

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 October 2018

Public Authority: Halton Borough Council
Address: Municipal Building
Kingsway
Widnes
Cheshire
WA8 7QF

Decision (including any steps ordered)

1. The complainant has requested a witness statement held by Halton Borough Council ("the Council"). The Council withheld the information under sections 40(2) and 41(1) of the Freedom of Information Act ("the FOIA").
2. The Commissioner's decision is that the Council has correctly withheld the information under section 40(2).
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 5 April 2018, the complainant wrote to the Council and requested information in the following terms:

In previous correspondence you referred to a statement in your possession supplied by the hearsay witness [...] I would, accordingly, like to request a redacted version (quite permissible) of this statement under FOIA.

5. The Council responded on 13 April 2018. It withheld the information under section 41(1).
6. Following an internal review the Council wrote to the complainant on 16 April 2018. It confirmed that the information was withheld under section 41(1), and additionally, that parts of it would also represent personal data, and therefore be exempt under section 40(2).

Scope of the case

7. The complainant contacted the Commissioner on 21 April 2018 to complain about the way his request for information had been handled, and specifically that the Council had incorrectly withheld the information.
8. The Commissioner considers the scope of the case to be the determination of whether the Council has correctly withheld the information under section 40(2).
9. At the time of compliance with the request, the relevant legislation in respect of personal data was the Data Protection Act 1998 ("the DPA 1998"). The determination in this case must therefore have regard to the DPA 1998, and the terms of the FOIA as applicable at that time.

Reasons for decision

Section 40(2) – Personal information

10. Section 40(2) states that:

Any information to which a request for information relates is also exempt information if–

- (a) it constitutes personal data which do not fall within subsection (1), and*
- (b) either the first or the second condition below is satisfied.*

11. Section 40(3) provides that:

The first condition is–

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene–*
 - (i) any of the data protection principles...*

Is the withheld information personal data?

12. Personal data is defined by 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...

13. In order for the exemption to apply the information being requested must constitute personal data as defined by section 1 of the DPA 1998. In this instance the Commissioner has reviewed the withheld information and recognises that it is a witness statement (using a template form) that has been provided by an individual. The information contains both the individual's name and biographical information about them. The biographical information includes an eye witness account of an incident (including specific details about the individual's location and actions).

14. Whilst the Council appears to have concluded that only parts of the witness statement would represent personal data, the Commissioner considers this to be incorrect. The witness statement contains an eye witness account of an incident; and even with identifiers such as the individual's name removed, it is feasible that the individual may be identified by third parties based on their location and actions on that date.
15. On this basis the Commissioner considers that the withheld information in its entirety represents personal data.

Would disclosure breach the data protection principles?

16. The data protection principles are set out in schedule 1 of the DPA 1998. The Commissioner considers that the first data protection principle is most relevant in this case. The first principle states that personal data should only be disclosed in fair and lawful circumstances, the conditions of which are set out in schedule 2 of the DPA 1998.
17. The Commissioner's considerations below have focused on the issues of fairness in relation to the first principle. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the data subject and any potential consequences of the disclosure against the legitimate public interest in disclosing the information.

The reasonable expectations of the data subject

18. The Council argues that public disclosure of the information would not be within the reasonable expectations of the data subject. The witness statement is a formal document, signed by the individual, and was taken only for the purposes of investigation and possible prosecution of an offence under the Dog Control Order Regulations 2006. In such a situation, the Council considers that the individual would have a strong expectation that, in the absence of court proceedings, the information would remain confidential and not be used for any purpose other than which it was provided (including disclosure into the public domain under the terms of the FOIA).

The potential consequences of disclosure

19. The Council has not provided any specific arguments in relation to section 40(2), due to focussing its submissions on section 41(1).
20. However, the Commissioner recognises that the disclosure of the information may cause distress to the individual by publically disclosing their identity and experience of the incident. It is also reasonable for the Commissioner to consider that the disclosure of the information may place the individual's safety at risk.

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

21. The Commissioner is aware that the witness statement was taken from the individual as part of an investigation carried out by the Council under its statutory powers. There is no indication that the individual held any expectation that the witness statement would be disclosed to the general public, and it is recognised that disclosure may cause distress to the individual, and additionally, place their safety at risk.
22. The complainant argues that they have a reasonable right to view the evidence on which a Fixed Penalty Notice ("FPN") has been issued, and that the issuing of an FPN without also the providing the evidence on which it is based is unfair. The complainant has also indicated that they have referred this matter to the Courts, and seek the information in order to consider a defence.
23. Whilst the Commissioner has considered the complainant's position, 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 public interest in disclosure which would make it fair to do so.
24. In the circumstances of this case, the Commissioner considers it reasonable to conclude that the complainant seeks the information to pursue a private, rather than public interest. It is also evident that, should the matter be referred to the Courts, the complainant may be given privileged access to the witness statement as part of that process.
25. Having considered these factors, the Commissioner has concluded that the disclosure of the individual's personal data would not be fair, and that the information is therefore exempt under section 40(2).
26. As the Commissioner has found that all of the withheld information is exempt under section 40(2), she has not needed to consider the Council's application of section 41(1).

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