

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 September 2018

Public Authority: Monmouthshire County Council

Address: foi@monmouthshire.gov.uk

Decision (including any steps ordered)

1. The complainant requested information relating to an alleged breach of data security. Monmouthshire County Council ('the Council') provided some information and withheld other information under section 40(2) of the FOIA. The Commissioner's decision is that the Council has correctly applied section 40(2) to the withheld information. She does not require any steps to be taken.

Request and response

2. On 5 February 2018 the complainant wrote to the Council and requested information in the following terms:

"I am writing to make an open government request for all the information to which I am entitled under the Freedom of Information Act 2000.

Please send me:

All correspondence between officers and staff of MCC, the information commissioners office relating to the potential or alleged breach of data security.

All correspondence relating to the suspension of the staff member including actions which lead to her suspension plus all attempts to request MCC staff to sign a gagging/confidentiality clause.

All correspondence relating to investigation of this case by MCC and third parties”.

3. The Council provided information relevant to the first part of the request and withheld other information under section 40(2) of the FOIA.
4. On 22 February 2018 the complainant wrote to the Council expressing dissatisfaction with its handling of the request.
5. The Council responded on 7 March 2018 and upheld its response to the request.

Scope of the case

6. The complainant contacted the Commissioner on 25 April 2018 to complain about the way his request for information had been handled.
7. The scope of the Commissioner’s investigation into this complaint is to determine whether the Council should disclose the remaining information held relevant to the request of 5 February 2018, or whether it correctly applied section 40(2) of the FOIA.

Reasons for decision

Section 40 – the exemption for personal data

8. 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'), which was the appropriate legislation at the time of the request.
9. The Council considers that the information requested constitutes the personal data of the individuals concerned and that disclosure would breach the first data protection principle.

Is the requested information personal data?

10. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information as data which relates to a living individual who can be identified:

- from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
11. In considering whether the information requested is “personal data”, the Commissioner has taken into account her own guidance on the issue¹. The two main elements of personal data are that the information must “relate to” a living person, and that person must be identifiable. Information will “relate to” a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus, or impacts them in any way.
12. The withheld information in this case relates to an investigation and subsequent suspension of a member of staff following an alleged breach of data security. The Council considers that the withheld information contains personal data about the circumstances which led to the individual’s suspension.
13. The Commissioner has considered the withheld information and is satisfied that, in the context of the request, it falls within the definition of ‘personal data’ as set out in section 1(1) of the DPA as it constitutes the personal data of the individual who was the subject of the investigation, and of other individuals who gave evidence or were otherwise involved in the investigation.

Would disclosure breach one of the data protection principles?

14. Having accepted that the information requested constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles. She considers the first data protection principle to be most relevant in this case. The first data protection principle has two components:
- personal data shall be processed fairly and lawfully; and
 - personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

¹ <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

Would disclosure be fair?

15. In considering whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has first considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations of the individual concerned, the nature of those expectations and the consequences of disclosure to the individual. She has then balanced these against the general principles of accountability and transparency as well as any legitimate interests which arise from the specific circumstances of the case.
16. The Council argues that it has a duty of care towards the individual who was the focus of the investigation, and others involved in the investigation. The Council confirmed that it had not consulted with any of the individuals whose personal data has been withheld. However, it considers that the individuals *"would reasonably expect throughout the processes together with the sensitive nature of the information collected and the circumstances in which the information was obtained that it is not information which should be in the public domain"*.
17. The Council confirmed that the posts occupied by the individuals are not senior management or management posts and are therefore considered more junior roles. The Council also confirmed that the individuals have public facing roles to the extent that they interact with the public in respect of the roles they undertake. The individuals are not responsible for making policy decisions nor are they responsible for decisions regarding expenditure.
18. The Council believes that the withheld information comprises information that the staff members would regard as most private and disclosure into the public domain would prejudice their rights and freedoms. In addition, the Council considers that disclosure would lead to the identification of individuals who provided evidence in the disciplinary process and other staff members, which could in turn lead to them being subjected to threats and/or harassment.
19. The Commissioner is of the opinion that disclosing personal data is generally less likely to be considered unfair in cases where the personal data relates to an individual's public or professional life rather than their private life. In this case, the Commissioner accepts that the information relates to the public life of the individuals in question and in some cases references to their private lives. The Commissioner recognises people have an expectation that certain information will not be disclosed and that its confidentiality will be respected. For example, the Commissioner considers that information relating to an internal investigation, a

grievance or disciplinary hearing will carry a strong general expectation of privacy.

20. In this case, based on the nature of the withheld information, and the representations provided by the Council, the Commissioner is satisfied that the individuals would have had a reasonable expectation that the withheld information would be kept confidential and not disclosed into the public domain without their explicit consent.
21. In assessing the consequences of disclosure the Commissioner has considered what those consequences might be and has then looked at other related factors. The Commissioner has taken into account that an individual's emotional wellbeing may be affected by disclosure of information even though the distress or damage caused may be difficult to quantify.
22. In light of the nature and content of the withheld information and the reasonable expectations of the individuals whose personal data has been withheld the Commissioner is satisfied that disclosure would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the individuals in this case.
23. The Commissioner has considered whether the information could be disclosed in a redacted or anonymised form. Taking into account the fact that the information relates primarily to a specific individual involved in a potential data security incident, the Commissioner considers that disclosure of any of the withheld information would result in the identification of the individual concerned. In this respect, the Commissioner considers that disclosure of any of the information is likely to result in the same unjustified adverse effects identified above.
24. Notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, depending on the circumstances of the case it may still be fair to disclose requested information if there is a more compelling public interest in disclosure. In considering 'legitimate interests', the Commissioner's view is that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
25. The complainant has argued that the potential breach in the Council's data security is a serious matter. He is concerned that the Council has not dealt with the potential security breach satisfactorily to date and has not taken adequate steps or measures to prevent a similar incident occurring in the future.

26. The Council advised the Commissioner that issues regarding risks associated with the security of personal data within the relevant department have been raised with the relevant Council committee. A decision was also made for the head of the department to meet with two elected members who serve on the committee. The members were provided with information on the measures which had been put in place by the Council *“against unauthorised or unlawful processing of personal data and how we secure the personal data of service users while ensuring staff have access to accurate and appropriate information that they require for their role”*. The members were satisfied that the department was taking all the necessary steps to ensure that any future security risks concerning personal data are mitigated against. The outcome of this ad-hoc meeting will be reported back to the next select committee meeting.
27. The Commissioner accepts that there is a legitimate interest in information which would assure the public that the Council has processes in place to investigate potential breaches of personal data appropriately and that it takes its responsibilities to safeguard the personal data of its service users seriously. However, having considered the nature and content of the withheld information and the facts of this case, the Commissioner does not consider that the legitimate interests of the public in accessing the actual withheld information are sufficient to outweigh the individuals’ right to privacy. The Commissioner considers that the individuals had a strong expectation of privacy in relation to the information and that to release it would be unfair and likely to cause damage or distress to them.
28. In conclusion, the Commissioner finds that disclosure would be unfair and would therefore contravene the first data protection principle. As the Commissioner has decided that the disclosure 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. The Commissioner therefore upholds the Council’s application of section 40(2) to the information.

Right of appeal

29. 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

30. 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.
31. 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

David Teague
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