

Freedom of Information Act 2000 ('FOIA')

Decision notice

Date: 11 March 2013

Public Authority: Dudley Metropolitan Borough Council

Address: Council House
Priory Road
Dudley
West Midlands
DY1 1HF

Decision (including any steps ordered)

1. The complainant has requested information relating to the employment histories of various named individuals at Dudley Metropolitan Borough Council ('the council'). The Commissioner's decision is that the council has correctly applied the exemption for personal data. The Commissioner does not require the council to take any steps to ensure compliance with the legislation.

Background

2. The council explained that it has had extensive contact by telephone and in writing from the complainant over many years. It stated that, in brief, he raised complaints in 2004/05 relating to Building/Property matters which went through the council's complaints procedure and ultimately onto the Local Government Ombudsman ('LGO'). The LGO closed the complaints and no findings or issues were raised against the council by the LGO.
3. Around the end of 2010 the complainant received a Tenants newsletter and saw photographs of Housing Officers, some of whom were part of his complaints made in 2004/2005. This led him to ask for his complaints to be re-opened and for the officers identified to be dismissed.
4. The complainant contacted the LGO again who advised him that they would not re-open the complaints. The council has also advised the

complainant that it cannot re-open complaints that have previously gone through the complaints process and have been concluded by the LGO. The complainant has refused to accept this position and has continued to persist in presenting the council with complaints of the same nature and requests both in writing and verbally via the telephone.

5. The council informed the Commissioner that it has endeavoured to resolve matters and has paid multiple visits to the complainants home and provided support, assistance and more recently provided all recorded information held about the complainant and his property.

Request and response

6. On 5 September 2011, following a telephone call from the complainant, a request for information was logged on the council's request management system by the Data Quality Officer in the council's Directorate of Adults, Community and Housing Services. The initial request logged at that time was summarised as:

"[named individual] - LIST OF ALL POSTS HELD BACK TO 1984 [named individual] - AS ABOVE [named individual] - AS ABOVE [named individual] - AS ABOVE [named individual] - AS ABOVE [named individual] - AS ABOVE [named individual] - AS ABOVE."

The complainant was then provided with the following summary sheet and asked to agree it:

"RFI - 5446 - [complainant's name]"

REQUEST ?

- 1) Contract of Employment - [named individual] - Asst. Director,
- 2) Copy of correspondence between [named individual] and [named individual] – MP ?? and subsequent response to [complainant] by [named individual]
- 3) Full List of Repairs carried out to [complainant's address] – individual job costs.
- 4) Reason for [named individual] leaving her post as Area Housing Manager – Stourbridge.

- 5) [named individual] – Employment History with Dudley MBC from 1984
 - 6) ?? – [named individual] - as above
 - 7) [named individual]
 - 8) [named individual]
 - 9) [named individual]
 - 10) [named individual]
 - 11) [named individual]
 - 12) Any Other ????
 - 13) Why no appointment with Chief Exec or Director.”
7. On the 8 September 2011 the Data Quality Officer in the council’s Directorate of Adults, Community and Housing Services requested that the "clock" was stopped as he was arranging a visit to the complainant's home in order to clarify the request that had been made.
 8. On the 19 September 2011 the Data Quality Officer in the council’s Directorate of Adults, Community and Housing Services advised that the complainant had changed his mind and the request could be withdrawn. However, on the 20 September 2011 the council was advised that the complainant had changed his mind again and the request should proceed as previously defined.
 9. The council responded on 13 October 2011 and provided the information requested at points 1, 2 and 4, provided some information in relation to point 3 and stated that the provision of further detailed information in relation to point 3 would exceed the appropriate limit. In relation to the employment history requests (5-11), it stated that no-one with the name stated at point 6 currently works for Housing, the individual named at point 7 did not work on the complainants address, the individual named at point 11 no longer works for the department and, for the remaining named employees, the council applied the exemption for personal data at section 40(2) of the FOIA.
 10. On the 18 October 2011 the council received verbal communication from the complainant advising that he had contacted the Commissioner because he was not happy with the response he had received and the Commissioner had advised him that he was to ask for a review.

11. The council subsequently sent a letter to the complainant asking for his request for a review to be put in writing. This letter was followed up on the 31 October 2011 with a telephone call from the council to the complainant during which the complainant confirmed that he would write in with a request for a review.
12. The council provided the Commissioner with a copy of the complainant's internal review request stating that it is very difficult to follow the complainant's letters as they are often confused and are not dated. The council stated that the undated letter appears to have been received around week commencing the 12 December 2011 and was seen as the complainant's initial request for a review as it refers to a section 40 exemption.
13. An internal review response was sent to the complainant on 22 December 2011 in which the council maintained the application of the personal data exemption at section 40(2) of the FOIA to the requests for employment history information.

