

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 October 2012

Public Authority: Oakengates Town Council
Address: Theatre Square
Oakengates
Telford
TF2 6EP

Decision

1. The complainant has requested information relating to the suspension of the former Town Clerk of Oakengates Town Council (the "council"). The council refused the request, withholding the information under the exemptions for law enforcement, commercial interests and personal data.
2. The Commissioner's decision is that all the requested information constitutes the personal data of a third party and that disclosure of the information would be unfair under the terms of the Data Protection Act 1998 (DPA). He has concluded that the information is, therefore, exempt under section 40(2) of the FOIA. The Commissioner also finds that the council failed to issue a proper refusal notice.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 20 December 2011, the complainant wrote to the council and requested information in the following terms:

"....a copy of all minutes since the 23rd June 2011 that are not currently included on your website, for all meetings, including those meetings held in closed session where discussion took place relating to the property, known as 27 Market Street, or relating to the role of, or to the Town Clerk following the suspension reported in the Shropshire Star (on 29/06/11)."

5. The council responded on 16 January 2012 and refused the request. It stated that information relating to the Town Clerk was being withheld under the exemptions for law enforcement and personal data. Information relating to 27 Market Street was being withheld under the exemption for prejudice to commercial interests.
6. Following an internal review the council wrote to the complainant on 2 February 2012 and stated that it was maintaining its position.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way their request for information had been handled, specifically that the council had not provided a valid reason for withholding the information.
8. The Commissioner has considered whether the council has correctly withheld the requested information.

Reasons for decision

Section 40 – personal data

9. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the FOIA would breach any of the data protection principles or section 10 of the DPA.

10. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

“...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 intentions of the data controller or any other person in respect of the individual.”

11. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of

that data would breach any of the data protection principles under the DPA.

12. In its responses to the request the council neither identified the specific subsection of the exemption upon which it was relying nor did it specify the data protection principle which it considered would be breached by the disclosure of the data. The Commissioner has considered these procedural matters later in this decision notice.
13. The Commissioner is under no positive duty to pro-actively consider exemptions which not been referred to by a public authority and he is not obliged to generate associated arguments on behalf of public authorities. However, he may do so if it seems appropriate to him in any particular case and after carefully taking into account his obligations under the Human Rights Act 1998 and his jurisdiction for data protection in assessing the risks associated with disclosure.
14. In this instance, in view of his obligations under the DPA, the Commissioner has considered whether it would be fair to disclose the withheld information.

Is it personal data?

15. The Commissioner has viewed the withheld information and notes that it consists of minutes of meetings of the council's personnel committee. Having considered the withheld information the Commissioner is satisfied that the focus of the information, including any references to 27 Market Street, is the former Town Clerk of the council (the "data subject"), that the information relates to him and that he is identifiable by reference to the information.
16. As the Commissioner finds that the withheld information in its entirety constitutes the personal data of the Town Clerk he has concluded that the information falls within the scope of the exemption. He has gone on to consider whether disclosure would breach the first data protection principle.
17. The first data protection principle states that:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -

(a) at least one of the conditions in schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

18. The Commissioner has first considered whether disclosure of the information would be fair.

Would disclosure be fair?

19. In assessing fairness, he has considered:

- the nature of the information itself;
- the reasonableness of the expectations of the individual(s) about what would happen to their information; and
- the possible consequences of disclosure - whether disclosure would cause any unnecessary or unjustified damage or distress to the individual(s) concerned.

20. He has then balanced against these the general principles of accountability and transparency, as well as any legitimate interests which arise from the specific circumstances of the case.

The nature of the information

21. The withheld information consists of minutes of meetings of the council's personnel committee in relation to the data subject.

Reasonable expectations of the data subject

22. Disclosure of information under FOIA is disclosure to the public at large and not just to the complainant.

23. The Information Commissioner recognises that people have an instinctive expectation that a public authority, in its role as a responsible data controller, will not disclose certain information and that they will respect its confidentiality. For example, he considers that information relating to an internal investigation, a grievance or disciplinary hearing will carry a strong general expectation of privacy.

24. In this case, the Information Commissioner is satisfied that the data subject would have had a reasonable expectation that their personal information would be kept confidential and not passed on to third parties without their consent.

25. In its submissions to the Commissioner, the council confirmed that the data subject had not given their consent to the information being disclosed. Although the council did not clarify whether consent had been sought, the Commissioner notes that, although he considers it good practice to do so, there is no obligation on a public authority to seek a data subject's consent to disclosure.

