

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 October 2016

Public Authority: Eden District Council

Address: Town Hall
Penrith
Cumbria
CA11 7QF

Decision (including any steps ordered)

1. The complainant has requested information from Eden District Council ("the Council") about a complaint that they have made. The Council disclosed some information under the terms of the Data Protection Act ("the DPA") and withheld some under the exemption provided by section 40(2) of the Freedom of Information Act ("the FOIA"). The complainant subsequently contested the Council's application of this exemption, and whether further information was held which should be disclosed under the FOIA.
2. The Commissioner's decision is that the Council has correctly applied the exemption provided by section 40(2), and that no further information is likely to be held which should be disclosed under the FOIA. However in failing to issue a response within the time for compliance, the Council breached section 10(1).
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 14 September 2015 the complainant requested:

"...copies of any correspondence relating to a complaint we made to Eden District Council and a subsequent Local Government Ombudsman's investigation Case ID number [redacted], dating from 26th September 2015 [later clarified to 2013] to date."

5. On 9 October 2015 the Council responded. It disclosed held information. The Commissioner understands that this information represented the complainant's personal data and was therefore disclosed under the terms of the DPA.
6. On 13 and 28 October 2015 the complainant corresponded further with the Council and clarified they also sought copies of correspondence with 'developers' that was associated with the complaint file.
7. On 5 November 2015 the Council responded that this further information was held but exempt from disclosure under the FOIA. The Council confirmed this position on 19 November 2015 when it issued a refusal notice citing section 40(2).
8. On 1 December 2015 the complainant requested an internal review.
9. On 3 March 2016 the Council provided the outcome of its internal review. It maintained its position but specified that further searches for information would be undertaken.

Scope of the case

10. The complainant contacted the Commissioner on 21 March 2016 to complain about the Council's response.
11. The Commissioner considers the scope of this case to be the determination of whether the Council has correctly applied the exemption provided by section 40(2).
12. The Commissioner will also consider whether further information is likely to be held that should be disclosed under the terms of the FOIA. This determination will not extend to the complainant's personal data, to which there is no right of access under the terms of the FOIA (being subject to an absolute exemption under section 40(1)). Any dispute about the completeness of the Council's disclosure under the terms of the DPA must be referred to the Commissioner as a complaint under the DPA.

Reasons for decision

Context

13. The Commissioner understands that a planning application for a balcony has previously been made by a third party, and that this was approved by the Council. The complainant subsequently made a complaint to the

Council about the effect of this approved planning application; however this complaint was not upheld. The complainant subsequently appealed the matter to the Local Government Ombudsman ("the LGO"), which upheld the appeal and required the Council to impose changes on the planning application. This required the Council to correspond with the third party, and it is this correspondence and associated records that have been withheld in respect to the request.

Section 40(2) – The personal data of third parties

14. Section 40(2) provides 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.*

15. 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?

16. Personal data is defined by section 1 of the DPA 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...

17. In order for the exemption to apply the information being requested must constitute personal data as defined by section 1 of the DPA. In this instance the Commissioner has reviewed the information that has been withheld and has identified that it represents correspondence and meeting notes between the Council and the third party following the

complainant's upheld appeal to the LGO. It is also evident that this information relates explicitly to a matter of which the complainant is aware and that redaction would not render the information anonymous. On this basis the Commissioner accepts that the information in its entirety is the personal data of the third party.

Would disclosure breach the data protection principles?

18. The data protection principles are set out in schedule 1 of the DPA. 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.
19. 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 the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

The reasonable expectations of the data subject

20. When considering whether the disclosure of personal information is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the data subject. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.
21. In this case the Council considers that such disclosure would not be reasonably expected by the individuals, who have not given consent for their personal data to be publically disclosed.

The consequences of disclosure

22. The Council considers that the request has been made in relation to an ongoing private matter, and that the information relates to the third party's private life. The disclosure of the information would therefore breach Article 8 of the Human Rights Act.

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

23. In the circumstances of this case the Commissioner recognises that the sought disclosure would intrude on the right and expectation of privacy held by the third party.

24. The Commissioner does not consider that the connection of the withheld information to the complainant's LGO appeal provides a legitimate interest in public disclosure. The appeal to the LGO represents a private matter and the identities of parties are treated as confidential. It is also reasonable for the Commissioner to consider that should the complainant continue to dispute the Council's actions then this would need to be further referred to the LGO.
25. Having considered the above factors, the Commissioner recognises that disclosure would represent a significant infringement on the rights and freedoms of the third party, and considers that there is limited legitimate interest to warrant this.