Scope of the case

14. The complainant contacted the Commissioner on 29 October 2012 to complain about the way his request for information had been handled.
15. During a telephone conversation with the Commissioner on 31 January 2013, the complainant stated that his concern is that people within the council get promoted without relevant qualifications to do the job. It was explained to the complainant that his request is not for qualifications but for employment history within the council and that if he specifically wants qualifications he should make a specific request for them. He was asked whether he wanted to withdraw this complaint and make a more focused request but he did not wish to do so.
16. The Commissioner has considered the application of the personal data exemption at section 40(2) of the FOIA in relation to the information requested at points 5 - 11 of the request.
17. During the Commissioner's investigation, the council disclosed to the complainant information, where held, relating to the current and previous roles held by the individuals listed. As the complainant is now in receipt of this information, the Commissioner has not considered the application of section 40(2) of the FOIA to the disclosed information. This decision notice only considers the remaining information withheld under the FOIA.

18. The Commissioner has not considered the council's response to points 1-4 or points 12- 13 of the request as this has not been requested by the complainant. This was confirmed to the complainant by letter on 31 January 2013.
19. The council also sought to apply the exclusion for vexatious requests at section 14(1) of the FOIA during the Commissioner's investigation. As the Commissioner has decided that the exemption at section 40(2) of the FOIA applies to the disputed information, he has not considered the council's application of section 14(1).

Reasons for decision

20. 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').
21. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

““personal data” means 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.”
22. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the data protection principles under the DPA. The Commissioner notes in this case that the council stated that disclosure would breach the first data protection principle.
23. The first data protection principle states that:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

 - (a) at least one of the conditions in schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

24. As explained above, the first consideration is whether the withheld information is personal data. The council has stated that the employment history (posts held), dating back to 1984, of 7 middle management officers clearly falls within the description of personal data because the information relates directly to identifiable living individuals. The Commissioner is satisfied that posts held by identifiable individuals constitutes the personal data of those individuals.
25. As the Commissioner is satisfied that the withheld information is personal data, he now needs to consider whether disclosure would breach the first data protection principle, as the council has claimed, i.e. would disclosure be unfair and/or unlawful.
26. In deciding whether disclosure of this information would be unfair, the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subjects, the consequences of disclosure on those data subjects and balanced the rights and freedoms of the data subjects with the legitimate interests in disclosure.

Nature of the information and reasonable expectations

27. The council has stated that employees of the council would have an expectation that their current job title would be likely to be disclosed to the clients and customers to whom they deal with and, in fact, it is regularly accepted by council employees that when they correspond with a client or customer, they would sign off letters or emails with their name and job title.
28. In addition, the council stated that it is aware that a distinction should be drawn between information that relates to an individual's public and private life. It stated that employment history, whilst employed at the council, is information about someone acting in the work capacity and should therefore normally be provided on request unless there is some risk to the individual concerned.
29. As a consequence the council accepts that some information about employees' roles should be disclosed under the FOIA, hence the provision of information as described in paragraph 17. However, the council stated that the scope of the request was also considered which clearly identifies a timescale dating back to 1984. It stated that providing employment history for this period of time would quite clearly paint a career path picture for the individuals named that focuses on their life and activities, from their junior days at the council, to their middle management roles where applicable. It stated that there is no

expectation by council officers (other than perhaps the most senior of officials) that this career profile would be placed in the public domain and that this type of information would be recorded on an individual's private curriculum vitae.

30. However, the council did state that the information is likely to have previously been in the public domain as the individuals went about their business during their careers. It stated that;

"In this particular scenario it is believed that the passage of time does add value to the compilation of the information. As previously commented it develops a profile of an individual officer, a career profile or path. The Officers do not have an expectation that this profile will be placed in the public domain."

Whilst the Commissioner agrees that the requested information may have previously been in the public domain, he recognises the distinction between a piecemeal disclosure of the requested information, over a period of up to 29 years to limited members of the public, and disclosure to the world at large as a result of this freedom of information request.

31. As stated in the Commissioner's guidance on 'Requests for personal data about public authority employees'¹, information about an employee's actions or decisions in carrying out their job is still personal data about that employee, but given the need for accountability and transparency about public authorities, there must be some expectation of disclosure. On the other hand, information that may be held in a personnel file about their health or disciplinary record or payroll information about their tax code all relate to them as individuals and to their personal circumstances and there is a greater expectation that a public authority would not disclose such information. In this case, the Commissioner considers that the employment history (posts held) of individuals is information held within a personnel file and therefore carries that greater expectation of privacy.

Consent

32. In its initial response and internal review response, the council stated that relevant individuals had been contacted and advised as to what had

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http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx

been requested and their consent for disclosure sought but consent had been refused. The council acknowledged that whilst refusal of consent does not prevent disclosure, it was a factor taken into consideration by the council.

