

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 June 2015

Public Authority: Cheshire West and Chester Council
Address: HQ Building
58 Nicholas Street
Chester
CH1 2NP

Decision (including any steps ordered)

1. The complainant has requested information relating to 'gagging orders' to which former planning staff have been subjected to. The Commissioner's decision is that Cheshire West and Chester Council does not have a duty in this case to comply with section 1(1)(a) of the FOIA on the basis of the exemption contained within section 40(5)(b)(i). He does not require the public authority to take any steps to ensure compliance with the legislation.

Background

2. To put this case in context, Cheshire West and Chester Council ('the council') informed the Commissioner that the request was part of a large number of requests made by the complainant in relation to planning issues. It explained that it does not recognise the term 'gagging orders' but interpreted this to mean compromise agreements with confidentiality clauses which may be signed between the council and former employees to settle employment terms or when agreeing redundancy terms. It also said that compromise agreements are now referred to by the council as settlement agreements.

Request and response

3. On 13 October 2014, the complainant wrote to the council and requested information in the following terms:

"Can you confirm how many planning officers who have left the council in the last twelve months have signed confidentially agreements."

4. The council responded on 17 October 2014 and refused to provide the requested information citing the exemption for personal data at section 40(2) of the FOIA.
5. The complainant wrote back to the council on the same day stating that he is not looking for data on individuals and rephrased his request as follows:

"Will you kindly provide the fullest details permitted of any such gagging orders to which Cheshire West and Chester council former planning staff have been subjected to.

I do not expect names but would expect the approximate dates and any sums of public money involved, both individual sums and the total on any such orders in the last 12 months.

Any explanation of the need for such orders would also be welcomed.

Finally, in light of government and national concern over 'gagging orders", does Cheshire West and Chester council have a view on the issue of stopping using these methods in the future, or indeed in releasing any ex-employee from any such orders?"

6. The council responded on 21 October 2014 stating that its response remains the same and referred the complainant to its review procedure. The complainant requested an internal review on 28 and 29 October 2014.
7. On 17 December 2014, the council provided its internal review response. It revised its position stating that it neither confirmed nor denied the information pursuant to sections 36(3) and 40(5)(b)(i) of the FOIA. It also stated that the following are not valid requests for information:

"Any explanation of the need for such orders would also be welcomed."

"Finally, in light of government and national concern over 'gagging orders", does Cheshire West and Chester council have a view on the

issue of stopping using these methods in the future, or indeed in releasing any ex-employee from any such orders?"

Scope of the case

8. The complainant contacted the Commissioner on 15 January 2015 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the council was entitled to rely on section 40(5)(b)(i) of the FOIA to neither confirm nor deny holding the requested information.
10. As the Commissioner has found that the council was entitled to rely section 40(5)(b)(i) of the FOIA, he has not deemed it necessary to consider whether the council was entitled to rely on section 36(3).

11. In relation to the following requests;

"Any explanation of the need for such orders would also be welcomed."

"Finally, in light of government and national concern over 'gagging orders", does Cheshire West and Chester council have a view on the issue of stopping using these methods in the future, or indeed in releasing any ex-employee from any such orders?"

the Commissioner has explained to the council that under the FOIA, a question can be a valid request for information if information that answers the question is held in recorded form and therefore if the council has information in its records that answers the questions it should provide it to the complainant. He asked the council to provide a response under the FOIA, directly to the complainant, to the questions it has stated are not valid requests. Therefore, this aspect of the request has not been considered in this decision notice.

Reasons for decision

12. In relation to a request regarding the personal data of a third party, section 40(5)(b)(i) excludes a public authority from complying with the duty to confirm or deny whether it holds the requested information if complying with that duty would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 (the 'DPA') or would do so if the exemptions in section 33A(1) of that Act were disregarded.

13. Personal data as defined under section 1(1) of the DPA is data which relates to a living individual who can be identified from that data or from that data and other information which is in the possession of the data controller or is likely to come into the possession of the data controller.
14. The Commissioner has first considered the nature of the information sought by the complainant. He notes that the request states 'I do not expect names...'. The council has explained that, if held, disclosure of the information requested would allow individual planning officers to be identified. This is because the council's planning portal has details of planning permissions and planning consents granted with recommendations by planning officers and it is possible to do a sift of applications during the past 12 months and identify which planning officers no longer appear in planning reports, thus identifying those officers who have left. It said that the fact that such officers have left does not necessarily mean that a particular officer did sign a compromise agreement, but it is easy for this assumption to be made, and therefore information to be obtained about particular employees.
15. In the Commissioner's opinion, any information which might be held by the council in respect of settlement agreements would be the personal data of identifiable individuals.
16. The council has said that disclosure of the requested information, if held, would contravene the first data protection principle.
17. The first data protection principle states:

"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. In considering whether or not confirming or denying whether the requested information was held would be fair, the Commissioner has taken into account the nature of the requested information, the reasonable expectations of any potential data subjects, whether it would cause damage and distress to any of the potential data subjects, and the legitimate interests of the public at large.
19. The Commissioner is aware that settlement agreements are prepared under section 111A of the Employment Rights Act 1996 and constitute legally binding contracts which generally prohibit the disclosure of certain types of information and prevent the parties to that agreement from taking further action. The effect of settlement agreements is to

provide certainty for the parties and to allow for a clean break. They are almost always subject to explicit confidentiality clauses which both parties to the agreement accept.

20. The Commissioner considers that the parties to those agreements would have more than a reasonable expectation that details associated with the termination of their employment would not be made public by their employer. Such details would include any payments made to those individuals for the purpose of severance.
21. Having taken into consideration the nature of settlement agreements, their obligations and effects, the Commissioner has decided that confirming or denying whether the requested information is held would cause damage and distress to the potential data subjects.
22. The Commissioner does consider that the public has a legitimate interest in knowing whether the council has entered into any compromise agreements as there is a public interest in knowing how public money is being spent. However, the Commissioner notes the council's statement that its budget each year contains details of payments made to employees and the budget is open to public inspection. Therefore the public are able to know how much money the council has spent overall in making employees redundant whether by compulsory redundancy or voluntary redundancy.
23. The Commissioner considers that under all the circumstances of this case, confirming or denying whether the requested information is held would breach the first data protection principle. The Commissioner is therefore satisfied that any response provided in this regard in line with the provisions of section 1(1)(a) of the FOIA would not be fair. As the Commissioner is satisfied that complying with section 1(1)(a) would in this case contravene the first data protection principle, he finds that the council was not obliged to have responded to the complainant's request in accordance with the duty imposed on it by the provisions of section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i).

Right of appeal

24. 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

25. 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.
26. 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
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Cheshire
SK9 5AF