

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 July 2018

Public Authority: Hastings Borough Council
Address: 4th Floor Muriel Matters House
Breeds Place
Hastings
TN34 3UY

Decision (including any steps ordered)

1. The complainant has requested to know the total severance payments made to two named individuals. Hastings borough Council (the council) initially refused the request under section 40(2) of the FOIA – third party personal data. During the Commissioner’s investigations it amended its response to refuse the request under section 40(5)(b)(i) of the FOIA – to neither confirm nor deny whether any severance payments were made.
2. The Commissioner’s decision is that section 40(5)(b)(i) of the FOIA is engaged to this request.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 17 July 2017 the complainant requested the following information from the council:

"Please advise actual also the anticipated total costs to the public purse at the severance of employment of the Council’s former Planning Officer [name redacted] and the former Development Manager [name redacted]."

5. The council responded on the 1 August 2017 refusing the request under section 40(2) of the FOIA as it considered the information to be third party personal data.

6. The complainant requested an internal review on the 3 August 2017 as he considered this information should be released as the substance of the request is with regards to the cost to the public purse rather than an individual's personal information.
7. The council provided its internal review on the 13 September 2017 upholding its initial refusal.

Scope of the case

8. The complainant contacted the Commissioner on the 22 October 2017 as he did not consider the information should be refused.
9. During the Commissioner's investigations the council amended its response to instead refuse the request under section 40(5)(b)(i) of the FOIA – neither confirm nor deny holding the information – as it considered to even reveal if a severance payment had been made or not would be a disclosure of personal data. The council issued its revised refusal to the complainant on 31 May 2018.
10. The council advised the Commissioner this was what it was always intending to keep from being made public, but had applied the wrong subsection of section 40.
11. The Commissioner considers the scope of the request is to determine whether the council can rely on section 40(5)(b)(i) of the FOIA to refuse the request.

Reasons for decision

Section 40(5)(b)(i) of the FOIA – neither confirm nor deny

12. Section 40(5) of the FOIA states that:

"The duty to confirm or deny –

- (a) Does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and*
- (b) Does not arise in relation to other information if or to the extent that either-*
 - (i) the giving to a member of public of the confirmation or denial that would have to be given to comply with*

section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal being processed)."

13. In order for the Commissioner to determine whether the council are correct to rely on section 40(5)(b)(i) of the FOIA, to neither confirm nor deny this information, the Commissioner will need to determine whether the information, if it were held by the council, would constitute personal data. If it is personal data, then she must decide if disclosure would breach any of the data protection principles.

Is the withheld information personal data?

14. Personal data is defined by the data protection act as any information which relates to a living individual who can be identified from the data or from that data along with any other information in the possession or is likely to come into the possession of the data controller.
15. The information the complainant has requested in this case is the total severance costs attributed to two named former council employees. Confirming whether or not payments have been made to an employee (or in this case, former employees) would constitute their personal data as they 'relate' to living individuals.

Would disclosure contravene any of 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. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations

17. The council has advised the Commissioner that both individual's chose to leave the council's employment of their own accord and the council considers this would relate to their private lives.
18. The council has told the Commissioner that one of the officers was a 4th tier officer and the other a 6th tier. Neither were in roles classed as deputy chief or chief officer positions and so it considers they have a stronger expectation of privacy than more senior officers.
19. The council has also stated that the two officers' positions within the council, at the time of their employment, were not of a senior level, so their remuneration would not have been placed into the public domain and therefore their expectation that it would not be revealed whether or not they received any severance payment would carry the same rights to privacy.
20. The Commissioner's guidance¹ on public authority employee's personal data states at paragraph 54:

"Employees' expectations as to what information will be released will have to take account of statutory or other requirements to publish information. For example, the Accounts and Audit (Amendment no 2) (England) Regulations 2009 require local authorities, fire and police authorities and certain other bodies in England to publish in their annual accounts the amounts paid to employees in connection with the termination of their employment, if their total remuneration is over £50,000. These amounts are published by job title if the total remuneration is between £50,000 and £150,000 and by name if it is over £150,000."

21. The two named individual's do not fall within these pay categories and so they would assume a greater right to privacy – that being the council to neither confirm nor deny whether or not any severance payments have been made to them.

¹ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

Consequences of disclosure

22. The council has told the Commissioner to even confirm or deny whether the officers received any remuneration would cause some distress to them. Knowing that the council is revealing financial information about them – even just to reveal whether they did, or did not receive a severance payment – would be outside their expectations.
23. The Commissioner can see that if financial information is divulged, that being whether or not a severance payment was received, that this could cause some distress to the individuals that it relates as they would have an expectation of privacy in their financial matters.

Balancing the legitimate rights and freedoms of the data subject with the legitimate interests in disclosure.

24. The complainant has told the Commissioner that the information relates to the public purse and so there is legitimate interest in its release.
25. He has stated he is only after total costs to the public purse not individual costs. He also argues that individual salaries are available on the council's website.
26. The Commissioner has viewed the link² he provided to the salaries and notes these are the salaries of the senior officers in the council, not the salaries of the grade level of the named individual's in this case.
27. As previously stated, senior staff would have less expectation of privacy, such as demonstrated in the link to their salaries. However, the two named individual's in this case were not considered to be of senior positions.
28. The council considers that there is public interest in transparency and accountability when it comes to requests about the public purse. But there has to be a balance when it comes to individual's personal data.
29. The Commissioner sees that there is always going to be some public interest in how public funds are being used by authorities. The issue

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https://www.hastings.gov.uk/content/my_council/transparency/pdfs/council_payments.pdf

being considered here is the council's refusal to even confirm whether or not any severance payments were made.

30. Given the circumstances of this case, the fact that the officers chose to leave the council and considering they are not of senior grade, the Commissioner's decision is that their individual rights to privacy outweighs any legitimate public interest in disclosure and therefore finds that section 40(5)(b)(i) of the FOIA to neither confirm nor deny the request is engaged.

Right of appeal

31. 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

32. 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.
33. 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
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Cheshire
SK9 5AF