

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 November 2012

Public Authority: Wirral Metropolitan Borough Council
Address: Municipal Buildings
Cleveland Street
Birkenhead
Merseyside
CH41 6BU

Decision (including any steps ordered)

1. The complainant requested information on two senior officers who left Wirral Metropolitan Borough Council by mutual consent. His request encompassed detailed information on whether the individuals were paid severance pay, whether they any disciplinary action was held and whether they signed compromise agreements, including whether these held 'gagging clauses'.
2. The council responded withholding the information applying section 40(2) (personal data). It did however subsequently disclose information on severance payments made to the individuals.
3. The Commissioner's decision is that Wirral Metropolitan Borough Council was correct to apply section 40(2) to the information. The Commissioner notes however that the councils response fell after the 20 days required by section 10(1) of the Act. The Commissioner has therefore decided that the council breached section 10(1). He has also decided that as the council did not disclose severance information to the complainant until 2 November 2012 it was again in breach of section 10(1).
4. The Commissioner does not require the public authority to take any steps.

Request and response

5. On 11 January 2012 the complainant wrote to Wirral Metropolitan Borough Council and requested information in the following terms:

"Above is a link to a news story published this week in the Wirral Globe, which reports the departure "by mutual consent" of two senior officers, presumably involved at the very least, in disabled abuse.

This story relates to the findings within the AKA (Anna Klonowski) report, and the learning disabled abuse which was admitted to by the Council in this document (see 7.1):

<http://democracy.wirral.gov.uk/mgConvert...>

Please provide all information you have which is connected to the departure of the above two senior members of staff. This will relate to meetings, hearings, discussions, and may be stored in the form of recorded minutes, verbatim and non-verbatim notes, emails, letters, memos, aide memoirs, whether electronically or manually.

Please confirm and provide details of the existence of any payments made to the two members of staff in relation to their departure, collectively or individually. This will include precise amounts, the method of payment and the budget from which the payment was derived.

Please confirm details of the existence of any "compromise agreements" signed by the two members of staff. This will include confirmation of any 'gagging clauses' and whether a positive/neutral/negative reference was provided regarding potential future employment.

Please provide the names and addresses of all organisations/bodies involved in providing legal advice to the two departing officers. Please also provide details of meetings which occurred including times, dates and matters discussed.

Please confirm the details of any disciplinary charges either planned or levelled against the two officers in relation to the failures which brought about their departure from the Council.

If either or both of the two officers were provided with a "clean bill of health" regarding their time served at the council, please provide a copy of this / these document(s).

Please redact documents as you see fit, and remove the names of two departing officers in accordance with the requirements of the Data Protection Act"

6. The council responded on 8 February 2012. It stated that it thought that the information would be exempt under section 40(2) of the Act because

the information was personal data of third parties and its disclosure would breach one of the data protection principles of The Data Protection Act 1998 (the DPA). However it stated that it had not yet made a final decision on this and said that it would respond to him within 20 working days with its final decision as it was still considering the public interest. The council did not however provide its refusal notice until 26 June 2012.

7. Following an internal review the council wrote to the complainant on 30 October 2012. It restated its opinion that the information is exempt from disclosure under section 40(2) however it provided the complainant with some information relating to the salary and job titles of the individuals. After further correspondence with the Commissioner it subsequently disclosed details of the severance packages paid to the individuals on 2 November 2012.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled on 3 March 2012. At that time he had not received a final response from the council. He requested the Commissioner to make a decision as to whether the council should have responded, and whether it was correct to apply the exemption in section 40(2) of the Act to the information.

Reasons for decision

Procedural issues

9. The council's initial response sought to extend the 20 working day requirement of section 10(1) by stating that it was still considering the public interest.
10. Section 10(3) allows an authority an extension of time to issue a notice or to disclose information if the extension is required for the purposes of considering aspects of any public interest test which needs to be considered when considering the application of applicable exemptions. However the test referred to in section 40(2) by the council in this instance is an absolute exemption. There was therefore no requirement for a public interest test to be carried out. Therefore the council was unable to extend the time for its deliberations under section 10(3) and it was therefore not correct to extend its response time above the 20 working days required by section 10(1).

11. The Commissioner also finds that the council breached section 10(1) in its informal disclosure of the severance packages of the individuals as this did not occur until 2 November 2012. This also falls outside the 20 working day period required by the Act.

