

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 November 2013

Public Authority: Chard Town Council

Address: The Guild Hall
Fore Street
Chard
Somerset
TA20 1PP

Decision (including any steps ordered)

1. The complainant has requested details of the final severance payment made to a former Town Clerk of Chard Town Council and the Council's justification for making any payment.
2. The Commissioner's decision is that Chard Town Council has properly withheld the information requested by the complainant in reliance of section 40(2) of the FOIA.
3. The Commissioner does not require Chard Town Council take any further steps in this matter.

Request and response

4. On 4 January 2013, the complainant wrote to Chard Town Council ("the Council") and requested information in the following terms:

"What I seek is that at a full meeting of Chard Town Council a formal statement is made on the final severance payment(s) to the Town Clerk who left office in January 2011, including the amounts and the justification for making such payments(s) and that this is properly recorded in the Minutes of the meeting."
5. The Council responded to the complainant's request on 11 January 2013 by refusing to supply the information he seeks in reliance of the exemption provided by section 41(1)(b) of the FOIA. The Council stated that:

"I confirm that your request is denied as under section 41(1)(b) the information is exempt as it would constitute a breach of confidence."

6. Following an internal review the Council wrote to the complainant on 28 March 2013. It advised the complainant that:

"...the information you have requested is not available, as to publish this information would, I believe, breach the Data Protection Act. I consider that disclosure would neither be fair nor lawful on the grounds that it constitutes personal data."

Scope of the case

7. The complainant contacted the Commissioner on 2 April 2013 to complain about the way his request for information had been handled.
8. The Commissioner has noted the language used by the Council in its internal review and its reference to the Data Protection Act. His investigation of this case was therefore concerned with the application of section 40 (personal data) in addition to section 41 (information provided in confidence).

Reasons for decision

Section 40 – personal data

9. Section 40(2) provides an exemption from disclosure for information which is personal data of any third party, where disclosure would breach any of the data protection principles contained in the Data Protection Act 1998 ("the DPA") or section 10 of that Act.

10. In order to rely on the exemption provided by section 40, the information being sought by the complainant must constitute personal data as defined by the DPA. The DPA defines personal data as:

'...data which relates 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,
- c) And includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect to the individual.'

11. The Commissioner is satisfied that the information sought by the complainant is the personal data of the Council's former Town Clerk.
12. The Commissioner must now consider whether disclosure of the requested information would breach any of the data protection principles contained in Schedule 1 of the DPA. He considers that the first data protection principle is the one most relevant in this case.

The first data protection principle

13. The first data protection principle has two components:
 1. Personal data must be processed fairly and lawfully, and
 2. Personal data shall not be processed unless one of the conditions in Schedule 2 of the DPA is met.
14. The Commissioner has considered what might be the former Town Clerk's reasonable expectations about the release of the information requested by the complainant.
15. The Commissioner recognises that there is a widespread and general expectation that the details of a person's employment – including when this employment ends, should be considered as confidential.
16. In addition to this general expectation, the Commissioner must also consider any information which the Council is able to provide which would explicitly confirm its former Town Clerk's reasonable expectation of privacy.
17. The Council has provided such information in its detailed representations. The Commissioner has given this information appropriate weight in his overall consideration of fairness.
18. However the Commissioner also considers that the seniority of the employee should be taken into account when personal data is requested under the Freedom of Information Act.
19. In his View, the Commissioner considers that the more senior a person is, it will be less likely that to disclose information about him, acting in an official capacity, would be unfair.
20. The former Town Clerk was a senior council employee. Consequently there would be some degree of expectation that certain information about his employment within the Council would be put into the public domain. In this instance the requested information relates to any payment made to the former Town Clerk when he left the Council's employment and the Council's justification for making such payment. In

the Commissioner's view the information sought by the complainant consists of information which is not usually made available to the public.

21. The expectation of privacy in respect of the termination of a person's employment has been affirmed in the Tribunal case of *Trago Mills (South Devon) Limited v Information Commissioner and Teignbridge District Council*¹. The Tribunal upheld the Commissioner's decision that disclosure of the details of a severance agreement would be unfair and therefore would contravene the first data protection principle. The Tribunal states that:

"Even without an express confidentiality provision, an individual would have a reasonable expectation that the terms on which his employment came to an end would be treated as confidential. The question we have to consider is not whether X's severance package was a private transaction (it clearly was), but whether the factors in favour of disclosure would not have represented an unwarranted interference with that right."

22. The Commissioner recognises the seniority of the former Town Clerk's position within the Council's organisation. He also recognises that even amongst senior members of staff there would still be a high expectation of privacy in respect information relevant to the severance of their employment.
23. In view of the Commissioner's conclusion concerning fairness, he has not gone on to consider any of the conditions for processing personal data contained in Schedule 2 of the DPA.

Severance payments

24. The Commissioner's guidance on requests for personal data about public sector employees² states that:

"Employees' expectations as to what information will be released will have to take account of statutory or other requirements to publish information. For example, the Accounts and Audit Amendment no 2 (England) Regulations 2009 require local authorities, fire and police authorities and certain other bodies in England to publish in their annual

¹ Appeal number EA/2012/0028

²

http://www.ico.org.uk/~media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx

accounts the amounts paid to employees in connection with the termination of their employment, if their total remuneration is over £50,000. These amounts are published by job title if the total remuneration is between £50,000 and £150,000 and by name if it is over £150,000. However, this legislation only directly affects reasonable expectations regarding the actual amounts of money paid out, and only for those particular authorities. Reasonable expectations in other contexts may differ, but it should be recognised that there is an increasing public expectation of transparency regarding expenditure of public money and the performance of public authorities. This is especially the case if there is any evidence of mismanagement by senior staff in a public authority.”

25. The Commissioner has examined the information requested by the complainant. He is satisfied that any payment made by the Council to its former Town Clerk does not engage the requirements of the Accounts and Audit Amendment no 2 (England) Regulations 2009 which would require its publication.
26. This leads the Commissioner to conclude that the former Town Clerk would have a reasonable expectation that the detail of any payment he received and the Council’s justification for such payment would not be placed in the public domain. The Commissioner is satisfied that publication of the information sought by the complainant would be unfair to the former Town Clerk and consequently would contravene the first data protection principle.
27. Therefore, the Commissioner’s decision is that the Council was correct to rely on section 40(2) of the FOIA as the basis for withholding the information sought by the complainant.
28. The Commissioner has not gone on to consider whether the Council was correct to rely on section 41 of the FOIA.

Right of appeal

29. 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

30. 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.
31. 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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Wycliffe House
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