

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 June 2015

Public Authority: Guildford Borough Council

Address: Millmead House
Millmead
Guildford
GU2 4BB

Decision (including any steps ordered)

1. The complainant has requested information about the departure of the Head of Planning. Guildford Borough Council (the council) refused the request relying on section 40(5) of the FOIA to neither confirm nor deny holding the requested information. It considered to either confirm or deny holding the information would in itself reveal personal data about the Head of Planning.
2. The Commissioner's decision is that the council has correctly relied on section 40(5) of the FOIA in this case.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 18 September 2014, the complainant wrote to the council and requested information in the following terms:

"The previous head of planning, [name redacted], left the employment of GBC somewhat precipitously, and at a critical time in the development of the local plan. As such, the public has a valid interest in the reasons for this departure.

Was her departure brought about by any or a number of disagreements with councillors over the content of the local plan?

If so, with which councillors did she have any disagreements?

If she resigned, please provide a copy of her resignation letter, or email.

If you will not release a copy of the letter or emails, please provide the reason given by her for her resignation, in any and all communications on the matter.

If her departure was brought about by a compromise agreement, please provide a copy of this agreement.

If you will not release a copy of the agreement, please confirm if a 'gagging' or similar clause was included, preventing Ms. Humphrey from discussing the reasons for her departure.

Please provide the details of any compromise, exgratia or other payment made to [name redacted] as part of any agreement, arising from her departure."

5. The council responded on 13 October 2014. It refused to either confirm or deny holding the information, relying on section 40(5) of the FOIA. It considered to do so would constitute a disclosure of the Head of Planning's personal information.
6. The complainant requested an internal review on 15 October 2014 as he considered it to be in the public interest to know if a dispute between councillors led to her departure.
7. He also considered that it is the right of council tax payers to have disclosure of the relevant compromise agreement or whether it included a gagging clause or confidentiality agreement. He also did not consider all of the information would be personal data.
8. The council provided its internal review on 5 November 2014. It maintained its decision.

Scope of the case

9. The complainant contacted the Commissioner 27 November 2014 as he was not satisfied with the council refusing his request.
10. The Commissioner considers the scope of the case is to determine whether the council was correct to rely on section 40(5) of the FOIA to neither confirm nor deny holding the requested information.

Reasons for decision

11. Section 40(5) of the FOIA states that:

"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), and

(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, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

12. The council is of the opinion that confirming or denying holding the requested information in relation to the departure of the Head of Planning, which is regarding any reasons for her departure, would in itself breach one of the data protection principles.

13. In order for the Commissioner to determine whether the council is correct to rely on section 40(5) of the FOIA, to neither confirm nor deny holding the information, the Commissioner will need to determine if the information requested, if it were held by the council, would constitute personal data. If it is personal data, then he must decide if disclosure would breach any of the data protection principles.

Is the information personal data?

14. Personal data is defined by the Data Protection Act 1998 (the DPA) as any information which relates to a living individual who can be identified from that data or from that data along with any other information in the possession or is likely to come into the possession of the data controller.

15. The Commissioner is satisfied that the information, if held by the council, would fall within the definition of personal data as set out in the

DPA because it 'relates to' an identifiable living person as it could provide details about the Head of Planning's departure.

Would disclosure contravene any of the Data Protection Principles?

16. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focussed on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of disclosure against the legitimate public interest in disclosing information.

Reasonable expectations

17. The information, if held by the council, could identify details around the reasons for the Head of Planning's departure from the council.
18. The council released a public statement on the Head of Planning's departure which stated she left to pursue other personal and career opportunities. The council says this is what the Head of Planning would reasonably expect to be released in to the public domain in terms of an explanation to her departure. Releasing anything further, or confirming or denying whether the requested information is held, could imply there were other circumstances for her departure. The council considers the requested information relates to her personal life rather than her working life, increasing the individual's expectations for privacy.
19. The Commissioner's view is that the seniority of an employee can help to determine their reasonable expectations of privacy. For instance, a more public facing or senior public authority employee would, in general, have less reasonable expectations of privacy to that of a junior employee.
20. The Commissioner needs to balance the seniority of the individual against the type of information requested, or in this case, the requested information that the council is neither confirming nor denying being held.
21. The council has explained that, in terms of seniority, the Head of Planning was responsible for the council's development control, building control and planning policy services as well as being instrumental in the development of the Local Plan. She reported to the Executive Head of Development, who in turn reports to the Managing Director. Therefore this post is within the council's top three management layers.