Section 40(2)

12. Section 40(2) of the Act provides an exemption to the disclosure of personal data as defined by the DPA where a disclosure of that information would breach any of the data protection principles.

Is the information personal data?

13. The first question which the Commissioner therefore needs to consider is whether the information is personal data for the purposes of the DPA or not. Personal data is defined in the DPA as information which

"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 intentions of the data controller or any other person in respect of the individual"

14. The council provided the withheld information to the Commissioner. The withheld information is details about two named officers and discussions between the council and them about the individuals leaving the council. The information is therefore the personal data of the officers concerned.
15. The complainant suggested that the names of the individuals could be redacted from the information in order to anonymise any information which is disclosed. Having considered this further the Commissioner is satisfied that as senior officers within the council it would not be possible to anonymise the information.
16. Any person who through professional or informal association had regular contact with the holder of those posts would be able to identify that the information refers to them simply by association and/or the fact that they are no longer in post. Other employees within the relevant departments would also be able to identify the individuals from the information and their knowledge of the personal circumstances of the individuals. Whilst in some cases the ability of a work colleague to identify that information relates to a specific individual within an authority would not be an issue as regards their data protection rights,

where personnel matters are concerned an individual's dealings with his or her employer are generally private and confidential between them and their employer and are not shared with colleagues. Colleagues who are directly involved in the management of their employment such as managers and officers involved with human resources management may have access to that information but there would be no expectation that general work colleagues would be able to access it generally. A council officer would not for instance expect specific details of a grievance or a disciplinary matter to be available generally to all employees within the council.

17. The Commissioner also notes that the complainant has said that he knows who the individuals are, albeit that he did not know this at the time that he made the request. Clearly if he is correct in this assumption then a disclosure of the information at this time would be a disclosure of personal data, whether or not the actual information which is disclosed is redacted to remove any identifiers.
18. Although the Commissioner must generally make his decision based upon circumstances at the time that the request is received by the authority this is one occasion where he can consider later events when reaching his decision. As the regulator of the DPA the Commissioner cannot order a disclosure of personal data in breach of the DPA where he is aware that events subsequent to the request being received would mean that an individual could be identified from that information.
19. The Commissioner is satisfied in any event that the information was likely to come into the possession of a third party for the reasons outlined in paragraph 12 above.
20. The Commissioner is therefore satisfied that the information is personal data, and that the council is not able to redact that information to ensure that the individuals could not be identified.
21. The Commissioner must therefore consider whether the information should be disclosed, taking into account that any information disclosed would be a disclosure of personal data.

Would disclosure breach any of the data protection principles?

22. Under section 40(2), having decided that the information is personal data, the next question which the Commissioner must consider is whether a disclosure of that information would breach any of the data protection principles of the DPA.
23. The most relevant data protection principle in this case would be the first data protection principle. This requires that information is processed 'fairly and lawfully'. If a disclosure would on the face of it be fair and lawful then the Commissioner must then consider whether any of the

conditions stated in schedule 2 of the Act are applicable. If one of those conditions can be met then the information can be disclosed. The Commissioner must therefore firstly decide whether a disclosure of the information would be 'fair and lawful'.

24. For a disclosure of personal data to be fair the individual must generally have an expectation that the information held about them would be disclosed. This would be because they were told that that would occur or because it would have been obvious at the time that they provided their information. In the case of a disclosure under the Freedom of Information Act the expectation would need to be that their personal data might be disclosed to 'any member of the public'. This is because a disclosure under the Act is considered to be global rather than just to the applicant.
25. When making this decision the Commissioner can also consider whether any of the other circumstances of the case would make a disclosure of the information fair in spite of the expectations of the individual. The Tribunal has referred to this in the past in the terms of a 'pressing social need' for that information to be disclosed.
26. The Commissioner therefore needs to consider whether the individuals would expect that detailed information about the circumstances which led them to leave their positions at the council would be disclosed to any member of the public. If that is not the case he must consider whether in the circumstances of the case there is a pressing social need for that information to be disclosed, which would make a disclosure of the information fair in any event.
27. In general, employers are under an implied duty of confidence to keep personnel information about employees confidential. Details about their private lives and affairs, their disciplinary record and their general performance during their employment will generally only disclosed beyond the authority in rare circumstances, for instance in response to requests for references where the employee has given consent for a disclosure of this information to occur.
28. Having considered the withheld information the Commissioner is of the view that the individuals would have no expectation that detailed information about the discussions and terms under which they left the authority would be disclosed to any member of the public in response to a freedom of information request.
29. There are however some details where there would or should have been an expectation of disclosure relating to details about severance payments. This relates to the councils duties under The Accounts and Audit (England) Regulations 2011. This requires that certain details

about 'senior officers' are published in the accounts of the authority, with a note referring to the salary and any "*compensation for loss of employment paid to or receivable by the person, and any other payments made to or receivable by the person in connection with the termination of their employment by the relevant body*".

