

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 January 2021

Public Authority: Devon County Council
Address: County Hall
Topsham Road
Exeter
Devon
EX2 4QJ

Decision (including any steps ordered)

1. The complainant has requested reasons why an officer left her role at the council shortly after he had made a complaint about her work. The council refused the request on the basis that section 40(2) of the FOI Act applied.
2. The Commissioner's decision is that the council was correct to apply section 40(2) to withhold the information.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 4 February 2020, the complainant wrote to the council and requested information in the following terms:

"On 1st October [name of council officer redacted] told me during a telephone call that she couldn't tell me what had happened to [name of council officer redacted]. A few weeks later we were told that she had given seven days notice. Why not tell me that on 1st October, unless it wasn't true?"

5. The council responded on 28 February 2020. It said that it could not respond as doing so would breach the provisions of the Data Protection Act 2018. It therefore applied section 40(2) to withhold the information.
6. Following an internal review, the council wrote to the complainant on 4 June 2020. It clarified that it considered that the complainant's statement was actually a request for the reasons why the officer had left her employment with the council, and again refused to provide that information on the basis that section 40(2) of the Act applied.

Scope of the case

7. The complainant contacted the Commissioner on 22 February 2020 to complain about the way his request for information had been handled.
8. The complainant considers that, given the past history of the parties over a wider issue, he has a right to be informed when the officer in question handed her notice into the council. He argues this to be the case because he made a complaint about the officer concerned and she left her role at the council three working days later. He argues that the officer was still making appointments for the future shortly before this occurred and surmises that she may therefore have been dismissed from her position following his complaint. He says he has also heard that this was the case from another source. However, he argues that the council subsequently told a Court that the officer had handed her 7-day notice in. He is therefore concerned that the Court may not have been told the truth in the matter.
9. The Commissioner therefore considers that the complaint is whether the council was correct to refuse to respond to the request for information on the basis that section 40(2) of the Act applies.

Reasons for decision

Section 40 personal information

1. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
2. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
3. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then section 40 of the FOIA cannot apply.
4. 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 DP principles.

Is the information personal data?

5. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

6. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
7. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

8. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
9. In this case the complainant's request is for information about the manner in which a named individual left their employment at the council. The information is therefore personal data as it provides biographical information about an identifiable individual.
10. In the circumstances of this case, having considered the nature of the withheld information, the Commissioner is satisfied that the information relates to the named individual council officer. She is satisfied that this information both relates to and identifies the individual concerned. The information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
11. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
12. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

13. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

14. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair, and transparent.
15. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

16. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"

17. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test: -
- **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
18. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

19. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
20. The council said that it has not identified any legitimate interest in the information being disclosed. It explained that the complainant has already received the information he is entitled to receive through his use of the council's complaints procedure. It considered, therefore, that there was no legitimate interest in disclosing the requested information to the whole world, as is nominally considered to be the case with any response to an FOI request. Also, in its response to the complainant's original service complaint the council was clear and specific in explaining that it had not found that the officer had acted dishonestly.
21. The Commissioner notes that under the circumstances of the case, the complainant's suggestion that the officer might have been dismissed from her position appears to be primarily based upon his reading of the circumstances prior to the officer leaving her position at the council, although he argues that he did receive information to that effect from another source.

22. The Commissioner notes that the primary arguments of the complainant relate to his own private legitimate interest in investigating whether his complaint about the actions of the officer were sufficiently investigated and resulted in her being dismissed from her role.
23. The Commissioner notes that if the complainant's allegations have substance, then there are also wider legitimate interests involved. The allegations made by the complainant may be relevant to the officers' professional standing. The general public has a legitimate interest in having access to any information clarifying the facts behind the allegations which the complainant has made given the seriousness of the allegations he has made. Again, it should be clarified, that the council carried out an investigation of the complaint and found that the officer had not acted dishonestly. The Commissioner has also noted that the complainant may have other means to take forward his complaint about the officer and is able to take legal advice to identify whether this is possible or not.
24. The Commissioner is, however, not party to the full facts of the matter surrounding events leading to the complaint about the council employee and can therefore only place only a limited weight on the complainant's arguments under these circumstances. The Commissioner also notes that she is not in a position to offer judgement on the veracity of the original claims made. Nevertheless, she accepts that both the complainant, and the wider public, have a legitimate interest in the requested information being disclosed.

