

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 February 2014

Public Authority: Durham County Council
Address: County Hall
Durham
County Durham
DH1 5UFX

Decision (including any steps ordered)

1. The complainant has requested details on suspensions, dismissals or disciplinary action which had been taken against staff at a pupil referral unit regarding a complaint he had made previously. The council responded by applying section 40(5)(b)(i) and refusing to confirm or deny whether it held relevant information.
2. The Commissioner's decision is that Durham County Council has correctly applied the exemption in this case.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 10 July 2013, the complainant wrote to Durham County Council and requested information in the following terms:

"Hi can I request how many staff at the pru have been sacked are still suspended or have been disciplined regarding the safeguarding investigation at the pru and can you take it to the day you send it to me."

The council responded on 7 August 2013. It stated that it was applying section 40(5)(b)(i) and was refusing to confirm or deny whether it holds information falling within the scope of his request.

5. Following an internal review the council wrote to the complainant on 4 September 2013. It stated that the it was applying 40(5)(b)(i) and again refused to confirm or deny whether it held relevant information.

Scope of the case

6. In a long running dispute between the parties the complainant has made a number of requests for information to the council which had been responded to. The council has informed the complainant that he has made 30 previous requests which had all been responded to previously.
7. In response to a number of previous requests the council had disclosed information the number of staff who had been suspended by the council. It had not also previously informed the complainant that it did not hold any information as regards disciplinary action it had taken against any person.
8. In response to a previous FOI complaint to the Commissioner he had also been told that no person had been disciplined as a result of the investigation. This was in relation to a request from prior to the current request which was in July 2013.
9. The complainant had also received some information in response to a complaint to the ombudsman.
10. The council has also provided some information to the complainant in response to an appeal to the First-tier Tribunal and in response to a complaint he had made outside of FOI. As of November 2013 he therefore partially knew the answer to 2 of his questions, however this information related to November 2013 and not the time when he made his request.

11. The complainant was seeking to build up a picture of the number of staff who remained suspended over the course of its investigation, and when, or whether they returned to work and any details of disciplinary action which had been taken against staff.
12. The Commissioner has therefore considered the complaint in spite of the fact that he was told if any staff remained suspended as of November 2013. Although the Commissioner asked the complainant if he was satisfied with the information he had received in November 2013 the complainant said that he had not received all of the information which he had asked for and wanted to continue with his complaint.
13. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He considers that the council should respond to his request and provide him with the information which he has requested. He considers that the request does not involve a request for the personal data of third parties as he has only asked for details of the number of individuals, not their identity.
14. The Commissioner considers that the complainant's complaint is that he wishes the council to confirm whether it holds any relevant information and to supply him with the information it holds in response to his request.

Reasons for decision

15. Section 40(5)(b)(i) provides that:

"The duty to confirm or deny—

(a) *does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and*

(b) *does not arise in relation to other information if or to the extent that either—*

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or....."

Is the information personal data?

16. The council's argument is that as the number of staff who were suspended is quite small, members of the public who have day to day contact with the Unit and other employees would be able to work out which individuals had been suspended. This would be due to their absence from the Unit over the relevant period of time. Following this argument they would also know who had returned to work, and if the council confirmed that a specific number remained on suspension then they would be able to confirm their suspicions that specific individuals were those that remained on suspension. From this they would be able to ascertain who was having disciplinary action taken against them.
17. The Commissioner is satisfied that as the pupil referral unit was relatively small, and the suspensions lasted a number of months any person with day to day contact, such as a parent or pupil in the unit, would be aware of any staff who were missing over the relevant period and could therefore identify that they were one of the suspended staff if their absence matched the responses being provided to the complainant's previous requests.
18. The complainant made a series of information requests as the field of those suspended was narrowed down whilst investigations continued. Clearly in this way his intention was to follow the course of the investigation by discovering how many officers were still on suspension or had had disciplinary action taken against them as time went by. The response he had received prior to the request which is the subject of this complaint indicated that 3 staff remained under suspension. In response to one of the earlier requests the council confirmed that it did not hold any information as regards any disciplinary action being taken against any employee as a result of the issue. However as the investigations were ongoing at that time this did not mean that that was the case when he made his later request.
19. The council further argued that the length of time an individual was on suspension for would also provide a good indication as to whether disciplinary proceedings were ongoing against that person, especially where other staff had returned to work from being suspended and they had not.
20. The failure of any individuals to return to work after confirmation that no further staff were on suspension could also be construed as evidence that that a member of staff had been dismissed from his post or that he had resigned from his post. Whether this is the correct interpretation or not it would lead to an inference being drawn that disciplinary action had been taken against that individual.

21. The Commissioner is therefore satisfied that individuals' could be identified from the information and that the information was therefore personal data relating to the individuals concerned.

