

Freedom of Information Act 2000

Decision notice

Date: 11 October 2017

Public Authority: Spennymoor Town Council
Address: Town Hall
Spennymoor
County Durham
DL16 6DG

Decision (including any steps ordered)

1. The complainant requested information relating to complaints of bullying made against staff and councillors from Spennymoor Town Council (the Council). The Council refused the request under section 40 of the Freedom of Information Act 2000 (the Act), although it did not specify which subsection it was relying on.
2. The Commissioner's decision is that the Council is entitled to neither confirm nor deny whether any relevant information is held in reliance on section 40(5)(a) of the Act. The Commissioner's decision is also that the Council breached section 17(1) of the Act because it did not specify the relevant subsection of section 40 when it refused the complainant's request. However, as this notice informs the complainant of the relevant subsection, no steps are required by the Council.

Request and response

3. On 12 January 2017 the complainant wrote to the Council and requested information in the following terms (numbers added by the Commissioner for reference):
 1. *"In the last 2 years has there been any reported / recorded complaints of bullying by officers towards staff at the Town Hall?"*

2. *In the last 2 years has there been any reported / recorded complaints of bullying by elected Spennymoor Town Councillors towards officers at the Town Hall?*
 3. *If so, who investigated these complaints?*
 4. *Was NEREO involved in anyway?*
 5. *What was the outcome of any investigations, any warnings or sanctions?"*
4. The Council responded on 10 February 2017 and stated it held no relevant information that was not "personal information", and so refused the request under section 40 of the Act (no subsection was specified).
 5. The complainant requested an internal review on the same day. This review was issued on 13 February 2017, which provided answers to items 1 and 2 of the complainant's request. The answers were nought and one respectively.
 6. On 14 February 2017, the complainant wrote to the Council and requested information in the following terms (numbers added by the Commissioner for reference):

"As I was far from happy with some of my questions being refused, I will try again, this time I am asking for dates and the replies can be simple yes or no, which I am sure cannot be construed as being "personal".

 1. *Who was this complaint reported to, no name necessary, just position will suffice?*
 2. *How was this complaint made, face to face, letter, email ect. [sic]*
 3. *What is the date when the bullying complaint was first made?*
 4. *What is the date when the Councillor accused of bullying was informed / spoken too about the complaint?*
 5. *Was this complaint of bullying investigated using the Councils [sic] Grievance Policy?*
 6. *Was NEREO or any Union involved in anyway?*
 7. *Was the Councillor that was accused of the bullying spoken to about his conduct or given a warning or any sanctions?"*
 7. The Council responded on 20 February 2017. It stated that the requested information was "deemed personal information and exempt from release under Section 40 of the Freedom of Information Act 2000." This response was upheld in the Council's internal review of 23 February 2017.

Scope of the case

8. The complainant contacted the Commissioner on 28 February 2017 to complain about the way his request for information had been handled. Specifically, that the Council refused his request of 14 February 2017.
9. The Council did not specify a subsection for section 40 of the Act in its correspondence to the complainant. In the Commissioner's view, the request of 14 February 2017 asked for the Council to confirm whether it held personal data as defined in section 1 of the Data Protection Act 1998 (DPA):

"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; "

10. The personal data requested relates to allegations of bullying by a councillor. In instances such as this the Commissioner usually recommends that a public authority refuses to confirm or deny whether it holds relevant information by virtue of the provisions in section 40(5) of the Act.¹ The Commissioner is the regulator of the DPA and so must ensure that personal data is not disclosed in contravention of its provisions.
11. The Commissioner asked the Council to confirm which subsection it was relying on to refuse the request, and made her view clear that a section 40(5) argument might be valid in this instance. The Council provided submissions stating that it would be relying on section 40(5).
12. The Commissioner considers the scope of the case to be whether the Council is entitled to neither confirm nor deny whether it holds information relevant to the complainant's request of 14 February 2017. The Commissioner will also look at the Council's refusal of the

¹ For example - <https://ico.org.uk/media/action-weve-taken/decision-notice/2016/1625267/fs50622582.pdf>

complainant's request and determine whether it was in accordance with the Act.

Reasons for decision

13. The Commissioner wishes to note that disclosure under the Act is disclosure to the world at large. It is immaterial whether the complainant knows whether a complaint was made against him or a colleague, the Commissioner's determination is based on whether the information can be placed into the public domain.
14. Section 40(1) of the Act states that:

"(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."
15. Section 40(5) of the Act states that:

"(5) The duty to confirm or deny –

 - (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1),*
 - (b) does not arise in relation to other information if or to the extent that either –*
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded,"*
16. Section 40(1) of the Act applies where a requester asks for their own personal data, and it would not disclose their personal data to confirm or deny whether that information was held. For section 40(5)(a) to be engaged, the request needs to ask for information that – if held – would be personal data of the requester, and by confirming or denying that the information is held the Council would disclose the requester's personal data.
17. The Council's response of 13 February 2017 confirmed that one complaint had been made against a councillor. As the complainant is one of those councillors then the information could potentially be his own personal data.

18. Were the Council to apply section 40(1) of the Act to the request then it would be confirming that information was held and it was the complainant's own personal data. This would confirm that the Council held a complaint about bullying relating to the complainant. Similarly if the Council applied section 40(2) – which is the exemption for third party personal data held by public authorities – then it would confirm that information was held but related to one of the other councillors.
19. Were the Council to apply section 40(5)(b)(i) then it would neither confirm nor deny whether it held relevant information. However, by applying this subsection it would confirm that the information would – if held – relate to third parties, and this would confirm that any potentially held information does not relate to the complainant.
20. For this reason the Commissioner considers that the request should be refused under section 40(5)(a). The information – if held – would be personal data, and due to the scope of the request the information – if held – could relate to the complainant. For the Council to give any other response under section 40 then it would be providing the requester with information about what information – if any – is held and thus disclose his personal data. The Commissioner's decision is that the request should be refused under section 40(5)(a) of the Act.
21. The Commissioner wishes to note that the complainant does have a right under the DPA to submit a Subject Access Request (SAR) to the Council. The Council would then have to confirm whether it holds personal data about him, although there is no guarantee that this information would be disclosed to the complainant. There are a number of exemptions in relation to disclosure of information in response to a SAR which might cover the information requested.²

Section 17(1) – refusal of a request

22. Section 17(1) of the Act states that:

“(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

² For more information please see – <https://ico.org.uk/for-organisations/guide-to-data-protection/?template=pdf&patch=3#link18>

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

23. The Council stated to the complainant that the request was being refused because the information was "deemed personal information and exempt from release under Section 40 of the Freedom of Information Act 2000."
24. The Council is required to specify the relevant subsection when it is relying on an exemption from Part II of the Act. It is not sufficient to state that the information would be personal data, the Council needs to confirm which specific subsection from the personal data exemption is being relied upon. These subsections have different meanings and it is essential that a requester is informed of this.
25. As the Council did not specify the specific exemption in question it breached section 17(1)(b) and 17(1)(c) of the Act. As the Commissioner's notice has informed the complainant which subsection is being applied no steps are required, but the Commissioner recommends that the Council ensure that relevant subsections are specified in future.

Right of appeal

26. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

27. 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.
28. 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

**Gerrard Tracey
Principal Advisor
Information Commissioner's Office
Wycliffe House
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