33. When considering the issue of consent, the Commissioner's view is that where the data subject consents to the disclosure of their personal data within the time for statutory compliance with the request, then this disclosure will generally be considered fair.
34. However, any refusal to consent is not determinative in the decision as to whether the data subject's personal data will be disclosed. Rather the Commissioner will take the data subject's comments into account insofar as they represent an expression of views of the data subject at the time of the request had the data subject given any thought to the issue at the time. These views help form the analysis of fairness. In this particular case, the Commissioner has not been made aware of any specific concerns held by the individuals.

Consequences of disclosure

35. The council considered whether disclosure would cause the individuals any unnecessary or unjustified damage or distress. It commented that normally this would be unlikely to be the case as the information, as stated above, is likely to have previously been in the public domain as the officers went about their business during their careers.
36. However, the council informed the Commissioner that this complainant has made it quite clear in his communication, along with other matters he is progressing, that he has a grievance against some of the officers of the council and feels that they should be dismissed. He has made it clear that he has escalated the extent of his campaign against the council to a variety of bodies, including the police and various levels of government. He has raised matters with the press and local political parties, specifically stated that he has produced a 5 hour video diary of his dealings with the council, commented that he is going to leaflet drop tenants and residents with his campaign and set up a website championing his cause. The council also stated that the complainant has made some of his issues very personal hence his request to have further historical information about the officers in order to support his allegations that officers are allegedly of a sub-standard skill set.
37. It is the view of the Council, given the background, that disclosure of the depth of information such as requested would clearly lead to a greater infringement into the privacy of the individuals named. The council believes it is therefore reasonable to consider that disclosure of this information would cause the individuals unwarranted distress or

unjustified damage. It also stated that as a number of officers involved have left the council, there is a potential risk that they would have to contend as private individuals to on-going challenges from the complainant.

38. Although the Commissioner does not view information relating to posts held within the council as particularly sensitive, because of the information provided by the council at paragraph 36 and the fact that the complainant has expressed his belief that people within the council get promoted without relevant qualifications to do the job and that one officer is merely a 'glorified carpenter' and another is 'nothing more than an electrician', the Commissioner considers that there is a possibility that, should the information be disclosed, it could expose those individuals to harassment. The complainant provided the Commissioner with the background as to why he has made this request and although the FOIA is applicant blind, the Commissioner believes that this background increases the risk of the individuals being exposed to harassment if the information is disclosed, regardless of the actual employment history of those individuals.
39. The Commissioner therefore considers that disclosure of the requested information and the associated loss of privacy has the potential to cause damage and distress in this case.

Legitimate interests in disclosure

41. In considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
42. In considering if there is a legitimate interest in the public knowing the requested information, the council stated that it considered that the public has a right of access to information about who is making decisions at the council and to what role they perform in making those decisions. It also stated that there is a legitimate public interest in openness and transparency in public bodies in relation to understanding the roles of middle managers. The Council concluded that the legitimate interests of those to whom the information would be disclosed outweighs those of the data subjects with regards to disclosure of the current and most recent employment history and therefore disclosed that information during the course of the Commissioner's investigation (as detailed in paragraph 17). However, it considered that disclosure of the individual's career path would lead to a greater infringement of their legitimate right to privacy that is not outweighed by the legitimate interest of the public in this circumstance. It stated that disclosure of this level of information would also be processing that is unwarranted in

any particular case because of prejudice to the rights and freedoms or legitimate interests of the data subjects.

43. Whilst the Commissioner believes there is a legitimate public interest in knowing that staff are suitably qualified to perform their roles, and that it is important for members of the public to have faith that council officers are appointed appropriately, he does not believe that it is necessary to know the exact career path of individuals in order to do so. He considers that the council's recruitment procedures are another mechanism to achieve the same result without disclosure of individuals' personal data. The Commissioner is also aware that the council would address any complaint about an appointment through its complaints procedures and that any complainant would be able to refer to the LGO if unsatisfied with the outcome of the internal complaint investigation.
44. In addition, the Commissioner made enquiries as to the seniority of the individuals and was informed that the officers are, at most, middle managers no higher than Head of Service. Whilst his view is that generally there is a legitimate public interest in information about individuals in senior public roles, he does not believe it is necessary to release the level of detail requested in this case.

Conclusion on analysis of fairness

45. Taking all of the above into account, the Commissioner concludes that it would be unfair to the individuals concerned to release details of their employment history at the council. Such individuals would hold an expectation that their employment history would not be disclosed, and, despite the information itself being of relatively low sensitivity, disclosure could cause damage and distress. He acknowledges a legitimate interest in knowing that staff are suitably qualified but there are other mechanisms to ensure this. Therefore he does not believe that the legitimate interest outweighs the individuals' reasonable expectations, their right to privacy, and the possible consequences of disclosure in this case. The Commissioner has therefore decided that the council was entitled to withhold the information under section 40(2), by way of section 40(3)(a)(i). As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, he has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

Right of appeal

47. 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

48. 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.
49. 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
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