The consequences of disclosure

26. In light of the nature of the information and the reasonable expectations of the data subject, as noted above, the Commissioner is satisfied that release of the withheld information would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the individual in this case.
27. Arguing in favour of disclosure, the complainant said in correspondence with the council that the information could be provided in redacted form, with any personal data removed.
28. The Commissioner has considered whether the information can be disclosed in a redacted or anonymised form. Taking into account the fact that the information at issue relates to a specific individual who is identified in the request itself and the (already established) fact that the focus of the information in its entirety is the same individual, the Commissioner considers that disclosure of any of the withheld information will result in the identification of the individual concerned. In this respect, the Commissioner considers that disclosure of any of the information is likely to result in the same unjustified adverse effects on the data subject identified above.

The legitimate public interest in disclosure

29. Notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, depending on the circumstances of the case it may still be fair to disclose requested information if there is a more compelling public interest in disclosure.
30. In considering 'legitimate interests', the Information Commissioner's view is that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. The complainant has argued that, in view of the council's role as a public authority, the general principles of accountability and transparency apply and the information should be disclosed.
31. The Commissioner notes that the suspension of the former Town Clerk has been a matter of press report and that disclosure of information relating to this matter would assist the public understanding of the relevant circumstances and demonstrate whether the matter has been handled appropriately.
32. However, the Commissioner believes that the public's interests must be weighed against the prejudices to the rights, freedoms and legitimate interests of the data subject. The Commissioner accepts that they would have a strong expectation of privacy and confidentiality over the details

of their suspension or their employment history. The Commissioner also notes that there is no suggestion that either the council or the data subject has placed any of the requested personal data into the public domain.

33. In their submissions, the complainant made reference to section 228(1) of the Local Government Act 1972 (LGA) which states:

"The minutes of proceedings of a parish or community council shall be open to the inspection of any local government elector for the area of the council and any such local government elector may make a copy of or extract from the minutes."

34. The complainant has submitted that the restriction of access to information described in this section of the LGA (which the complainant considers would include the withheld information) to the electors of a relevant authority is in breach of human rights legislation.
35. The complainant has not cited specific human rights legislation and the Commissioner does not see the direct relevance of any of the articles of the Human Rights Act 1998 to the facts of this case. He notes that there is a distinction between the global, unconditional nature of disclosures made under the FOIA and the restricted disclosure referred to in section 228(1) of the LGA.
36. Although he does not have any jurisdiction over the LGA, the Commissioner has referred to his published guidance which, with reference to schedule 12A, clarifies that any disclosures made under the LGA should take into account an authority's obligations under the DPA¹. The Commissioner considers that this general principle is transferable to the specific scenario described by the complainant, namely, the right to inspection described under section 228(1).
37. The Commissioner accepts the general principle that openness in government is desirable and sees that it is clearly in the public interest for individuals to see how a council applies its policies and procedures in practice. However, in facilitating any access required under the LGA, the Commissioner considers that authorities should also have regard for

¹ See the ICO website here:

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/schedule_12a_local_gov_act_v2.0_260808.pdf

their duties under the DPA and ensure that personal data is dealt with in accordance with that legislation.

38. Having considered this point the Commissioner finds that there should be no disparity between the extent of access to information provided by the LGA and that provided by the FOIA and he does not accept that the point raised by the complainant is relevant to the facts of this case.

Conclusion

39. Having considered the facts of this case, the Commissioner has concluded that it would be unfair to the data subject to release the requested information as he considers that their right to privacy in relation to personnel matters in the context of a suspension outweighs the interests of the public in understanding the details of these matters.
40. The Commissioner has therefore decided that the disclosure of the requested information would be unfair and a breach of the first data protection principle. It has therefore not been necessary to go on to consider any of the conditions in Schedule 2 of the DPA.
41. As he has concluded that all the withheld information is exempt under section 40(2) of the FOIA, the Commissioner has not gone on to consider the council's application of the other exemptions in this case.

Section 17 – refusal of request

42. Section 17(1) of the FOIA requires that a public authority which is relying on a claim that information specified in a request is exempt from disclosure must give the applicant a notice (a "refusal notice") which:
 - "(a) states that fact,*
 - (b) specifies the exemption in question, and*
 - (c) states (if that would not otherwise be apparent) why the exemption applies."*
43. The Commissioner considers that, in failing to specify the subsection of section 40 upon which it was relying or to explain why the exemption applies, the council breached section 17(1) of the FOIA.

Right of appeal

44. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

45. 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.
46. 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
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