

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 October 2014

Public Authority: Mole Valley District Council

Address: Pippbrook
Dorking
Surrey
RH4 1SJ

Decision (including any steps ordered)

1. The complainant has requested a copy of an investigation report into allegations and complaints about the conduct of a named councillor. Mole Valley District Council (the council) withheld the report under section 40(2) of the FOIA as it considered that the information was personal data and its disclosure would breach the Data Protection Act 1998 (the DPA)
2. The Commissioner's decision is that the council has correctly applied the exemption at section 40(2). The Commissioner does not require to the council to take any steps.

Request and response

3. On 12 June 2014, the complainant made the following request for information to the council:

"Please supply to me under the FOI Act 2000 a copy of the report by [named independent investigating officer], sent to the council by [named independent investigating officer] on 28 September 2012, regarding complaints about the conduct of Councillor [name]."
4. The council responded on 9 July 2014. It stated that the information was held but that it was exempt from disclosure under section 40(2). It explained that the information was the personal data of the councillor and other third parties and its release was beyond their reasonable expectations and would breach the first data protection principle.

5. Following an internal review the council wrote to the complainant on 14 July 2014. It stated that its position remained that the report comprised personal data and its disclosure would breach the first data protection principle. It therefore upheld its original decision that the exemption at section 40(2) applied.

Scope of the case

6. The complainant contacted the Commissioner on 16 July 2014 to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the council was correct to withhold the requested information.
7. The Commissioner notes that a small amount of the information contained within the report had been made publically available by the council in the form of a Monitoring Officer Assessment Summary dated 30 April 2012 which detailed the nature of the allegations and confirmed that taking the seven allegations as a whole, there was reasonable enough doubt of misconduct that an investigation was warranted. Following the conclusion of the independent investigation, the council also published a press release which stated that the councillor did not breach the code of conduct. Information that was in the public domain has not been considered as part of this decision notice.

Reasons for decision

8. Section 40(2) provides that:

"Any information to which a request for information relates is also exempt information if-

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied."

Section 40(3) provides that –

"The first condition is (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles"

Is the information 'personal data'?

9. In order for the exemption to apply the information being requested must constitute personal data as defined by section 1 of the DPA. Section 1 states that:

“personal data” means data which relate to a living individual who can be identified –

(a) From those data, or

(b) From those data and any other information which is in the possession of, or is likely to come into the possession of the data controller.”

10. All the information relates to an investigation that was conducted following a number of allegations made about a councillor. The information is the independent investigating officer's full report which details the allegations, the investigation he conducted, and his conclusions. The Commissioner considers that it is appropriate to consider the report in its entirety as comprising the personal data of the councillor, who can be identified from that information. Furthermore, the information also includes the personal data of third parties who were involved in the investigation and who can also be identified.

Would disclosure breach one of the Data Protection Principles?

11. The Commissioner considers that the most relevant principle in this case is the first data protection principle. This requires that personal data is processed fairly and lawfully.
12. In determining whether a disclosure is fair under the first data protection principle for the purposes of section 40 of the FOIA, the Commissioner considers it appropriate to balance the consequences of any disclosure and the reasonable expectations of the data subject with general principles of accountability and transparency, as well as any legitimate interests which arise in the specific circumstances of the case.

Reasonable expectations

13. When considering whether a disclosure of personal information is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the individual or individuals concerned. 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.

14. In this case, the council explained that the report is marked as private and confidential and as the contents relate to an investigation into an individual's conduct, it is clearly information of a confidential nature. The council has stated that in the circumstances of the investigation and the report, a reasonable expectation of privacy was conferred on the councillor. In addition to this, the councillor later confirmed that they did not wish the report to be placed in the public domain.
15. The council has also provided background information which the Commissioner considers would shape the councillor's reasonable expectations. It has stated that where a report commissioned by the monitoring officer finds wrongdoing, it is then referred to the Standards (Complaints) Subcommittee which has the authority to take action and make recommendations. In the event of a finding of wrongdoing, it is council practice that the relevant report will be put into the public domain. In this case there was no finding of wrongdoing, and therefore the councillor had no reasonable expectation that the report would be made publically available.
16. The Commissioner accepts that an expectation of privacy generally arises in relation to information pertaining to disciplinary matters or issues of an individual's conduct because of the inherent sensitivity of that information.

Consequences of disclosure

17. The council argued that disclosure of the information would be prejudicial to the councillor's rights and legitimate interests as she would be likely to suffer unjustified distress and upset by reopening the matter. In addition to this the council maintains that following the outcome of the report, the councillor has the right to continue with her civic responsibilities unhindered by allegations that have been put to rest in the report.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

18. The council acknowledges that all of its residents have a legitimate interest in their elected representative complying with the Members' Code of Conduct. However, it maintains that it has fulfilled this legitimate interest in a number of ways. It had released information that was contained in the Monitoring Officer Assessment Summary, it had provided a full copy of the report to each of the complainants and challenges could be made to the Local Government Ombudsman. It stated that a challenge was made to the Local Government Ombudsman who did not consider there should be any further action by the council in respect of the allegations and complaints.

