

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 June 2019

Public Authority: Rotherham Metropolitan Borough Council
Address: Riverside House
Main Street
Rotherham
S60 1AE

Decision (including any steps ordered)

1. The complainant requested information from Rotherham Metropolitan Borough Council ("the Council") relating to the hours worked by a named council officer. The Council withheld the requested information under section 40(2) of the FOIA – third party personal data.
2. The Commissioner's decision is that the Council correctly withheld the information under section 40(2) of the FOIA. However, the Council breached section 10(1) of the FOIA in failing to provide a response to the request within 20 working days.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 22 February 2018, the complainant wrote to the Council and requested information in the following terms:

"[Name redacted] is a Policy Officer with RMBC whilst also being the [redacted] at [redacted] Council. You have previously told me that he is not in a politically-restricted post.

- 1) For the periods 1st April, 2016 to 31st March, 2017 and 1st April, 2017 to the date of your reply to this request please state the contractual hours required to be worked by [name redacted] and please state the ACTUAL hours he has worked;*

- 2) *If the actual hours worked were less than the contractual hours was he paid pro rata? If not, why not?*
- 3) *Did [name redacted] work for RMBC for any period of the day on 10th February, 2016?"*
5. The complainant included a fourth question about the relevant individual, which, subsequently, he agreed did not need to be considered as part of his request for information.
6. The Council responded on 29 March 2018. It stated that the requested information was exempt from disclosure under section 40(2) of the FOIA – third party personal data.
7. Following an internal review the Council wrote to the complainant on 28 June 2018. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 2 August 2018 to complain about the way his request for information had been handled. On 3 September 2018, the Commissioner explained that some further evidence was necessary in order for his complaint to be investigated.
9. The complainant provided the necessary evidence to the Commissioner on 8 January 2019.
10. The decision which follows covers whether the Council correctly withheld the requested information under the exemption at section 40(2) of the FOIA. It also considers the time taken to respond to the request.

Reasons for decision

Section 40(2) – third party personal data

11. Section 40(2) of the FOIA is concerned with the disclosure of third party personal data in response to a freedom of information request and, as such, is linked with the provisions of data protection legislation.
12. While the Data Protection Act 2018 has been in force since 25 May 2018, owing to the date of the request and response in this case the Council was required to comply with the legislation in force at that date; that is, it considered section 40(2) of the FOIA in conjunction with the Data Protection Act 1998 (the DPA 1998).

13. The exemption at that date provided that any third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the DPA 1998.

Is the withheld information personal data?

14. Personal data was defined by the DPA 1998 as any information relating to a living and identifiable individual.
15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
16. In this case, the complainant argued that his request related to the requirements of the particular part-time post (Policy Officer) at the Council, rather than to the individual who holds that post.
17. However, the Commissioner notes that the scope of the request covers information specific only to the named individual: not just the hours that a Policy Officer is expected to work, but the hours that the individual actually worked, and whether he was paid pro rata.
18. The Commissioner notes that the request makes reference to the fact that the named individual holds another role as a councillor for a different council. It also names the individual.
19. In her view, the request is clearly targeted at finding out whether a specific individual had been working his contracted hours, and which hours he was paid for. She is therefore satisfied from the wording of the request that the information requested relates to an individual.
20. Since he is named in the request, she is also satisfied that he is identifiable from it.
21. The Commissioner has considered whether any part of the requested information could be disclosed in anonymised form. As the request was for information about the named individual, the Commissioner does not believe that it was possible for any of the information it sought to have been anonymised. She therefore considers that the Council took the correct approach in not attempting to disclose any of the requested information in an ostensibly anonymised form.
22. Having determined that the information held falling within the scope of the request constitutes third party personal data, the next step is for the Commissioner to consider whether its disclosure would breach any of the data protection principles set out in Schedule 1 of the DPA 1998.

Would disclosure breach the Data Protection Principles?

23. The Data Protection Principles are set out in Schedule 1 of the DPA 1998. 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 focused on the issue of fairness.
24. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual, the potential consequences of the disclosure and whether there is legitimate public interest in the disclosure of the information in question.