Is disclosure necessary?

25. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
26. The council contends that a disclosure of the requested information is not necessary for the purposes of satisfying his legitimate interest for the reasons noted above; it has not recognised any legitimate interests in the information being disclosed.
27. The Commissioner notes that the complainant's interests are largely relating to his own private concerns about the officer's actions and their result on him and his family. A disclosure of the information would provide him with the evidence he needs to clarify whether his suspicion that the council, and the officer concerned did not act appropriately are correct. If the officer was dismissed this provides stronger evidence suggesting that his allegations about dishonesty were found to be

correct by the council, noting however that the council was clear in clarifying to him that that was not the case. However, there may be other avenues which might allow the complainant to take forward his arguments and evidence, such as the Local Government and Social Care Ombudsman. If there are other, more appropriate avenues beyond his complaint to the council which could lead to the issues he has raised being considered, which would not require a disclosure of personal data to the whole world under the FOI Act, then this weakens the arguments towards a disclosure of the information.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

28. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
29. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
30. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
31. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
32. The information in question relates to the officer's reasons for leaving the authority. This information relates to both her professional, and her private life, but in this context, it relates primarily to her private life. It relates to the manner in which she left her employment with the council, which is generally a private and personal issue.

33. The council argues that, as an employee of the council, the officer concerned would have clearly expected that information about her personal, rather than her public life would be retained in confidence by the council. The Commissioner accepts this argument. There is an expectation of implied confidence between employers and employees that personnel details will be retained in confidence by the employer. Matters relating to an employee leaving their employment fall within this type of information. The officer would not have expected details of the reasons, or the manner in which she left the council to be made public, regardless of whether she left out of choice or because she was dismissed. She would not expect that the council would disclose personal information such as this to the whole world, (as is considered to be the case under a disclosure under the FOI Act).
34. The council said that it has not asked her consent to disclose the information under the circumstances. The Commissioner presumes that this argument relates to the nature of the complainant's request; whether she was dismissed following a complaint he had personally made about her actions to the council, together with the complicated nature of the relationship between them prior to this. Alongside this, the council said that it believed that a disclosure of personal information, such as the reason why the officer left the authority, would cause distress to her. Given that such a disclosure would be a significant, and unexpected, breach of her right to privacy over personnel matters the Commissioner accepts that this would be the case.
35. The requested information is not otherwise in the public domain and would not be known by wider members of the public. Presumably, the officer's former colleagues within her team may however have an idea of the reasons for her leaving her role.
36. Balanced against this is the complainant's, and the public's legitimate interests in knowing whether the individual officer left her role after handing in her notice, or whether she was dismissed following the complainant's complaint.
37. As stated, whilst the Commissioner accepts that the public has such a legitimate interest, under the circumstances of this case, that legitimate interest is relatively low when compared to the rights of the individual concerned.
38. The Commissioner has no doubts that the complainant strongly believes the allegations he has made. She also accepts that those allegations are serious and raise a number of public interest questions. She notes however that he has a right to take legal advice to look into ways in which he can have his allegations investigated further, and the Commissioner has highlighted a number of these which might be

applicable above. Expressing such rights would be the correct approach to take to address his issues, and would not involve a direct disclosure of personal data relating to the individual officer being made to the whole world, as would be the case in any disclosure through the FOI Act.

39. As it stands, the complainant's allegations are unproven, and the council's investigation of his issues found that the officer had not acted dishonestly. It has provided a reasonable argument that the officer left her role at the council voluntarily after handing her notice in, however the complainant disbelieves this statement. In such circumstances, the Commissioner considers that the complainant's allegations, as serious as they are, do not override the right of the individual under the Data Protection Act 2018. The complainant may have other means of taking his arguments forward which are more appropriate to the circumstances of this case, which do not impinge upon the data protection rights of the individual concerned.
40. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
41. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

42. The Commissioner has decided that the council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

43. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. 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

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