

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 03 September 2012

Public Authority: Middlesbrough Council
Address: Town Hall
Middlesbrough
TS1 9FX

Decision (including any steps ordered)

1. The complainant has requested details of any compensation payments resulting from defamatory comments made by the Mayor of Middlesbrough about an employee of Middlesbrough Council (the Council). The Council refused to confirm or deny if it held this information and cited the exemption from the duty to confirm or deny provided by section 40(5) (personal information) of the FOIA.
2. The Commissioner's decision is that the Council has applied the exemption provided by section 40(5) correctly and so it is not required to confirm or deny whether this information is held.

Request and response

3. On 30 September 2011 the complainant wrote to the Council and requested information in the following terms:

"I would like to submit a freedom of information request in relation to a compensation payment made to employee [named individual].

How much was the payment and for what reason was it given? Was it in relation to a comment made about her by Middlesbrough Mayor Ray Mallon? How long did [named individual] take off as a result of the situation?

I would also like to see copies of all correspondence in relation to this issue."

The complainant made the following further information requests to the Council on 4 October 2011:

"I would like to submit a Freedom of Information request in relation to a payment made in relation to a council employee.

Has the authority made a payment to a council member of staff to compensate them as a direct result of defamatory comments made by Mayor Ray Mallon?"

"Can I ask if the council has made any compensation payment to any employee from public funds as a result of comments made by Mayor Ray Mallon?"

4. The Council responded to all of these requests on 4 October 2011. It stated that it refused to confirm or deny whether the information requested was held and cited the exemption provided by section 40(5).
5. Following an internal review the Council wrote to the complainant on 19 October 2011. It stated that the refusal to confirm or deny under section 40(5) was upheld.

Scope of the case

6. The complainant contacted the Commissioner to complain about the refusal to confirm or deny whether the requested information was held. The complainant argued that, if it was the case that a compensation payment had been made, this would have been funded through the public purse and so information about any such payment should be made publicly available.

Reasons for decision

7. Section 40(5) of the FOIA provides an exemption from the duty to confirm or deny where to do so would disclose personal data and where that disclosure would be in breach of any of the data protection principles. Consideration of this exemption is a two-stage process. First it must be considered whether confirmation or denial as to whether the requested information is held would constitute a disclosure of personal data. Secondly, it must be considered if any such disclosure of personal data would be in breach of any of the data protection principles.

8. Turning first to the issue of whether confirmation or denial would involve the disclosure of personal data, the complainant made three separate requests, with the intention of the latter two being to avoid personal data concerns. The view of the Commissioner is that it is clear that confirmation or denial in response to the first of the complainant's requests would involve the disclosure of personal data. It is inescapable that disclosure of the confirmation or denial would reveal a fact about the individual named in the request.
9. Whilst the situation is less clear cut with the latter two requests, the Commissioner is also of the view that confirmation or denial in response to these would disclose the personal data of the individual named in the first requests. Brief research reveals that this individual has been publicly associated with the incident to which the requests relate. This suggests that it would be a simple task to associate a confirmation or denial given in response to these requests with the individual named in the first request.
10. Section 1(1) of the Data Protection Act 1998 (DPA) provides that information can constitute personal data if that information can be combined with other information to enable the identification of an individual. In this case the Commissioner believes that confirmation or denial in response to the two latter requests made by the complainant could be combined with other information that is publicly available to enable the confirmation or denial to be related to an individual.
11. Having established that confirmation or denial would mean disclosing personal data, the next step is to consider whether this disclosure of personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on the first data protection principle, and specifically on whether disclosure would be in general fair to the data subject. In forming a conclusion on this point the Commissioner has taken into account the consequences of disclosure upon this individual, their reasonable expectations as to whether this information would be disclosed, and any legitimate interests of the public in this information.
12. Covering first consequences to the data subject, the view of the Commissioner is that disclosure of the confirmation or denial would be likely to result in distress to the data subject. The incident to which the request refers was itself highly likely to have resulted in distress to this individual. Given this background, the conclusion on this point is that confirmation would likely result in further distress to the subject.
13. Turning to the reasonable expectations of the data subject, the view of the Commissioner that it is likely that the data subject would hold a strong expectation of privacy in relation to any information concerning

this particular subject matter. In general an employee would expect that information relating to them that is held by their employer would be kept confidential and the strength of this expectation would increase in line with the sensitivity of the information. Also notable is that confirmation or denial in response to the requests in this case would reveal the existence or not of a financial arrangement between employer and employee; information in relation to which most people would hold a strong expectation of privacy.

14. On the issue of whether there is any legitimate public interest in the provision of this confirmation or denial, the Commissioner recognises that any compensation that was paid from Council funds would have meant the expenditure of public money. Given this, the Commissioner also recognises that there is some legitimate public interest in a confirmation or denial.
15. The Commissioner does not, however, believe that this public interest is of significant weight. Had compensation been paid, it is likely that the sum of public money that would be in question would be, in public spending terms, very minor. To the extent that this would further understanding of the possible misconduct of an individual in public office, the Commissioner notes that there has been already been media coverage of this issue through which the facts of this incident have previously been disclosed into the public domain.
16. In conclusion, the Commissioner has recognised a legitimate public interest in confirmation or denial on the basis that this concerns the possible expenditure of public money. However, his view is also that it is likely that the data subject would suffer distress through the disclosure of a confirmation or denial and that this individual would hold a strong expectation of confidentiality in relation to any information connected to this incident. Given these factors, the Commissioner finds that the public interest is outweighed and that it would be unfair and in breach of the first data protection principle to disclose the confirmation or denial.
17. Overall the Commissioner has found that confirmation or denial in response to the complainant's requests would constitute the disclosure of personal data and that this disclosure would be in breach of one of the data protection principles. The finding here is, therefore, that the exemption provided by section 40(5) of the FOIA is engaged and so the Council is not required to confirm or deny whether the requested information is held.

Right of appeal

18. 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

19. 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.
20. 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

**Jon Manners
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Wycliffe House
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