The Commissioner's conclusion

26. Having considered the above factors the Commissioner is satisfied that disclosure would not be fair under the first principle of the DPA.
27. Whilst the Council has also proposed that the second principle (which specifies that personal data will not be processed for reasons incompatible for why it is held) is relevant in this case, the Commissioner is satisfied that disclosure would already be a breach of the DPA under the first principle.
28. On this basis the Commissioner upholds the Council's application of section 40(2).

Section 1(1) – whether information is held

29. Section 1(1) states that any person making a request for information is entitled to be informed by the public authority whether it holds the information, and if so, to have that information communicated to them. This is subject to any exemptions or exclusions that may apply.

The complainant's position

30. The complainant has raised concerns that further information is held besides that disclosed to him or else refused under section 40(2). The complainant has also referred to discussions between Council officers that are referenced within email correspondence, but which have not been recorded.

The Council's position

31. The Council has informed the Commissioner that the information disclosed to the complainant has been done under the terms of the DPA, as it represents the complainant's personal data. This information is contained in a physical file, alongside other information which is not the

complainant's personal data and which has consequently been withheld under section 40(2).

32. The Council has informed the Commissioner that besides accessing the physical file, a 'trawl' of all Council email addresses has been undertaken for associated records, and all relevant information is believed to have been retrieved. The Council has advised that emails cannot be deleted from the email system that it uses, and that consequently no information will have been previously destroyed.

The Commissioner's conclusion

33. When the Commissioner receives a complaint that a public authority has not provided any or all of the requested information, it is seldom possible to prove with absolute certainty that there either isn't any information or anything further to add. The Commissioner will apply the normal civil standard of proof in determining the case, i.e. she will decide on the balance of probabilities whether the information is held.
34. The Commissioner understands that besides the information so far disclosed under the terms of the DPA, and that withheld under the FOIA (and subsequently reviewed by the Commissioner), no further recorded information is reasonably believed to be held. The information relating to the complaint is held in a physical file, and an electronic search has been undertaken for any associated email correspondence which relates to the request and which has not already been copied into the physical file.
35. Having considered that the relevant information is stored centrally in a physical file, and that electronic searches have been undertaken for any further email correspondence, there is no evidence available to the Commissioner that suggests further information is held in relation to the request and subject to disclosure under the FOIA.
36. Although the Commissioner has noted the complainant's concerns that discussions between Council officers have not been recorded, this matter falls outside the terms of the FOIA, which does not require a public authority to record information. The determination of whether the Council should have recorded the content of these discussions therefore falls outside the Commissioner's role.

Section 10(1) – time for compliance

37. Section 10(1) specifies that a refusal notice must be provided no later than 20 working days after the date on which the request was received.
38. In this case the Council provided its refusal notice outside of this time frame, and therefore breached section 10(1).

Other matters

Internal review

39. The Commissioner has identified that the Council provided the outcome of its internal review outside of forty working days following this being requested.
40. Under the FOIA, there is no obligation for a public authority to provide a complaints process. However, it is good practice (under the section 45 Code of Practice¹) to do so, and the Commissioner recommends that an internal review outcome be provided within twenty working days, or forty working days in exceptional circumstances. In circumstances where a public authority is found to consistently fail to follow good practice, the Commissioner may issue a practice recommendation.

The relevant access regime

41. The Commissioner notes that the Council's responses to the complainant do not clearly advise under which access regime information has been provided (i.e. the FOIA or DPA).
42. The disclosure of personal data to an individual under the terms of the DPA is under significantly different terms to the disclosure of official information to the public under the FOIA. The Commissioner considers that by not differentiating between these two access regimes, the Council has caused understandable confusion on the part of the complainant, and that should clear advice have been provided to the complainant at an early stage of the correspondence this may have resulted in an earlier resolution. The Commissioner would therefore refer the Council to the published guidance on managing situations where an information request under the FOIA seeks the personal information of the requester².

¹ <https://www.gov.uk/government/publications/code-of-practice-on-the-discharge-of-public-authorities-functions-under-part-1-of-the-freedom-of-information-act-2000>

² <https://ico.org.uk/media/for-organisations/documents/1209/personal-data-of-both-the-requester-and-others-foi-eir.pdf>

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@hmcts.gsi.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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF