employed by Hambleton, if not the month/year of leaving?;*
- The reason that they left if there was additional cost to council eg redundancy, early retirement etc;*
- Their salary (and any bonuses) at the time of leaving;*
- Post title at the time of leaving;*
- Details (amounts and details) of any additional payments made and any additional costs to HDC eg redundancy payment, compensation, payments to the pension fund.'*

7. The Council responded on 7 March with a spreadsheet showing post titles, and payments made.

8. On 24 March 2107 the complainant replied and expanded his request.

'I do have some queries about the information provided.

With regards to the departure of the chief executive in 2013/14, the FOI response states his salary was £62,500.

The annual statement of accounts for that year does not have a chief executive with that salary. It records a salary of £107,100 for the chief executive.

I would therefore be grateful if you would clarify the discrepancy.

The FOI response also does not provide a reason for his departure and is blank with regards to any other payment received.

The council must know the reason for the chief executive's departure and I would be grateful if that would be provided. That would be a requirement under the terms of the FOI Act unless an exemption was being applied and none has been provided in the response.

With regards to any payment received or pension contribution, I would be grateful if the council would clarify its response; it seems unlikely a chief executive would leave without any recompense at all.

In the circumstances, I would also like to ask for the decision records relating to the chief executive's departure in 2013/14.'

With regards to the departure of the chief executive in 2015/16, the FOI response states he received a redundancy payment of £296,986.83.

The council's press release at the time said the chief executive was taking voluntary retirement.

It is unclear how a chief executive could be made redundant given this is a statutory appointment and a replacement was (and had to be) in place the day after the chief executive left.

I would therefore be grateful if the council would clarify whether the chief executive was made redundant or retired.

If he was made redundant, please provide the legal provision for making the chief executive redundant and please provide the calculation leading to the payment.

In the circumstances. I would also like to ask for the decision records relating to the chief executive's departure in 2015/16.

9. The Council replied on 29 March, stating that the 2013/14 accounts showed the salary for the Chief Executive subsequent to the one who left in that year. It confirmed that the final salary payment to the Chief Executive who had left, Mr Simpson, was £62,500, but refused to supply reasons for, or records relating to, his departure, citing the exemption within section 40(2) of the FOIA as the information requested was personal data. It stated that disclosure would be unfair and unlawful and therefore breach the first data protection principle, and that no conditions for processing would be met. It also said that Mr Morton, the Chief Executive who left in 2016/17 'retired upon taking voluntary redundancy as part of a Management Restructure which deleted the post of Deputy Chief Executive'. Again it cited section 40(2) of the FOIA, saying the legal provisions and details about the departure were personal information and that disclosure would be unfair and unlawful, thereby breaching the first principle of the DPA 1998.
10. The complainant appealed against the use of 40(2) on the same date. In its review response of 13 April 2017, the Council upheld its use of section 40(2) of the FOIA.

Scope of the case

11. The complainant contacted the Commissioner 18 April 2017 to complain about the way his request for information had been handled. The complainant contested that there was additional information regarding payments to Mr Simpson on his departure that had not been disclosed, and was concerned about the seeming omission of payments to him from the annual accounts. Consequently he considered any information held about his departure to be in the public interest. He also held that the circumstances surrounding Mr Morton's departure were also in the public interest as his FOI request has raised a discrepancy between the public announcement of retirement and payments made due to redundancy.
12. The Commissioner considers the scope of the case to be whether Hambleton District Council was entitled to rely on section 40(2) of the FOIA for information relating to the departures of Mr Simpson and Mr Morton.

Reasons for decision

Section 40(2) and 40(3)(i)

13. Section 40(2) of the FOIA states that information is exempt from disclosure if it is personal data as defined by the Data Protection Act 1998, and such disclosure would breach any of the data protection principles (section 40(3)(i)).

Is the information requested personal data?

14. Personal data is defined in section 1 of the DPA 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 data controller or any person in respect of the individual..”

15. In the complainant’s original request, he only asked for information about payments to officers over a certain salary, which was duly supplied. However, his expanded requests named specific officers, asking for financial information and reasons/circumstances surrounding their departures, the latter of which the Council applied section 40(2) of the FOIA. The Commissioner is satisfied that the withheld information constitutes personal data.

Would disclosure breach the data protection principles?

16. The Council has argued that disclosing information relating to the departures of both Mr Simpson and Mr Morton would breach principle 1 of the DPA - that personal information must be processed fairly and lawfully. In its review response to the complainant the Council states *‘the information in question is personal data and the public interest in disclosure does not outweigh those individuals’ reasonable expectations of privacy’*. It has cited examples in the form of another Decision Notice issued by the Commissioner, and a First-tier Tribunal case where the higher expectation of, and right to, privacy outweighed any public interest in disclosure.

