

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 05 December 2016

Public Authority: Wrexham County Borough Council
Address: Guildhall
Wrexham
LL11 1AY

Decision (including any steps ordered)

1. The complainant requested various items of information in respect of a grievance investigation. Wrexham County Borough Council refused this request on the basis of section 40(2) of the FOIA. The Commissioner's decision is that Wrexham County Borough Council should have relied on section 40(5) in respect of this request to neither confirm nor deny whether it held any relevant information. Additionally, in failing to provide a response within the required timescales, the Council breached section 10(1) of the FOIA. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 13 January 2016, the complainant wrote to Wrexham County Borough Council ('the Council') and requested the following information:
"Can you please provide me with copies of the following paperwork with regards to my grievance investigation?"
 - *[Named individual A's investigation finding's in relation to an investigation she carried out for WCBC.*
 - *If denied a copy of the 3 Council officer's response/replies, then I request a copy of the questions asked of them.*
 - *Examination of the files (paperwork) held by the Council's HR section in relation to the above investigation."*

3. The Council responded on 13 July 2016. It refused the request in reliance on section 40(2) of the FOIA on the basis that disclosure would breach the first principle of the Data Protection Act 1998, ('the DPA').
4. Following an internal review the Council wrote to the complainant on 3 August 2016. It confirmed that it was upholding its original decision.

Scope of the case

5. The complainant originally contacted the Commissioner on 4 April 2016 to complain about the way his request for information had been handled. The Commissioner notes that whilst the Council had acknowledged the FOIA aspect of the request, it had failed to issue a formal response. It had however responded to that part of the request which constituted the complainant's own personal data under the provisions of the Data Protection Act, 1998, which was subsequently investigated by the Commissioner under RFA0623361. Following the Commissioner's intervention, the Council provided its FOIA response and internal review.
6. Following the complainant's confirmation that he remained dissatisfied with the outcome of the Council's internal review, his complaint was accepted as valid under section 50 of the FOIA.
7. Although the Council refused this request by virtue of section 40(2) of the FOIA, the Commissioner will consider whether the Council should have neither confirmed nor denied holding the requested information by virtue of section 40(5)(b)(i) (third party personal information).

Reasons for decision

Section 40 – personal data

8. Section 40(5)(b)(i) FOIA provides that if a public authority receives a request for information which, if held, would be the personal data of a third party, it can rely on section 40(5)(b)(i) to neither confirm or deny whether or not it holds the requested information.
9. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of personal data and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.

Is the information personal data?

10. The definition of personal data is set out in section 1 of the DPA:

" ...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 intention of the data controller or any other person in respect of the individual."

11. The two main elements of personal data are that the information must 'relate' to a living individual and the individual must be identifiable. Information will relate to an individual if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

12. The Commissioner notes that the request concerns a grievance investigation instigated by the complainant, and specifically concerns three Council employees. Therefore, the Commissioner accepts that the requested information, if held, is the personal data of three identifiable individuals.

13. The Commissioner has also considered whether disclosing just the questions asked during the investigation would reveal personal information, and having had sight of the information, can see that they are specific to the complainant's grievance with many revealing the role of the individual Council employee being interviewed. The Commissioner is therefore satisfied that this, together with other information in the public domain, would constitute the personal information of the data subjects as defined by section 1 of the DPA.

14. Having accepted that the request is for personal data of three living individuals, the Commissioner will go on to consider whether disclosure of this personal data would breach one of the data protection principles.

15. The Commissioner considers that the first data protection principle is relevant in the circumstances of this case.

Would confirmation or denial breach the first data protection principle?

16. 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.”*

17. 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 disclosure, ie the confirmation or denial in this case, can only be given if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.
18. When considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
- the individual’s reasonable expectations of what would happen to their information;
 - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned);
 - any legitimate interests in the public having access to the information; and,
 - the balance between these and the rights and freedoms of the individuals who are the data subjects.

The reasonable expectations of the data subject

19. The Commissioner’s guidance regarding section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party’s public or private life.¹ Although the guidance acknowledges that there are no hard and fast rules it states that:

“Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to

¹http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/PERSONAL_INFORMATION.ashx

deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."

20. The Commissioner's guidance therefore makes it clear that where the information relates to the individual's private life (i.e. their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life). However, not all information relating to an individuals' professional or public role is automatically suitable for disclosure.
21. The Commissioner considers the seniority of the data subject is an important factor when considering their reasonable expectations, and in his view, the more senior a person is, the less likely it will be unfair to disclose information about him or her acting in an official capacity.
22. However, the Commissioner also recognises that there is a widespread and general expectation that details of a person's employment and matters relating to Human Resources should be considered confidential.
23. In this particular case, the Commissioner notes confirming or denying whether relevant information is held would reveal whether three Council employees were interviewed as part of the complainant's grievance investigation. Whilst the complainant was aware of the investigation, the Commissioner can find no evidence that at the time of the request, there was anything in the public domain which refers to it. It is therefore the Commissioner's view that the data subjects would have little – if any - expectation that such details would be put into the public domain by way of a request under the FOIA.

Consequences of disclosure

24. The Commissioner's guidance regarding the disclosure of information about employees states that:

"Disclosure is unlikely to be fair if it would have unjustified adverse effects on the employees concerned. Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life."

25. In her determination of whether such a disclosure would be fair, the Commissioner must therefore assess whether disclosure would be likely to result in unwarranted damage or distress to those individuals.

26. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. She will also take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions.
27. Given the nature of the request, the Commissioner considers that confirming or denying in this case is highly likely to cause damage and distress to the individual members of staff concerned.

The legitimate public interest in disclosure

28. Despite the reasonable expectations of the data subjects, and the fact that damage and/or distress may result from disclosure, it may still be fair to disclose information, or in this case confirm or deny whether information is held, if there is a more compelling public interest in doing so. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subjects against the public interest in confirming or denying if the information is held.
29. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest in confirming whether or not information is held must therefore outweigh the public interest in protecting the rights and freedoms of the data subjects if providing confirmation or denial is to be considered fair.
30. The interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.
31. In light of the nature of the information, the reasonable expectations of the data subjects and the consequences of disclosure, the Commissioner is satisfied that confirming or denying if the requested information is held could potentially cause unnecessary and unjustified distress to the data subjects. She considers that these arguments outweigh any legitimate interest in disclosure. She has therefore concluded that confirmation or denial in this case would breach the first data protection principle and finds the exemption at section 40(5) is engaged and the duty to confirm or deny does not arise.

Section 10 – time for compliance with the request

32. Section 10(1) of FOIA states that a public authority must comply with section 1(1) promptly and no later than 20 working days following receipt of the request.²
33. For the purposes of section 10(1), public authorities must respond 'promptly' to a request. In this case, the Council dealt with the part of the request relevant to the complainant's own personal information, however, failed to respond to the request regarding third party personal data until the intervention of the Commissioner, some six months after the request and well in excess of the 20 working day timescale specified under the FOIA. Accordingly, the Council has breached section 10(1) of the FOIA.

² Section 1(1) states that: ' Any person making a request for information to a public authority is entitled (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have the information communicated to him.'

Right of appeal

34. 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

35. 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.
36. 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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