

Freedom of Information Act 2000 (FOIA)
Decision notice

Date: **8 November 2018**

Public Authority: **Hampshire County Council**
Address: **The Castle**
Winchester
Hampshire
SO23 8UJ

Decision (including any steps ordered)

1. The complainant has requested information about any complaints made against a named officer employed by Hampshire County Council ("the Council"). The Council refused to comply with the request, and stated that it relied upon section 40(2) to do so.
2. The Commissioner's decision is that the exemption provided by section 40(5)(b)(i) is engaged, as the confirmation or denial that information is held would disclose the personal data of a third party.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 6 April 2018, the complainant wrote to the Council and requested information in the following terms:

I wish to enquire whether there has been any complaints about [redacted council officer name and job title]...

5. The Council responded on 30 April 2018. It stated that any information would be exempt from disclosure under section 40.
6. Following an internal review the Council wrote to the complainant on 22 May 2018. It maintained that any information would be exempt from disclosure under section 40, and specifically cited section 40(2).

Scope of the case

7. The complainant contacted the Commissioner on 23 May 2018 to complain about the way his request for information had been handled.
8. At the time of compliance with the request, the relevant legislation in respect of personal data was the Data Protection Act 1998 ("the DPA 1998"). The determination in this case must therefore have regard to the DPA 1998, and the terms of the FOIA as applicable at that time.
9. Having considered the nature of the requested information, and the content of the Council's submission to her, the Commissioner considers the scope of this case to be the determination of whether the exemption provided by section 40(5)(b)(i) is engaged.
10. The Commissioner notes that the Council has demonstrated some uncertainty about the disclosure of personal data under the FOIA. The Commissioner advises the Council to refer to 'Other matters' for specific guidance about this.

Reasons for decision

Section 40(5) – exemption from the duty to confirm or deny

11. Section 40(5) 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 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. Section 40(5)(b)(i) provides that the duty to confirm or deny does not apply to situations where the act of doing so would disclose the personal data of third parties, and in doing so, contravene any of the data protection principles.

Is the requested information the personal data of a third party?

13. In the circumstances of this case, the request is for information about any complaints that have been made against a named officer employed by the Council.
14. The confirmation or denial that such information is held would clearly indicate whether or not complaints had been made against the officer. This action would therefore disclose the officer's personal data.

Would disclosure breach the data protection principles?

15. The data protection principles are set out in schedule 1 of the DPA 1998. 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 1998.
16. 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

17. 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.

18. In this case the Council considers that the officer has a reasonable expectation that complaints made against them are kept confidential, and are investigated under the appropriate processes set by the Council.

The consequences of disclosure

19. The Council considers that any confirmation that complaints are held may subject the officer to unreasonable criticism, especially as the content of any such complaints made may be baseless and unsubstantiated.
20. The Council further considers that whilst confirmation or denial would disclose information relating to the individual's public life as an officer within the Council, the nature of their role means that any confirmation that complaints are held may cause reputational damage that could extend to the individual's personal life.

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

21. In the circumstances of this case, the confirmation or denial that information is held would disclose the officer's personal data.
22. There is no indication that this disclosure would be reasonably expected by the officer. The Commissioner recognises that officers will reasonably expect that any complaints made against them will be dealt with in accordance with the appropriate processes, and particularly with due regard to their rights under the DPA 1998.
23. The Commissioner has noted the specific, and private, circumstances which have led to the complainant making this request. However, it is understood that the complainant may submit his concerns to the Council through the processes provided for that, and the Commissioner notes that the complainant has clearly been informed of this in correspondence from the Council dated 6 April 2018.
24. Having considered the above factors, the Commissioner has concluded that public disclosure would infringe on the rights and freedoms of the officer, and that limited legitimate interest has been evidenced to warrant this. The Commissioner therefore finds that the exemption provided by section 40(5)(b)(i) is engaged

Other matters

25. The Commissioner reminds the Council that disclosure under the FOIA (including the confirmation or denial that information is held) is in effect disclosure to the world. The test in section 40(5)(b)(i) is whether giving the confirmation or denial to 'a member of the public' would contravene the data protection principles.
26. Whilst the request in this case took place in the context of wider matters involving the complainant, who holds privileged information about these wider matters, the FOIA requires the Council to provide an applicant-blind response (with the exception of some scenarios that are not relevant to this case).
27. The Commissioner refers the Council to the following specific guidance:
 - *Consideration of the identity or motives of the applicant* (paragraphs 1-12). This can be accessed at: <https://ico.org.uk/media/1043418/consideration-of-the-identity-or-motives-of-the-applicant.pdf>
 - *Neither confirm nor deny in relation to personal data* (paragraphs 14-21). This can be accessed at: https://ico.org.uk/media/for-organisations/documents/1206/neither_confirm_nor_deny_in_relation_to_personal_data_and_regulation_foi_eir.pdf

Right of appeal

28. 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

29. 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.
30. 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
Group Manager
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