

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 May 2018

Public Authority: East Riding of Yorkshire Council

Address: County Hall
Beverley
HU17 9BA

Decision (including any steps ordered)

1. The complainant requested information from East Riding of Yorkshire Council ("the Council") relating to settlement agreements.
2. Some information was provided during the course of the investigation. The Commissioner's decision is that the Council correctly withheld the remainder of the information under the exemption at section 40(2) of the FOIA (third party personal data).
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 17 January 2017, the complainant wrote to the Council and requested information in the following terms:

"Under the Freedom of Information Act could I please request:

1. *The number of gagging orders issued by ERYC for each of the past six years.*
2. *The amount paid out in relation to gagging orders by ERYC for each of the past six years."*

5. The Council responded on 18 January 2017. It requested clarification as to what was meant by *gagging orders*.
6. The complainant replied on 18 January 2017 that he was *"asking with regards pay outs EYRC employees have received with gagging orders attached."*
7. The Council responded on 23 January 2017 and applied the exemption at section 40(5)(b)(i) of the FOIA to the request. This section provides an exemption to the duty under section 1 of the FOIA to state whether or not information is held in cases where simply confirming or denying this would, in itself, disclose third party personal data. The Council explained that it had taken the request to refer to settlement agreements; that is, legally binding contracts (which also contain a confidentiality clause) which can be used to end employment relationships on agreed terms, and that it could neither confirm nor deny whether it held any information falling within the scope of the request, as doing so would reveal third party personal data.
8. Following an internal review, the Council wrote to the complainant on 29 March 2017. It upheld its position.

Scope of the case

9. The Commissioner wrote a letter of investigation to the Council in August 2017. The Council responded and stated that it was still seeking to rely on section 40(5).
10. The Commissioner explained to the Council that, in her view, it may be incorrect to rely on section 40(5) of the FOIA, since, in this case, revealing whether or not information was held did not appear likely to disclose any third party personal data.
11. The Council revised its position and issued a fresh response to the complainant on 17 November 2017. It confirmed that information was held falling within the scope of the request, but explained that it was withholding that information under section 40(2) of the FOIA – third party personal data.
12. The Commissioner wrote a further letter of investigation addressing the application of section 40(2) of the FOIA to the request on 28 November 2017. She invited the Council to consider further whether all of the withheld information comprised third party personal data.
13. During the course of the investigation, the Council has revised its position again and agreed with the Commissioner that some of the

information which it held did not constitute third party personal data. Accordingly it disclosed the information which it holds relating to 2012, 2013, 2014, 2015 and 2016 respectively, to the complainant. However, it continued to withhold information relating to 2011, under section 40(2).

14. The remaining scope of the case covers whether the exemption at section 40(2) of the FOIA has been correctly applied to the data which the Council holds falling within the scope of the request for the year 2011.

Reasons for decision

Section 40(2) – Third party personal data

15. 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 1998 (DPA).

Is the withheld information personal data?

16. Personal data is defined by the DPA as any information relating to a living and identifiable individual.
17. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus, or impacts on them in any way.
18. In this case, the complainant is seeking information about the number of instances where employees have left the Council after entering into a settlement agreement which contains a confidentiality clause. The Council has explained that this clause is, in fact, standard in all of its settlement agreements. In addition, the complainant is seeking information relating to the amount of money paid out by the Council, under the terms of the agreements, which can be compensation payments and/or payments in lieu of notice.
19. The Commissioner has determined that information is held by the Council and is satisfied that the information relates to living individuals.
20. The Commissioner considers that a key factor in this case has been to determine whether or not the individuals are identifiable from the withheld information.