Would the disclosure be unfair to the individuals concerned?

22. The Commissioner considers that responding to the request could amount to a disclosure of personal data if the authority were to disclose the final numbers requested by the complainant. In the first instance he however he must consider whether either confirming or denying whether information was held would breach one of the data protection principles. The councils argument is that if it confirms that it holds information on either dismissals, disciplinary action or suspensions which are ongoing this will in itself breach the data protection principles. Its argument is that if it confirms whether it holds information on employees who are still suspended then personal data would be disclosed in breach of the first data protection principle.
23. The data protection principles are set out in Part 1 of Schedule 1 to the DPA. The only one having application to the facts of this Appeal is the first data protection principle. It reads:

"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 ..."
24. Schedule 2 then sets out a number of conditions but they are not provided in this decision notice as they are not required for the purposes of this decision.
25. The initial consideration is whether a disclosure of the personal data would be 'fair'. The first question is whether the individuals whose data would be disclosed would have expected, or whether it would be obvious that the information on a suspension or disciplinary action being taken against them would be disclosed. If they would expect information on their suspensions or any disciplinary action being taken against them to be disclosed then it would be likely that that would be fair for the purposes of the first data protection principle.
26. The requested information relates to suspensions, disciplinary action and any dismissal of individuals working at the authority. The council considers that suspension is a neutral act and not evidence of fault on the individual's behalf. The council considers that suspension is not a form of disciplinary action in itself but is part of its process to investigate whether a complaint which had been made was correct and/ or whether any disciplinary action should be taken against any individuals.

27. In general the Tribunal has considered that it would be unfair to an employee for his employer to disclose information which would allow the public to identify that disciplinary proceedings had been taken against him.
28. In *Lord Dunboyne v Information Commissioner EA/2011/0261 & EA/2011/0303* the Tribunal addressed the issue of requests for information on the disciplinary files of employees. It said at paragraph 32:

"The Tribunal has – and will continue to – recognise the strong expectation of staff members that disciplinary matters are personal and to be kept private."
29. The Commissioner considers that both suspensions and disciplinary proceedings are generally a personal between the employer and the employee. Details about an individual's suspension do not carry the same degree of confidence which information about disciplinary action being taken against would. Nevertheless the Commissioner recognises that that an employee would not generally expect their employer to disclose to the public that they had been suspended as a result of a complaint made against them unless there was a very clear reason for them to do that.
30. The Commissioner is aware that individuals who had been suspended would be aware that this might be recognised by individuals who have day to day contact with the Unit. However he considers that they would have little expectation of any wider disclosure than that as would occur under the Act. As they would not expect that to be the case a wider disclosure would on the face of it be unfair for the purposes of the first data protection principle. It would also not have been obvious to the individuals that that would occur unless the situation merited such a disclosure – that a pressing social need existed for the information to be disclosed.
31. Although only those who had day to day contact with the college would be able to identify anyone who remained on suspension, and this may be relatively obvious to them in any event, a motivated individual such as a member of the press would be able to also identify the individuals by, for instance, asking pupils the identity of staff still missing from the college following the initial suspensions. In other words, that information could not be could not be anonymised by the council.
32. As the Commissioner considers that it would not lie within the individuals expectations he must therefore consider whether there is a pressing social need for the council to confirm whether it holds information which would override those expectations and make a

disclosure of the information fair for the purposes of the first data protection principle.

33. When considering whether the council should have confirmed whether or not it holds relevant information on staff suspensions the Commissioner must bear in mind the councils argument that a confirmation that it still held information on staff who were suspended would lead to an inference that disciplinary action was being taken against those individuals.
34. The Commissioner recognises that there would be a public interest in the Unit demonstrating that it had taken the allegations it had received seriously and that it had taken action to address those allegations. Although there is no requirements for a public interest test to be applied when making decisions regarding the disclosure of personal data the requirement for transparency and accountability might create a 'pressing social need' for information on its reactions to the allegations to be disclosed. This may or may not require that some personal information about the individuals concerned might need to be disclosed in order to achieve that.
35. Overall accountability for the actions of employees on behalf of the public authority generally rests with the authority itself rather than with the employees. If an employee of an authority acts inappropriately it is generally the authority which should be accountable to the public. The employee is accountable to the authority for his or her actions and the authority is free to take disciplinary action as necessary to prevent that happening again. The general public do not generally need to know the details of the disciplinary action which is taken other than where that is necessary to demonstrate that the authority has reacted appropriately and the circumstances require that (i.e. there is a pressing social need). The Commissioner considers this to be the case for suspensions as well as information on disciplinary actions.
36. The public does not therefore have a general right to know whether an individual has been suspended, disciplined or dismissed from their position. That is not to say that no information on this should ever be disclosed, however in order for that to occur there would need to be a demonstrable pressing social need which outweighs the expectations of individual concerned.
37. There are circumstances which provide stronger arguments that information on disciplinary action being taken against an individual should be disclosed to the public, however these are generally where there is a high profile or senior official concerned and where a criminal prosecution, or a public inquiry has taken place. Information is disclosed due to the nature of the proceedings in question.