30. The Commissioner therefore asked the council whether it would be under a duty to publish this information. If it was he suggested that this would affect the individuals' expectations as to whether that information would be disclosed. The council subsequently disclosed details of the severance payments made to the individuals, together with details of the job titles and the salary of the individuals concerned, stating that the Regulations did apply. Given this the Commissioner has not considered these details further within this decision notice.
31. The disclosure took place on 2 November 2012. This falls outside of the 20 working days required by section 10(1) of the Act from the date that the request was first received by the council. The Commissioner's decision is therefore that the council breached section 10(1) of the Act.
32. When considering the remaining information the Commissioner must therefore consider whether there are any countering arguments which would outweigh the officers' expectations and make a disclosure of the information fair. The First-tier Tribunal had previously indicated that where there is a pressing social need for the information to be disclosed this may shift the balance towards a disclosure of personal data being fair whereas otherwise it would not.
33. The Commissioner notes that the individuals are fairly senior within the authority. The Commissioner and the First-tier Tribunal have previously placed a strong weight on the disclosure of personal information where this is necessary in order senior public or civil servants to be held accountable for their actions. The decisions in these cases have reflected the seniority of the post, together with the public rather than the private nature of the information to be disclosed. Effectively if the information relates to a public official carrying out his role in an official capacity then the Tribunal have placed a strong weight on that information being disclosed. This is on the basis that senior officials working within public authorities should have some degree of expectation that their actions in carrying out that role must be transparent and that information pertaining to this may be disclosed. The Commissioner notes however that the information in question is not about the officers carrying out their role. It is about their decision to leave the authority. He therefore considers that there is a distinction between this information and information about how the officers carried out their role within the authority.

34. The Commissioner notes that the complainant related the officers leaving the council with the publication of a report, the Anna Klonowski report. This was an independent review of the council's social care functions following allegations made by a whistleblower against council managers and practices. The final report was broadly critical of the council, and of specific officers within the council.
35. The Anna Klonowski report was published in an anonymised fashion. It referred to officers by number rather than name. Subsequently however a 'key' was published on the internet identifying some of the officers within the report (but not all). The Commissioner understands that the publication of the key was not carried out by the council but by an individual or individuals acting independently from it.
36. The complainant's request presumes that the individuals' reasons for leaving the authority may be directly attributable to the findings of the report because they left the authority shortly before its publication. His argument is that if the individuals left the authority in order to avoid criticism of them personally, or of the council in general, and the council paid them out of public funds to do this then this should be made public.
37. The complainant also considers that it should be public knowledge whether the council offered to provide references to the individuals. This is essentially what he is asking for when he asks whether the individuals left with a 'clean bill of health' within his request. He considers that if the individuals left the council for reasons related to the report there is a public safety argument that this information should be disclosed. In his view, if the council is giving references to the individuals they could go on to obtain similar jobs in the future and make the same errors again. His view is that this may put vulnerable people at risk.
38. The Commissioner has given due weight to the complainant's arguments. If the individuals were criticised in the report, did leave the authority due the reports imminent publication and were paid public money as part of an agreement that they could or should leave then the public would have a legitimate interest in being informed that public money was used in this way. This however needs to be balanced against the individuals' right to privacy and the duty of confidence owed by the council to its employees.
39. As stated, the Audit Regulations required the council to publish some details in respect of payments made to the individuals together with the job roles and so the Commissioner considers that in this regard any pressing social need as regards the council's use of public money would be met by this legal requirement. This would not affect any pressing social need as regards finding out if the council paid this money to the individuals in order to avoid criticism or pressure to dismiss the individuals.