22. The type of information requested, held or not, in the Commissioner's view, is information that could be considered as information to do with the Head of Planning's human resources (HR) file and it would be information that relates more to her private life than working life.
23. HR information, in the Commissioner's view, carries a higher expectation of privacy in most circumstances, even for the more senior and public facing roles in a public authority. He considers that the type of information requested in this case, if held, would carry that greater expectation of privacy. Information about the circumstances of a person's departure from their job will be about them personally and will impact on their personal life outside of work. The Commissioner considers that this is the case regardless of the terms and reasons of the departure. Either confirming or denying that the requested information is held would reveal such information. As the council said in its statement, the Head of Planning left to pursue other personal and career opportunities. It is therefore clear to the Commissioner that the type of information requested, if held, would be about her personal life and would therefore carry a high expectation of privacy.
24. To divulge this type of HR information into the public domain, there would need to be very strong public interest arguments as to why an individual's rights to privacy and the consequences of disclosure should be outweighed by interests in disclosure.

Consequences of disclosure

25. The council has told the Commissioner that providing a response other than 'neither confirm nor deny' could reveal whether or not the Head of Planning left due to the reasons insinuated by the complainant in his request. Her reasonable expectations that this type of information, if held, would not be divulged into the public domain could cause her distress if the council were to state whether it was held or not.
26. The council has explained to the Commissioner that the Head of Planning has not given consent for disclosure. She has stated that she considers the reasons for her departure to be personal and confidential and disclosure would be a breach of the DPA.
27. The Commissioner notes that the time of this request has come soon after the event and when there has been speculation on the reasons as to why the Head of Planning left the council and whether this was to do with disagreements with councillors on planning issues.
28. The Commissioner accepts that some distress could be caused to the individual if the council were to confirm or deny holding such information. Especially as this sort of information, if held, would be held

in an individual's HR file, something which would carry a greater weight in expectations for privacy, even for more senior employees.

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

29. The council has acknowledged to the Commissioner that transparency in the workings of the council is a legitimate factor when considering legitimate interests in disclosure.
30. It has also stated that the DPA ensures that there is a presumption in favour of withholding personal information unless there is a pressing legitimate social or public interest in disclosure and the council does not consider public interest has been met in this case.
31. The Commissioner considers that there is always going to be public interest in the workings of a council, including reasons for employees leaving and whether costs were incurred in this. Also as mentioned previously, the more senior a person is at a public authority, the less their expectation of privacy in certain circumstances may be.
32. On this, the Commissioner has given consideration to the seniority of the position held. He does consider that the position of Head of Planning is at a seniority level which would carry a greater expectation for disclosure of certain information than to that of junior staff. However, the information in question in this case, is the type of information that would fall within the Head of Planning's HR file carries a greater weight in the expectations of privacy.
33. The complainant has stated that it is in the public interest to discover if a dispute between councillors and a chief planning professional on local plan issues caused the departure and to have any relevant compromise agreement disclosed including whether there is a 'gagging clause' or confidentiality agreement.
34. The Commissioner recognises that there may be certain circumstances around an employee's departure which could strengthen any legitimate public interest arguments in knowing the reasons why that employee no longer works for a public authority.
35. The Commissioner does therefore accept the complainant's position that there is some public interest in the requested information, if held, for the reasons he gave. However, the Commissioner has to consider whether they are legitimate enough to outweigh the rights and freedoms of the individual that the information relates to.
36. On consideration of the above, the Commissioner has determined that the legitimate interests in confirming or denying whether or not the

information is held do not outweigh the individual's right to privacy in this case. Therefore he is satisfied that the council was correct to rely on section 40(5) of the FOIA to neither confirm nor deny holding the requested information.

Right of appeal

37. 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

38. 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.
39. 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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Water Lane
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SK9 5AF