17. The Commissioner has issued guidance on FOIA requests for personal information¹ and more specifically on requests relating to the personal information of public sector employees². In determining whether the processing of personal information (which disclosure under the FOIA would fall) is fair and lawful, there are a series of steps to follow:
- Would disclosure be fair to the data subject? If no, then the information is exempt from disclosure.
 - If disclosure would be fair, then consideration must then be given to whether a condition in schedule 2, and schedule 3 in the case of sensitive personal data, is met. If the necessary conditions are not met, then the information is exempt.
 - If disclosure would satisfy any necessary conditions, then consideration must then be given as to whether or not it is lawful. If not lawful, the information is exempt.
18. In considering whether the disclosure of the information would be fair, the Commissioner poses four key considerations:
- Whether the information includes sensitive personal data;
 - The reasonable expectations of the individual to whom the data relates;
 - Consequences of disclosure; and
 - The legitimate interest of the requester or the public having access to the information versus the rights and freedoms of the individual.

The reasonable expectations of the individual

19. As both Mr Simpson and Mr Morton were Chief Executives when they left the Council, it is reasonable to expect that their positions would be subject to a high level of accountability and scrutiny than other staff within the authority. However, as the withheld information relates to personnel matters of the individuals, rather than the functions of their role, the Commissioner recognises that regardless of their seniority this

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

² https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

information is confidential and that they would have a reasonable expectation that it remains so. The expectations of a specific individual is not the only consideration; in the case of *Trago Mills (South Devon) Ltd v the Information Commissioner and Teignbridge District Council*, the First-tier tribunal noted that expectations of privacy should be measured not by the individual concerned, but by '*the reasonably balanced and resilient individual holding the position that X held with the council*' (EA/2012/0028, 22 August 2012). In view of the content of the withheld information, the Commissioner considers that there is a strong and reasonable expectation that the information should not be disclosed.

Consequences of disclosure

20. The Commissioner recognises that the request relates to information going back a number of years. In some cases this may mean that the consequences of disclosure may have decreased and potential damage or distress to the individual minimised. However, in this case the Commissioner believes that disclosure of the withheld information could have significant unfair consequences.

The legitimate interests of the individual / public in disclosure versus the rights and freedoms of the individuals concerned

21. Despite expectations of privacy and consideration of the consequences of disclosure in the form of damage or distress, it may still be fair to disclose the information if there is an overriding legitimate interest in the information. The FOIA is designed to increase openness, transparency and accountability in public authorities through the rights of public access to recorded information. Although section 40 is an absolute exemption and not subject to the public interest test, in determining whether the disclosure is fair and lawful, consideration must be given to the legitimate interests of the requester, and by virtue of any disclosure, to that of the wider public.
22. The complainant maintains that the seeming 'airbrushing' of Mr Simpson from the Council's accounts, and the discrepancy between the public announcement of retirement but disclosure of redundancy payments to Mr Morton are of concern and require 'clear scrutiny', and has provided examples of decision notices where there is an acceptance that payments on departure should be disclosed. He has also referred to the '*The Code of Recommended Practice for Local Authorities on Data Transparency*', maintaining that the Council have failed to comply with it by omitting the payments to Mr Simpson.
23. The Council has stated to both the Commissioner and the complainant that their audited accounts conform to all relevant standards, and has supplied all recorded information regarding payments made by the

Council to Mr Simpson as part of its FOI response to the complainant. It is not the role of the Commissioner to investigate alleged accounting anomalies and she can draw no conclusion about this matter.

24. The withheld information contained an explanation of the legal position regarding Mr Morton's departure, which at the request of the Commissioner the Council supplied to the complainant:

'You also asked how it could be that Mr Morton, the Chief Executive, had left due to redundancy. The answer is that it was a so-called bumped redundancy. This is the process of moving a potentially redundant employee (A) into another role, and dismissing the employee currently performing that role (B). This is still a redundancy dismissal, even if there is no actual or anticipated diminution in the requirements for employees to do B's work. The concept was explained in Gimber and Sons Ltd (1967) EWHC QB2 and approved by the House of Lords in Murray v Foyle Meats: 'If there is a reduction in the requirement for employees in one section of an employer's business and an employee who becomes surplus or redundant is transferred to another section of that business, an employee who is displaced by the transfer of the first employee and is dismissed by reason of that displacement is dismissed by reason of redundancy'

As you will know, Dr Ives took on the role of Chief Executive under circumstances like those above, with the council seeking to reduce the cost of its senior management team. Mr Morton thus left by reason of redundancy, and was paid a sum in accordance with the council's redundancy policy.'

Conclusion

25. The Council supplied the financial information to the complainant in response to his request, and disclosed some further non-financial information during the course of the Commissioner's investigation. However it has relied on the exemption in sections 40(2) of the FOIA on the basis that information relating to the circumstances surrounding the departure of Mr Simpson and Mr Morton (save for the bumped redundancy explanation) is personal data and disclosure would be unfair.
26. The Commissioner recognises the arguments of the complainant that decisions and actions by the Council should withstand scrutiny, particularly where they relate to the highest of officials. The complainant's request resulted in the release of financial information which in turn offered a public explanation for Mr Morton's departure. However, this is balanced against the rights and freedoms of individuals, which in this case includes reasonable expectations of privacy. The

Commissioner is satisfied that, having considered the nature of the withheld information (which includes confidential personnel matters), that in all the circumstances the Council is entitled to rely on section 40(2) as disclosure of the information would be unfair and therefore breach the first data protection principle. As the exemption has been effectively engaged at this point, it has not been necessary for the Commissioner to consider lawfulness or any schedule 2 and 3 conditions within the DPA 1998.

Right of appeal

27. 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

28. 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.
29. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF