

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 November 2016

**Public Authority:** Cumbria County Council  
**Address:** The Courts  
Carlisle  
Cumbria  
CA3 8NA

#### Decision (including any steps ordered)

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1. The complainant has requested information from Cumbria County Council in relation to a report it produced on behalf of Allerdale Borough Council regarding allegations of corruption. The Commissioner's decision is that, on the balance of probabilities, Cumbria County Council does not hold the requested information. She has also decided that the exemption at section 40(2) of the FOIA was correctly applied. She does not require the public authority to take any steps to ensure compliance with the legislation.

#### Request and response

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2. On 17 March 2016, the complainant wrote to Cumbria County Council ('the council') and requested information in the following terms:
  - "1) Who in the council dealt with this matter – i.e. the name, and functions of those involved?
  - 2) What form did the request from Allerdale take? Was it a formal letter to Cumbria County Council from your opposite member in Allerdale or was it a formal minute from the full council or a Committee of the full council. Please confirm what happened and the names of those involved in both Allerdale and your council?

- 3) How did Cumbria County Council evaluate the request from Allerdale? Was it considered by the full council or by a Committee of your council? Please provide the names of those involved and a copy of the relevant minute.
  - 4) In evaluating what course of action to take after receiving the request from Allerdale how did those involved in Cumbria County Council decide that it was not necessary to call the police? Please provide copies of the information which enabled your council to do this and a copy of the relevant minutes.
  - 5) Who prepared the final report and why have they left the council's employment?
  - 6) Was the final report approved by the full Cumbria County Council or by a committee? Please provide the names of those involved and a copy of the relevant minute.
  - 7) What meetings were held between Allerdale and Cumbria County Council while the report was being prepared? Please provide the names of those involved and the minutes of the relevant meetings.
  - 8) Why was the report and its conclusions never published?
  - 9) Are you aware of any long term acquaintance or council business relationship of any of those involved in either Allerdale or Cumbria County Council?
  - 10) While it is maintained your council has not kept a copy of this obviously sensitive report and that the person who prepared it has left your employment why was no effort made to answer my original request in relation to the involvement of the police.
3. The council responded on 22 April 2016. It said that, as has previously been advised, the request was commissioned by Allerdale Borough Council and the matter was dealt with by the Assistant Director Legal and Democratic Services. The council applied the exemption at section 40(2) to the reason why the person who prepared the final report left the council's employment. It also stated that it does not hold the information to answer all the other questions.
  4. On 11 May 2016, the complainant requested an internal review.
  5. The council provided its internal review response on 2 June 2016 in which it maintained its original position. It referred to the decision notice for case reference FS50597516 and suggested that the complainant should direct his request to Allerdale Borough Council.

## Scope of the case

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6. The complainant wrote to the Commissioner on 6 June 2016 to complain about the way his request for information had been handled.
7. The Commissioner has considered whether, on the balance of probabilities, the council holds information within the scope of parts 2-4 and 6-10 of the request.
8. She has also considered the council's application of section 40(2) to why the person who prepared the final report has left the council's employment (part 5 of the request).
9. The Commissioner issued a decision notice<sup>1</sup> on 11 February 2016 stating that the council correctly confirmed that it does not hold the report it produced for Allerdale Borough Council. For the avoidance of doubt, this decision notice does not reconsider whether the report is held by the council.

## Reasons for decision

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### Section 1 – is the requested information held?

10. Section 1 of the FOIA 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 him.
11. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held, she is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1560673/fs50597516.pdf>

12. The Commissioner informed 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. She said the council is not required to answer a question if it does not already have the relevant information in recorded form but pointed out that even though the FOIA only requires the council to provide recorded information, this doesn't prevent it providing answers or explanations as well, as a matter of normal customer service.
13. The Commissioner enquired as to whether the information has ever been held, the scope, quality, thoroughness and results of the searches carried out by the council, whether information had ever been held but deleted and whether copies of information may have been made and held in other locations. She also enquired whether there was any legal requirement or business need for the council to hold the information.
14. The council did not answer the specific questions that the Commissioner posed. Instead, it provided the following further information as to why it does not hold information to answer the complainants questions:

"2) The request was from Allerdale Borough Council for Cumbria County Council to carry out an independent investigation with regard to an internal matter. [The former Assistant Director Legal and Democratic Services] was commissioned to undertake the investigation and Cumbria County Council submitted an invoice to Allerdale Borough Council on completion of the investigation for the work undertaken. The investigation report was not considered by any Committees at Cumbria County Council.

3) As per our response at point 2 Cumbria County Council did not consider the request at full council or by any other committee. The request was handled by [the former Assistant Director Legal and Democratic Services] as a commissioned piece of work and an invoice submitted to recover costs on completion of the investigation.

4) On completion of the investigation a report was provided to Allerdale Borough Council as had been requested. The Council does not hold any record with regard to a formal review of the request or as to any considerations that the request to undertake an investigation should be referred to the police.

6) The report was not considered at a full Council meeting or by any other committee, therefore there is no relevant minute that can be provided. The report was provided to Allerdale Borough Council. Cumbria County Council does not hold any record of any actions or decisions Allerdale Borough Council may have taken upon receipt of the report.

- 7) As was advised in the review of our handling of [complainant's name] request under FS50597516 we hold some information in relation to interview statements which were compiled as part of the investigation. We do not hold information with regard to any possible review meetings or discussions that may have been held during the period the investigation was undertaken.
- 8) The report was never published by Cumbria County Council. It was provided to Allerdale Borough Council on completion of the investigation they had commissioned. As stated previously this was why we have suggested that [complainant's name] contacts Allerdale Borough Council to request a copy of the report.
- 9) As per our original response Cumbria County Council does not hold any information in relation to this request.
- 10) As per our response to question 4 on completion of the investigation a report was provided to Allerdale Borough Council as had been requested. The Council does not hold any record with regard to a formal review of the request or as to any considerations that the request to undertake an investigation should be referred to the police."
15. The Commissioner then contacted the council and asked it to revisit the questions in his letter regarding section 1 of the FOIA. The council then provided a further response stating that, in relation to emails and details of calendar appointments, it conducted a search of its Microsoft Outlook servers and that search has confirmed there is no longer any information held/retained with regard to accounts for [the former Assistant Director Legal and Democratic Services] which is where it would expect any relevant information to be. It further explained that procedures are now in place to create a .PST file which contains all email and calendar details at the point an employee leaves the council but [the former Assistant Director Legal and Democratic Services] left well before .PST files were retained.
16. The Commissioner has considered whether the council had any reason or motive to conceal the requested information. She has not seen any evidence of wrongdoing surrounding its records management obligations and has not identified any reason or motive to conceal the requested information.
17. In the circumstances, the Commissioner does not consider that there is any evidence that would justify refusing to accept the council's position that it does not hold any information relevant to the questions posed in this request. Taking into consideration the narrative answers provided to the questions (paragraph 14), and given that the report was a commissioned piece of work on behalf of another council, the

Commissioner considers it entirely feasible that the answers to the questions posed would not be held as recorded information. The Commissioner understands that the complainant believes the requested information should be held but acknowledges that there is often a difference between what a complainant believes should be held with what is actually held by a public authority. She is therefore satisfied that on the balance of probabilities, the requested information is not held by the council. Accordingly, she does not consider that there was any evidence of a breach of section 1 of the FOIA.

### **Section 40(2)**

18. 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 Data Protection Act 1998 ('the DPA').

19. 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:

“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.”

20. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA. The Commissioner notes in this case that the council said that disclosure would breach the first data protection principle.

### **Is the withheld information personal data?**

21. As explained above, the first consideration is whether the withheld information is personal data. The council explained that the information in this case is a confidential settlement agreement in place regarding the details of the former Assistant Director Legal and Democratic Services

departure from the authority. The agreement includes a name, financial information and the basis of the ending of the employment. The Commissioner is satisfied that an individual's settlement on leaving employment, including the reason for leaving, is personal data as defined in the DPA.

**Does the disclosure of the information contravene any of the data protection principles?**

22. The council considers that the disclosure of the information would contravene the first data protection principle.
23. 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."
24. In deciding whether disclosure of this information would be unfair, the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subjects, the consequences of disclosure on those data subjects and balanced the rights and freedoms of the data subjects with the legitimate interests in disclosure.

**Nature of the information and reasonable expectations**

25. The council said that the data subject in this case would have a strong expectation of confidentiality because confidentiality is expressly provided for within the text of the settlement agreement. It also said that, due to the nature of the agreement, the data subject would have no reasonable expectation at the time the information was collected that this information would be disclosed into the public domain.
26. The Commissioner recognises that people have an instinctive expectation that a public authority, in its role as a responsible employer and data controller, will not disclose certain information. She considers that information relating to the termination of an individuals' employment will attract a strong general expectation of privacy as it is inherently personal to the data subject.



27. This expectation of privacy was affirmed in the Tribunal case of Trago Mills (South Devon) Limited v Information Commissioner and Teignbridge District Council<sup>2</sup>. The Tribunal upheld the Commissioner's decision that disclosure of the details of a severance agreement would be unfair and thus contravene the first data protection principle. The Tribunal stated that:

"Even without an express confidentiality provision, an individual would have a reasonable expectation that the terms on which his employment came to an end would be treated as confidential. The question we have to consider is, not whether X's severance package was a private transaction (it clearly was), but whether the factors in favour of disclosure should lead us to conclude that, on balance, disclosure would not have represented an unwarranted interference with that right."

28. Taking the above into consideration, the Commissioner considers that the data subject would have had a reasonable expectation that the specific details of the settlement would not enter the public domain.

#### **Consequences of disclosure**

29. In this case the council said that termination of employment is an issue which is inextricably linked to an individual's personal life and any such disclosure may cause harm and distress to the data subject concerned.
30. The Commissioner considers that disclosure would amount to an infringement into the privacy of the data subject which has the potential to cause damage and distress.

#### **Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure**

31. In considering 'legitimate interests in disclosure', such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
32. In this case, the Commissioner recognises that there is a legitimate public interest in the expenditure of public money, especially in a climate of considerable public sector cuts.

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<sup>2</sup> Appeal number EA/2012/0028



33. As both the Commissioner and the Tribunal have made clear in the Trago Mills case previously cited, the legitimate interests of the public in knowing the details of termination of employment must be weighed against the individual's right to privacy. The Tribunal made clear that such decisions should be made on the expectations of privacy held by 'the reasonably balanced and resilient individual'. The Tribunal concluded that:

"We do not find that the Council's duty to be transparent and accountable about the expenditure of public money outweighs the requirement to respect the former employee's reasonable expectation of privacy. Accordingly, we conclude that disclosure would have breached the data protection principles."

### **Conclusion on the analysis of fairness**

34. Taking all of the above into account, the Commissioner concludes that it would be unfair to the data subject concerned to release the requested information. Disclosure would not have been within the data subject's reasonable expectations and the loss of privacy could cause unwarranted distress. She acknowledges that there is a legitimate interest in the expenditure of public money but does not consider that this outweighs the data subjects strong expectations of, and rights to, privacy. The Commissioner has therefore decided that the council was entitled to withhold the information under section 40(2), by way of section 40(3)(a)(i).
35. As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, she has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

## Right of appeal

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36. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

37. 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.
38. 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 .....

**Deborah Clark**  
**Senior Case Officer**  
**Information Commissioner's Office**  
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