Reasonable expectations

25. 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.
26. The Council has explained that, in this case, the individual concerned would have no reasonable expectation that details of his employment would be disclosed, since it is not information which is normally made public. It stated that he would, indeed, have a reasonable expectation of his personal data being protected by the Council and not disclosed into the public realm under the FOIA.
27. The Commissioner notes that the data subject does not hold a senior post at the Council. She is satisfied that, for this reason, it would not be within his reasonable expectations that information about his hours of work during a specific period would be disclosed.

Consequences of disclosure

28. Disclosure is unlikely to be fair if it would have unjustified adverse effects on the affected individual.
29. Specifically, the Commissioner's guidance on dealing with requests for information about public authority employees¹ states that disclosure is

¹ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

unlikely to be fair if it would have unjustified adverse effects on the employees concerned. However, although employees may regard the disclosure of personal information about them as intruding into their privacy, this may not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life.

30. The Council has not identified any particular damage and distress which may be caused in this case. Rather, it has relied on general arguments as to its employees' expectations of privacy, for example, that "*an individual officer's operational and working arrangements are personal to them and not a matter for public discussion*". The Commissioner understands that the Council considers that damage and distress in this case would be caused due to a perceived betrayal of the individual's justifiable expectation that his working arrangements would remain private.
31. The Commissioner's guidance, referenced previously, states that information "*which may be held in a personnel file*" is likely to relate to an individual's personal life. The information requested in this case may include content about any occasions of absence, which would be particular to the individual and not part of a general job description.
32. The Commissioner also notes that the data subject was asked whether he would give consent to the disclosure of the information in this case. He declined to give it.
33. The Commissioner agrees that a level of damage and distress would be caused to the individual by the Council disclosing the information, since this would go against his expressed view that details of his working pattern should remain a private matter between him and his employer.

Balancing the rights and freedoms of the individual with the legitimate interests in disclosure

34. In cases where complying with an information request would involve disclosing personal data, the Commissioner will always be mindful of the importance of protecting the privacy of individuals. Therefore, in order to find in favour of disclosure in this case, it would need to be shown that there is a compelling interest in disclosure which would outweigh the individual's rights and freedoms and which would therefore make it fair to do so.
35. The interest in disclosure must be wider than the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.

36. In favour of disclosure, there is always a need for a public authority to conduct its business in a transparent manner, and for transparency around the expenditure of public money.
37. The Commissioner is aware that the complainant considers that there is a wider interest in the information. He considers that the information should be disclosed since the individual *"is paid by the taxpayers and receives taxpayer allowances for simultaneously doing two jobs. The public need to know if he is working the agreed hours at Rotherham especially when he spending an awful lot of time a huge distance away in [redacted]. If he being [sic] paid at the full rate even when he does not complete his allotted hours the public is entitled to know this and to know why he is not being paid pro-rata (if that be the case) in a world where Council's resources are under great pressure"*.
38. The Commissioner agrees that the individual's specific circumstances – working part-time as a Policy Officer for one council while also serving as a councillor for a different council – do create some wider interest in the way he has carried out his paid role at the Council.
39. However, the Commissioner notes that it is entirely normal for councillors to work in other paid roles while serving on a council. While in this case the other paid role is somewhat unusually at another local authority, she does not consider that there is sufficient wider interest in the way this role is carried out – namely, details of a specific Policy Officer's working pattern at the relevant time – to outweigh his rights and freedoms. As previously stated, the role of Policy Officer is not a senior post.

The Commissioner's decision

40. The Commissioner is satisfied that, on balance, the legitimate public interest would not outweigh the interests of the individual staff member and therefore it would not be fair to disclose the requested information in this case.
41. She is satisfied that disclosing the information would therefore breach the first data protection principle.
42. The Commissioner considers the exemption at section 40(2) has been correctly applied to the information, and so the duty to disclose it does not arise.

Section 10(1) – time for compliance

43. Section 1(1) of the FOIA states that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him".

44. Section 10(1) of the FOIA states that section 1(1) must be complied with *"promptly and in any event not later than the twentieth working day following the date of receipt"*.
45. From the evidence presented to the Commissioner in this case, it is clear that, in failing to issue a response to the request within 20 working days, the Council breached section 10(1) of the FOIA. As a response was subsequently provided, she does not require the Council to take any steps.

Right of appeal

46. 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@justice.gov.uk

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

47. 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.
48. 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

Ben Tomes
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