

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 February 2013

Public Authority: Nottingham City Council
Address: Loxley House
Station Street
Nottingham
NG2 3NG

Decision (including any steps ordered)

1. The complainant has requested a copy of a District Auditor's report entitled 'Jobs Plan Review' ("the report"). Nottingham City Council ("the council") has disclosed the main body of the report, along with two of its appendices. The council has, however, withheld the report's third appendix under section 40(2) of the Act. The Commissioner's decision is that the council has not correctly applied section 40(2).
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose Appendix 3 of the 'Jobs Plan Review'.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 28 December 2011, the complainant wrote to the council and requested information in the following terms:

"Please will you provide me with a copy of the District Auditor's report into the operation of the 'Future Jobs Fund' entitled 'Jobs Plan Review'."

5. Having received no response from the council, on 31 January 2012 the complainant sought an internal review of the council's handling of his request. The council responded on 8 February 2012. It acknowledged that it had failed comply with section 10 and refused to supply a copy of the report under section 22 of the Act on the basis that it was intended for future publication.

Scope of the case

6. The complainant contacted the Commissioner on 28 February 2012 to complain about the way his request for information had been handled.
7. On 20 June 2012, the Commissioner wrote to the council seeking clarification of the circumstances surrounding its application of section 22 of the Act. On 20 July 2012, the council disclosed a copy of the report to the complainant. This disclosure included the report's first two appendices. Appendix 3, however, was withheld. In its correspondence of 20 July 2012 to the complainant, the council explained that this appendix was being withheld under the following provisions of the Act: section 40(2), section 41, section 31(1)(a), section 31(1)(b), section 31(1)(c) and section 31(1)(g) (sections 31(2)(a) and (b)).
8. On 12 August 2012, the complainant advised the Commissioner that he was not satisfied with the council's response and required the Commissioner to consider its failure to disclose Appendix 3.
9. The Commissioner then wrote to the council on 10 September 2012 seeking further, detailed, arguments for its reliance on the sections of the Act outlined in paragraph 7 above. The council advised the Commissioner of various staffing issues within its Information Governance Department and explained that it would not be able to provide a full response within the ten working days sought by the Commissioner.
10. On 28 September 2012, the council elaborated slightly on its application of section 40(2) to Appendix 3, although not in the level of detail expected by the Commissioner. The council provided no further representations in respect of the other sections of the Act cited in its correspondence to the complainant of 20 July 2012. Indeed, the council has made no reference to these sections of the Act in any subsequent correspondence or conversations with the Commissioner. In the circumstances, the Commissioner considers that the council has impliedly withdrawn its reliance on these sections.

11. The council contacted the Commissioner again on 12 October 2012 to advise that it was working on the case, but was unable to set out its final position in respect of Appendix 3.
12. The council next contacted the Commissioner on 29 October 2012. It explained that Appendix 3 contained the personal data of three individuals. Having reconsidered the matter, the council stated that it was of the view that disclosure of information in respect of two of the individuals would not be unfair within the meaning of the first data protection principle. It therefore proposed to disclose a redacted version of the Appendix, withholding the personal data of just one of the individuals under section 40(2) of the Act. The council then sent the Commissioner a copy of a letter it had drafted to the complainant to this effect dated 7 November 2012.
13. On 14 November 2012, the council then advised the Commissioner that it had not sent this letter and would not be making this disclosure imminently due to concerns raised by solicitors acting for one of the other data subjects referred to in the appendix. The council's Information Governance department also advised the Commissioner that responsibility for the request was being transferred to its Director of Legal Services.
14. Accordingly, the Commissioner wrote to the Director of Legal Services on 15 and 26 November 2012 seeking clarification of the council's position in respect of Appendix 3 and detailed arguments as to any application of section 40(2). On 26 November 2012, the Commissioner also spoke with the council's Director of Legal Services who confirmed that the Commissioner would be advised of the council's final position later that week. Having not received this, the Commissioner also telephoned the council seeking clarification of its position on several occasions in December 2012. On 17 December 2012, the Director of Legal Services advised the Commissioner that the council was of the view that an amended version of Appendix 3, as per paragraph 12 above, could be disclosed. The council advised that it would put its final position in writing by 21 December 2012. To date, the Commissioner has heard nothing further from the council in respect of this case.
15. Having considered the information which has already been disclosed, the Commissioner is of the view that the matter requiring consideration in this notice is to what extent the council is able to withhold information contained in Appendix 3 under section 40(2). Both in writing and over the telephone, the council has indicated that it is of the view only "data subject 2's" (see below) personal data should be withheld under section 40(2). However, the fact is that at present it has disclosed none of Appendix 3. Being mindful of his role a regulator for the Data Protection

Act ("the DPA", the Commissioner has considered the application of section 40(2) to all three data subjects identified in Appendix 3.

