

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 January 2017

Public Authority: East Hertfordshire District Council

Address: Wallfields
Peg Lane
Hertford
Hertfordshire
SG13 8EQ

Decision (including any steps ordered)

1. The complainant has requested information from East Hertfordshire District Council ("the Council") about employee complaints of harassment and bullying. The Council disclosed some information but withheld the remainder under the exemption provided by section 40(2) of the Freedom of Information Act ("the FOIA").
2. The Commissioner's decision is that the Council has correctly withheld the information under the exemption provided by section 40(2).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 14 June 2016 the complainant wrote to the Council and requested information in the following terms:
 - 1) *How many official complaints of harassment and bullying at work did you receive between the 1st April 2009 and the 31st December 2015?*
 - 2) *How many of these complaints were upheld in favour of the complainant? Please reply to these questions if the £450 limit is*

not exceeded or in order of the questions up to the limit should the limit be surpassed somewhere within these questions:

- 3) *How many of those which were not upheld in favour of the complainant went on to Appeal?*
 - 4) *How many of those that went to Appeal were found to favour the complainant?*
 - 5) *How many complaints went on to an Employment Tribunal?*
 - 6) *How many of these were found to uphold the complaint?*
 - 7) *Out of how many of those allegations (the number given to question 1) did the complainant of bullying claim that the bullies were telling lies?*
 - 8) *How many staff does your authority have and what is the current population within your authority's area?*
5. The Council responded on 21 June 2016. It disclosed some information, but withheld that sought by parts 2-7 of the request under section 40(2).
 6. The complainant requested an internal review on 23 June 2016.
 7. Following an internal review the Council wrote to the complainant on 11 July 2016. It maintained the original application of section 40(2).

Scope of the case

8. The complainant contacted the Commissioner on 13 July 2016 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of this case to be the determination of whether the Council has correctly withheld the information under section 40(2).

Reasons for decision

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

10. 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.*

11. 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?

12. 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...

13. 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 withheld information is the outcome of a single employee complaint of harassment and bullying.

The complainant's position

14. The complainant argues that this information cannot be defined as personal data because it is already sufficiently anonymised. The complainant has referred to an earlier decision notice (FS50614409), in which the Commissioner considered a similar request for information, and found that the information withheld under section 40(2) (namely the outcomes of eight employee complaints made across a period of 6.5 years) was not personal data because the outcomes could not be clearly attributed to individuals.

15. The complainant has also provided the Commissioner with the responses of other public authorities to the same request, and has referred to

examples where the outcomes of single employee complaints have been disclosed.

The Council's position

16. The Council argues that in this case it is reasonably likely that the outcome of the single employee complaint could be directly attributed to both the individual who made the complaint and the individual against whom it was made. This likelihood is increased by the recent nature of the complaint (which the Council has already confirmed in its response to the request was made between April 2013 and 31 December 2015). To support its argument the Council has referred to an earlier decision notice (FS50628518) in which the Commissioner considered a case where the small size of the public authority, and the knowledge likely to be held by other employees, meant that any disclosed information about employment disputes could be directly attributed to specific individuals.

Conclusion

17. The Commissioner has considered the arguments of both parties, and has referred to the previous cases they have referred to.
18. It has been noted that, unlike FS50614409, the withheld information in this case represents the outcome of a single complaint.
19. The Commissioner has also noted the responses of other public authorities to similar requests, as highlighted by the complainant. However, the Commissioner's decision must be based on the specific circumstances of this case, and in particular, the variables that may potentially lead to the disclosure of personal data.
20. Having considered that only one complaint has been made, it is reasonable for the Commissioner to speculate that individuals employed within the Council at the time the complaint took place may be aware of both its existence, and the identities of the individuals involved in it. This is particularly so as the Council is a relatively small organisation, and it is recognised that the situations that lead to such complaints may be highly visible or otherwise well known amongst employees.
21. Should the specific outcome of the complaint be disclosed, these employees would be able to directly attribute it to the complaint and the individuals involved in it. By this process the Commissioner accepts that the information would become personal data.

Would disclosure breach the data protection principles?

22. 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.

23. 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

24. 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.

25. In this case the Council considers that such disclosure would not be reasonably expected by the individuals. The information relates to the outcome of an employee complaint about harassment and bullying, and the individuals would reasonably expect such information to be treated as confidential (in the same way as disciplinary or other employee information held within a personnel file). Although the information can be interpreted to span both public and private life, the Council considers that the nature of information means that it relates more heavily to the individuals' private life, as the complaint relates to the conditions and social interactions of their employment rather than their public duties.

The consequences of disclosure

26. The Council considers that disclosure of the information would have an unjustified adverse effect on the individuals, who would not expect the outcome of the complaint to enter the public domain. This action has the potential to cause embarrassment to the individuals.

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

27. There is always some legitimate public interest in the disclosure of any information held by public authorities. This is because disclosure of information helps to promote transparency and accountability amongst public authorities. This in turn may assist members of the public in understanding decisions taken by public authorities and perhaps even to participate more in decision-making processes.

28. In the circumstances of this request, the Commissioner has noted that the withheld information clearly relates to a single employee complaint of harassment and bullying. The disclosure of this information would reveal details of the complaint outcome.
29. It is evident to the Commissioner that the information relates to personnel matters rather than the public duties of Council employees. On this basis it is recognised that the involved individuals are highly unlikely to expect such information to be routinely disclosed to the public, even if the public in this context may be current or former employees. There is no evidence available to the Commissioner that suggests there is a strong legitimate interest in disclosure that would surpass the expectation of privacy that the individuals may hold.
30. Having considered these factors the Commissioner is satisfied that disclosure would not be fair under the first principle of the DPA.
31. On this basis the Commissioner upholds the Council's application of section 40(2).

Right of appeal

32. 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

33. 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.
34. 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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