38. If the requestor has a personal interest in knowing whether any specific individual has been dismissed or disciplinary action has been taken against them this cannot be taken into account in the consideration as to whether the information should be disclosed under the Act. The Act requires authorities to be blind to the personal interests of requestors and simply consider whether the information can be disclosed to the whole world. The council recognised this in its internal review and said to the complainant that it had taken into account the global nature of disclosures under the Act when responding to his request.
39. The council initially disclosed that suspensions had taken place and that investigations were ongoing into the allegations. This may have been on the basis that there was a pressing social need for the Unit to demonstrate that it was addressing and responding to the allegations which had been made. Whether or not this was the intention it did demonstrate that the council was addressing and responding to the allegations which had been made. This therefore lessened any pressing social need for specific information on any disciplinary action being taken against individuals to be disclosed. It is also recognition that at the beginning of the investigation no real suggestions of fault could be inferred.
40. Additionally a complaint had been made to the Local Government Ombudsman and a referral had been made to the police regarding the issues involved. Although these investigations had not all been resolved by the time of the request, the independent oversight provided by the investigations would provide some degree of surety that the council had reacted appropriately to the allegations which had been made. Again this would lessen any pressing social need for details of the council's actions against any specific individual or individuals to be disclosed to the whole world. The council as a whole would be held accountable through the investigation of the Ombudsman and individual's actions would be considered by the police to see if any individual should be held to account.
41. After considering the above the Commissioner is satisfied that the council was correct not to confirm or deny whether it held any information as to whether any staff had been disciplined or dismissed as a result of the investigation. There was no pressing social need for information on that to be disclosed to the world as a result of the request.
42. Although the individuals themselves would not be identified from a simple number, the council argued that the public would consider that the individuals who had spent longest on suspension were the individuals who had been disciplined. It argued that the public would consider that the additional time which they were suspended would be

as a result of the disciplinary process being undertaken. Whilst this may or may not be a correct interpretation of events the individuals who had spent longest on suspension would be identified in the public's eye as those who had been disciplined.

43. The Commissioner is conscious of the fact that the councils argument is that those with day to day contact with the unit would already be aware if any individuals had still not returned to work, and therefore would be likely to recognise that the suspension was ongoing. The Commissioner however considers that the wider disclosure of information under the Act differs to the extent that this could still make a disclosure of the information unfair.
44. The Commissioner recognises that it would not be certain that those who remained on suspension longest had had disciplinary action taken against them. The fact that they had remained on suspension longest might simply have been as a result of difficulty in gathering evidence, or as a result of the council's approach to the investigation. It is also possible that those who had returned to work had had disciplinary action taken against them as the investigation into the circumstances in their case had been clearer and therefore had been concluded earlier. Nevertheless the Commissioner does understand that the combination of circumstances could lead the public to conclude that disciplinary action had been taken, and this would be difficult to refute without a further disclosure of personal information to clarify the issue.
45. The Commissioner recognises that accurate personal information would be disclosed about a person but that that may lead to an inaccurate conclusion being drawn by the recipients of the information. Any negative inference likely to be caused which would be detrimental to that individual can be taken into account when considering whether the disclosure is 'fair'.
46. On the counter side, if a disclosure led to the correct assumption that an individual was subject to disciplinary action again this would be detrimental to the individual concerned as they would be identified as having been disciplined, which the Commissioner has already established would be unfair.
47. Following this line of argument, any disclosure of personal data which would lead the public to infer that the individual had been disciplined is a relevant issue, whether or not that was the correct interpretation of the information. It would create a detriment to those individuals and would therefore be unfair for the purposes of the first data protection principle.

48. If the council confirmed that no staff were still under suspended then any member of staff who had not, or did not return could be identified as having left the employment of the council and the inference would be drawn that they had been dismissed or left of their own volition as a result of the investigation.
49. The council was therefore in a position where it is clear that it should not disclose details of any disciplinary action which had been taken, or any dismissals which had occurred. Whereas it had previously disclosed the number of staff who were on suspension it was in a position where doing so as a result of this request would lead to negative inferences being drawn about individuals due to the length of time of their suspension. These individuals would be identifiable due to their continued absence from the Unit.
50. Having considered this the Commissioner's decision is that the council was correct to apply section 40(5)(b)(i) in this case.

Right of appeal

51. 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: GRC@hmcts.gsi.gov.uk

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

52. 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.
53. 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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