19. The council's position is that the councillor was thoroughly investigated and the conclusion of the report confirmed that evidence did not show that she had breached the code of conduct. It considers that the matter was a time consuming and complex case which has been challenged through the appropriate channels and the allegations against the councillor have been put to rest. It has stated that the matter is now closed and that releasing the report at the time of the request would be to reopen matters which have been concluded for some time.
20. The council accepts that its residents have a legitimate interest in knowing that allegations against elected representatives are taken seriously and investigated thoroughly. It considers that publishing its Monitoring Officer Assessment Summary and a press release confirming the nature of the allegations and the outcome of the investigation satisfies residents in this regard and therefore balances the requirement to be open and transparent with the need to protect an individual's personal information.
21. The complainant considers that the matter is not closed as the planning issue to which the allegations relate was still a live matter at the time of the request. The planning application decision had recently been appealed to the Court of Appeal which overturned an earlier High Court decision to quash planning. In May 2014 the Court of Appeal refused permission for a Supreme Court appeal against the plans. He therefore considers that the report into the councillor remains relevant and that there is a legitimate public interest in it in connection with these clearly contentious planning issues.
22. The complainant has indicated that he does not consider the requested information to relate to the councillor's personal life, but rather to her public life and as such there is a lesser expectation of privacy and the likelihood of damage or distress is reduced.
23. He has explained that the councillor and her political party issued press statements on the outcome of the investigation which were inaccurate in their portrayal of the complaints as 'false and malicious', comments which have since been withdrawn. He therefore suggests that the concept of fairness should not be invoked for the councillor's benefit. It is the Commissioner's position that the concept of fairness in terms of data protection is not qualified in this way. The councillor's statement and subsequent withdrawal of parts of it do not impact whether or not it would be fair to disclose her personal data to the world at large.
24. The Commissioner notes that the complainant was provided with extracts of the report by the report's author, and he has provided these to the Commissioner as he considers that they demonstrate that the councillor acted in breach of the Planning Code of Good Practice. He is

therefore sceptical of the conclusion of no wrongdoing. The report was commissioned by the Standards (Assessment) Sub-committee into alleged breaches of the Members' Code of Conduct. The issues raised by the complainant were brought to the Investigating Officer's attention after the report and investigation had been commissioned by the sub-committee and did not form part of the remit of the investigation, the Investigating Officer therefore addressed the concerns 'for completeness'.

25. The council understands that the complainant does not agree with the outcome of the investigation. It has informed the Commissioner that the complainant has referred the matter to the Local Government Ombudsman who concluded that although the independent person should have been consulted sooner, there was no case to answer.
26. The Commissioner considers that there is always some legitimate interest in the disclosure of information that is held by public authorities. This is because disclosure helps to encourage the general aims of achieving transparency and accountability. In cases such as this, it also assists people in understanding the decisions made by public authorities and to be more involved in that process.
27. However, the circumstances of each case and each request for information will not always warrant the disclosure of every last detail of a particular matter in order to satisfy the legitimate public interest in that information. Public authorities have to balance their obligations under the DPA to protect individuals' rights to privacy.
28. In the circumstances of this case, the Commissioner finds that the council has correctly balanced the rights of the data subject with the legitimate interest in disclosure. It is clear that there were strong reasons why the individuals concerned would have expected confidence in the circumstances. The councillor was investigated through the proper council processes and was found not to have breached the code of conduct. The outcome of the investigation was made publicly available and the Local Government Ombudsman has also found no case to answer. As the matter has gone through the appropriate channels of appeal, it is clear that it is therefore closed. As such it is fair for the councillor to expect that she would now have the opportunity to move on in the absence of accepted and specific evidence to prove wrongdoing.
29. Clearly, the complainant continues to feel that the matter is not closed. He does not agree with the outcome of the investigation and he considers that the report is inextricably linked to the planning application which has long been active. The Commissioner accepts that the wider planning matter has been a contentious issue as is

demonstrated by the fact it has been appealed to the High Court and the Court of Appeal. As noted above, the Court of Appeal denied an application to appeal its decision to the Supreme Court in May 2014.

30. It does not appear to the Commissioner that there are any grounds that would warrant revisiting this issue now through the disclosure of more information, whether in the form of the whole report or more piecemeal disclosures lacking in complete context. The council has been reasonably transparent about the investigation that was conducted in line with the proper procedures. In view of the nature of the issues, further disclosure would be disproportionate.
31. In light of the above, the Commissioner considers that disclosure of the information would breach the first data protection principle because it would be unfair. Section 40(2) is therefore engaged.

Right of appeal

32. 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@hmcts.gsi.gov.uk

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

33. 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.
34. 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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