Reasons for decision

Section 40(2)

16. Section 40(2) of the Act states that information exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles of Schedule 1 of the Data Protection Act 1998 ("the DPA").
17. The Commissioner must first consider whether the information contained in Appendix 1 is personal data. Personal data is defined in section 1 of the DPA as follows:

"personal data" means 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."

18. Having considered section 1 of the DPA, the Commissioner is satisfied that the contents of Appendix 3 constitute the personal data of three individuals. Essentially, this is because all of the information contained in Appendix 3 "relates" to three individuals who are likely to be "identifiable" from that information.
19. Having satisfied himself 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. The Commissioner considers that the relevant data protection principle in this case is the first which 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.”

20. Consequently, the relevant issue in this case is whether disclosure of the information relating to each data subject would breach the first data protection principle by being unfair/unlawful.
21. In considering whether it would be “fair” to disclosure this information, the Commissioner has considered the following factors:
 - The likely consequences of disclosure;
 - The reasonable expectations of the data subject; and
 - The balance between the rights and freedoms of the data subject with any legitimate interests.
22. Mindful of the council’s rights of appeal, the Commissioner has had to be restrained in the level of detail which he has placed in this notice. This is because to provide his full reasoning would necessitate the disclosure of the information which is currently being withheld. Accordingly, he has set out further reasons for his decision in a confidential annex; a copy of which has been sent to the council along with this notice. Below, the Commissioner has set out as much of this reasoning for his decision as he is able to do.
23. The information the council has sought to withhold is contained in a confidential appendix of a District Auditor’s report into a councillor’s links to organisations and involvement in funding discussions in connection with his role as a ‘portfolio holder’. The appendix contains the personal data of three individuals. The Commissioner will now go on to outline his considerations regarding the application of section 40(2) to the personal data of these individuals. He will first consider whether the disclosure of the personal data of each of the data subjects is fair. Where disclosure is considered to be fair, he will go on to consider whether the disclosure meets a condition in Schedule 2 of the DPA.

Would the disclosure be fair?

Data subject 1 – the councillor

24. The council has summarised Appendix 3 as essentially disclosing four pieces of information about the councillor. In support of its view that the information in respect of the councillor can be disclosed, the council has noted in its correspondence with the Commissioner that two of these are now in the public domain, namely:
 - That the data subject had interests that may have conflicted with his role of a Portfolio Holder; and

- That the data subject failed to raise any concerns regarding those interests or the possibility of conflict.
25. In principle, this should significantly weaken any argument that the consequences of disclosure would be adverse to the data subject. This is because the effect of disclosure will usually be minimal where the withheld information is already in the public domain. However, the Commissioner's understanding is that these matters came into the public domain through disclosure of the main body of the report. Consequently, it is not clear that the information identified by the council was in the public domain at the time the request was made; which is the relevant issue for the Commissioner's analysis. For this reason, the Commissioner has not been able to place the weight on this factor which he would have done so if this information was in the public domain at the time of the request.
 26. The council has noted that a third issue, explained further in the confidential annex to this notice, contained in Appendix 3 is not currently in the public domain. However, it has provided arguments to suggest that whilst the information may not be explicitly in the public domain it would not be unexpected. The Commissioner is minded to accept the council's argument on this point. Furthermore, he is of the view that this particular piece of information is relatively anodyne and, for this reason alone, cannot see that the consequences of its disclosure would be adverse for the data subject.
 27. The Commissioner does not consider that the councillor could be said to hold a reasonable expectation that the information in Appendix 3 would remain private.
 28. Each individual has a right to expect a degree of privacy. However, the extent of that right will vary according the circumstances of that particular individual and the information at issue. The Commissioner is of the view that whether a data subject occupies a public facing role and whether the information relates to their professional or private life will have a keen bearing on the balance to be made between the individual's right to privacy and the wider public interest in transparency.
 29. The Commissioner considers that the role of an elected councillor is, by definition, public facing. Furthermore, the information contained in Appendix 3 relates to his role as an elected official. (This point is elaborated upon further in the confidential annex to this notice.) Taking these two factors into account the Commissioner is of the view that the councillor cannot be said to hold a reasonable expectation that the information in Appendix 3 would remain private.

30. The Commissioner considers that this approach, in respect of elected officials, is supported by the Information Tribunal's comments in *The Corporation Officer of the House of Commons v IC and Norman Baker MP* (EA/2006/0015 & 0016) where it noted:

"43. ... The existence of FOIA in itself modifies the expectations that individuals can reasonably maintain in relation to the disclosure of information by public authorities, especially where the information relates to the performance of public duties or the expenditure of public money..."

Having regard to his comments above, the Commissioner is of the view that the information at issue in this case relates to both the "performance of [an elected member's] public duties" and "the expenditure of public money" to which there should be a strong expectation of disclosure under the FOIA.