40. The Commissioner notes that the council has not confirmed whether the reason that the officers left the council has any association with the publication of the report. It has also not confirmed whether the individuals can be associated with the findings of the report in any way. Given the publication of the report and the partial key, and if these individuals are identifiable from the information so far disclosed or already within the public domain however then it may be possible to work out whether that is the case or not.
41. The withheld information does not address or mention the report in any way. The Commissioner considers therefore that whilst the arguments might hold greater weight if the information would aid the public in clarifying whether the complainant's assumptions are correct, the withheld information does not in fact do so.
42. The Commissioner also does not consider that a disclosure of this information would meet any pressing social need of establishing what active action has been taken to respond to the findings of the report. If the individuals did leave as a result of the imminent publication of the report that would not be made clear by a disclosure of this information.
43. The Commissioner also does not consider that the public risk arguments raised by the complainant hold sufficient weight in this instance to require the disclosure of any references provided to the individuals.
44. The information which the complainant has asked for is detailed information on personnel matters relating to the individuals concerned. This goes much further than a request for detail of any severance payments made to the individuals. It is also about the terms under which they left the authority.
45. The ultimate accountability for the matters addressed within the AKA report rests with the council. It is for the council to address those failings by ensuring that training needs, changes in procedures and/or disciplinary action is taken to ensure that mistakes or errors which led to the issues highlighted within the report are not repeated.
46. The public interest in knowing whether appropriate policies and procedures were followed or whether the council acted inappropriately in terms of the events outlined in the AKA report has been served by the disclosure of the report. The individuals identified with the AKA report have not been convicted of any crime. Public accountability for failings within the council's practices rests with the council as a whole rather than with individual officers.
47. If individual officers' conduct has been so below that expected of them then the complainant considers that they should not expect to be rewarded for their failures. This does not however mean that he, or the public in general should be able to access confidential personnel

information relating to officers on the basis that he considers that they should be disciplined or dismissed rather than 'paid off'. This is particularly the case as they have already left the authority.

48. If the individuals have left for the reasons which the complainant surmises then it is possible to criticise the council for taking an 'easy option' in letting the individuals walk away from the council with a severance package, paid out of public funds. However it should also be borne in mind that severance packages are often in the public interest. They allow individuals and organisations to reach a mutual agreement without long drawn out legal processes which could ultimately cost the tax payer more than the severance package itself would cost (and which may not succeed in any event).
49. The Commissioner further notes that in some cases an individual's actions may not amount to conduct for which they can be legally dismissed. However where senior figures are concerned it may be advantageous for an authority to allow such individuals to leave the organisation through such an agreement in order to allow a 'fresh start' within the organisation. The alternative is that matters are never quite resolved, and a fresh start for the department or the organisation as a whole becomes an impossibility. The effectiveness of the organisation is therefore affected.
50. A disclosure of such information on a regular basis would act against the public interest if it prevents such agreements being reached in the future.

Conclusions

51. There is a legitimate public interest in knowing how the council reacts to the report, but this information would not provide the public with that information in any event. There also has to be a balance between the council being transparent and open about the actions it has taken and individuals being held to publicly to account for that. The information which the complainant has requested would not specifically answer the question of how the council will react to the report. It relates purely to the employment affairs of the individuals concerned.
52. The Commissioner also recognises that if the withheld information demonstrated that the council had allowed the individuals to leave their posts for the purposes of avoiding further scrutiny or accountability then there may have been a stronger, (but not altogether conclusive) argument for a disclosure of some of that information. The withheld information also does not do that.
53. The Commissioner also notes that if this sort of information were to be disclosed on a regular basis it may ultimately prevent compromises

being reached, and that this may not be in the public interest in many cases.

54. The Commissioner therefore considers that any pressing social need for greater transparency on the council's reaction to the report would not be met by a disclosure of this information. He therefore considers that it would be unfair (and given the implied confidentiality of employer/employee information, unlawful) for the purposes of the first data protection principle for that information to be disclosed.
55. The Commissioner therefore considers that the council was correct to apply section 40(2) to the information requested by the complainant.

Other Matters

56. The complainant made his request for information on 11 January 2012. The council initially responded on 8 February 2011 which falls within the 20 working days required by the Act. The complainant requested a review of its decision on the same date however the council did not provide the review decision until 26 June 2012.
57. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his '*Good Practice Guidance No 5*', published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 40 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of appeal

58. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

59. 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.
60. 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

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