21. The Commissioner notes that the complainant requested the total number of agreements entered into by the Council, together with the total amount of money paid out by the Council under the agreements for the year in question.
22. The Commissioner also notes that no further identifying information has been requested, such as the names of individuals entering into the agreements, or the department or service area within the Council where they worked. The complainant therefore considers that the information requested can be said to be anonymised, and indeed has argued that he is not interested in identifying individuals.
23. However, the Council has argued that the disclosure of information held, if it relates to a small number of individuals, may lead to the identification of those individuals.
24. As is explored in her guidance on determining what is personal data¹, the Commissioner considers that it is necessary to consider whether individuals would be identifiable *"by a determined person with a particular reason to want to identify individuals."* This is because a disclosure which is ordered under the FOIA is a disclosure to the world at large and not only to the person making the request.
25. In this case, the Council has argued that members of the public with knowledge of individuals who have left the employment of the Council in 2011 could link them to the information that is held about settlement agreements.
26. In her guidance on anonymisation², from page 31 onwards, the Commissioner explains that *"removing numbers relating to five or 10 individuals or fewer may be a reasonable rule of thumb for minimising the risk of identification."* This is particularly the case with regard to a known geographical location.
27. The Commissioner has examined the withheld information in this case and has determined that the information which is held by the Council falling within the scope of the request in respect of 2011 relates to a small number of individuals; fewer than five. The Commissioner is

¹ <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

² <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>

satisfied that this means that individuals could potentially be identified from the information held.

28. She has therefore determined that the information held in respect of 2011 constitutes third party personal data, and has gone on to consider whether its disclosure would breach any of the data protection principles set out in Schedule 1 of the DPA.

Would disclosure breach the Data Protection Principles?

29. 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.
30. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individuals, the potential consequences of the disclosure and whether there is legitimate public interest in the disclosure of the information in question.

Reasonable expectations

31. When considering whether the disclosure of personal information is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the data subjects. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.
32. The Council has explained that, in this case, the individuals concerned would have no reasonable expectation that details of the conclusion of their employment by the Council would be disclosed, since it is not information which is normally made public.
33. Moreover, the settlement agreements contain a confidentiality clause, which means that the individuals are expecting their information to remain private.
34. The Commissioner is satisfied that it would not be within the reasonable expectations of those individuals that information about the conclusion of their employment would be disclosed.

Consequences of disclosure

35. Disclosure is unlikely to be fair if it would have unjustified adverse effects on the affected individuals.

36. In this case, the Council's view is that there is a likelihood of damage and distress to the individuals if it disclosed the information.
37. In the Commissioner's guidance on dealing with requests for information about public authority employees³, it states that disclosure is unlikely to be fair if it would have unjustified adverse effects on the employees concerned. However, although employees (or former employees) may regard the disclosure of personal information about them as an intrusion into their privacy, this may not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life. If an authority wishes to claim that disclosure would be unfair because of the adverse consequences on the employees concerned, it must be able to put forward some justification for this claim.
38. The Council's view is that the ensuing damage and distress to the individuals in this case would not be justified since the information held relates to the circumstances of the conclusion of employment, at which point the data subjects were ceasing to be public authority employees. Indeed the Commissioner's guidance, referenced previously, refers to the possibility of information held in workplace personnel files including content relating to an individual's personal life.
39. The Commissioner agrees that, due to the nature of the withheld information, damage and distress to the individuals would be likely to be caused by the Council disclosing the information.

Balancing the rights and freedoms of the individuals with the legitimate interests in disclosure

40. While there is no public interest test attached to the exemption, the requirement to consider the legitimate interest will involve looking at the wider public interest. It may still be fair to disclose information if there is a compelling public interest in doing so which outweighs the rights and freedoms of the data subjects.
41. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting individuals' personal data, the Commissioner's 'default position' is in

³ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

favour of protecting the privacy of the individuals. The wider interest in the disclosure of the data must outweigh the clear public interest in protecting the rights and freedoms of the data subjects if disclosure of the personal data is to be considered fair.

42. The interest in disclosure must be wider than the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.
43. The public interest in this case centres on the need for a public authority to conduct its business in a transparent manner. There is always a need for transparency as to the expenditure of public money. However, the Commissioner is not aware of any specific issues relating to the Council's expenditure of public money on exit packages.
44. The Commissioner also notes that some detail of 'exit packages and termination agreements' is published in the Council's annual accounts, demonstrating that the Council acts with some transparency in this area. The Council has also, following the involvement of the Commissioner, disclosed the majority of the information which it had initially withheld.

The Commissioner's decision

45. The Commissioner is satisfied that disclosing the information which is held in respect of 2011 would not be fair, and would breach the first data protection principle. The Commissioner therefore finds that the exemption at section 40(2) is engaged, and the duty to disclose the 2011 information does not arise.

Right of appeal

46. 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

47. 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.
48. 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

Ben Tomes
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