31. The Commissioner is mindful of that fact that the councillor may be of the view that the information contained in Appendix 3 relates to both his professional and private life. However, the Commissioner is of the view that the information cannot be said to be "private" in the sense of relating to his home life. Instead, the information predominantly relates to his business dealings. At the very most, it can be considered a fusion of his private and professional life. To this effect, the Commissioner would note the Tribunal's further comments in *The Corporation Officer of the House of Commons v IC and Norman Baker MP* (EA/2006/0015 & 0016), in respect of elected officials, that there is to be an expectation of disclosure: "... even where a few aspects of their private lives are intertwined with their public lives but where the vast majority of processing of personal data relates to a data subject's public life".
32. Having regard to both the nature of the information and the councillor's position within the authority, the Commissioner does not consider that he could hold a reasonable expectation that the information contained in Appendix 3 would not be disclosed.
33. The allocation of contracts under the 'Future Jobs Fund' has been a matter of on-going public concern. Various press reports have suggested that the £6.5m fund was mismanaged, which is to some extent supported by the conclusions of the 'Jobs Plan Review'. The Commissioner is of the view that there is a clear public interest in transparency surrounding this fund. This is both because of the considerable sum of public money involved, and because of the societal interest in the fund's aim of creating more jobs. Furthermore, as elected officials had a role in the fund's management, the Commissioner considers that there is a public interest in transparency surrounding decision-making processes involving elected officials.

34. Given the Commissioner's view that the councillor would hold a reasonable expectation that the information contained in Appendix 3 would be disclosed, combined with the public interest in that disclosure, the Commissioner is of the view that the disclosure of his personal data in this case is fair.

Data Subject 2

35. As the identity of data subject 2 is not already clear from the information which is already in the public domain, the Commissioner does not consider it appropriate to disclose this information in this notice.
36. The council has presented various arguments to the Commissioner as to why this individual's data should be withheld under section 40(2). Essentially, these arguments are along the lines that the person is a private individual and consequently they would not have a reasonable expectation of disclosure.
37. The Commissioner does not feel able to accept the council's arguments on this point and, on balance, is of the view that data subject 2 would have a reasonable expectation of this information in Appendix 3 being disclosed. Consequently, the Commissioner finds that the disclosure would of this individual's personal data would be fair. He has set out the reasons for this view in the confidential annex to this decision.

Data Subject 3

38. The council has put in writing to the Commissioner that it is of the view that disclosure of the information relating to data subject 3 in Appendix would be fair within the meaning of the first data protection principle. Having considered the personal data contained in Appendix 3 in respect of this individual, the Commissioner agrees with the council's view.
39. As the information relating to this data subject's is not yet in the public domain, the Commissioner has also chosen not to disclose the identity of this individual in this notice and the reasons for this decision are again set out in the confidential annex.

Is there a DPA Schedule 2 condition for disclosing the personal data?

Legitimate interests and lawfulness

40. Having decided that the disclosure of the entirety of Appendix 3 would be fair in the terms expressed by the first data protection principle, the Commissioner has gone on to consider whether the information should be disclosed. This requires an 'enabling' condition from Schedule 2 of the DPA to be met. The applicable condition in this case is the sixth:

Condition 6(1) provides that:

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason for prejudice to the rights and freedoms or legitimate interests of the data subject."

41. In order for the condition to be met, the Commissioner considers that disclosure must satisfy a three part test:
 - (i) There must be a legitimate interest in disclosing the information;
 - (ii) The disclosure must be necessary for that legitimate interest; and
 - (iii) Even where the disclosure is necessary it must not cause unwarranted harm to the rights, freedoms and legitimate interests of the data subjects.
42. The Commissioner considers that the legitimate public interest in disclosure of Appendix 3 has been set out in paragraph 33 of this notice. Consequently, the Commissioner considers that there is a legitimate interest in disclosure of the information sought by the complainants.
43. On the basis of the representations put to him, the Commissioner's view is that disclosure of this information would not cause an unfair degree of intrusion into the relevant individuals' privacy and that there is a legitimate public interest in such disclosure. He considers that disclosure of the information is necessary for these legitimate interests and would not cause unwarranted harm to the rights of the data subjects.
44. It is also necessary, when considering disclosure of personal data, to be satisfied that the disclosure would not be unlawful. The Commissioner's guidance indicates that disclosure would be unlawful if it would involve a breach of confidence, of an enforceable contractual agreement or of a statutory bar to disclosure (or, indeed, if disclosure would amount to a criminal offence). The Commissioner does not consider that the council has provided convincing arguments that disclosure would result in an actionable breach of confidence. The council has not provided arguments to suggest that disclosure would lead to a breach contract or a statute, or indeed that disclosure would amount to a criminal offence. The Commissioner therefore has no reason to conclude that disclosure would be unlawful.
45. Having already established that the processing is fair, the Commissioner is also satisfied that the release of the information would not cause any unnecessary interference with the rights, freedoms and legitimate interests of the data subjects. He is therefore satisfied that the schedule

2 condition is met. In addition, he does not believe that disclosure would be unlawful.

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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

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

Lisa Adshead
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