

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 September 2014

Public Authority: Cornwall Council

Address: County Hall
Truro
TR1 3AY

Decision (including any steps ordered)

1. The complainant has requested information from Cornwall Council about possible payments made to ex-members of staff at the John Daniel Centre in Penzance, and for a copy of a letter of resignation from the person appointed by the Council to lead its internal inquiry into matters at that Centre.
2. The Commissioner's decision is that the Council is entitled to rely on section 40(5) to neither confirm nor deny holding information relating to the any payment made to ex-members of staff at the Centre and is entitled to rely on section 40(2) in respect of the letter of resignation which is sought by the complainant.
3. The Commissioner does not require the Council to take any further action in this matter.

Request and response

4. On 11 November 2013, the complainant wrote to the Council and requested information in the following terms:

"I am still requesting to see the letter that [a named individual] wrote to [another named individual] re his resigning from his investigation.

...I am enquiring a as member of the council tax paying public (not as an employee, or ex-employee) if any benefits were paid to ex-members of John Daniel Centre staff with reference to the investigations that have

taken place over the previous 24 months. Specifically this query regards [a named individual] and [another named individual]."

5. The Council responded to the complainant's request for information on 18 December 2013 by issuing him with a refusal notice. The notice said:

"Cornwall Council neither confirms nor denies that it holds information falling within the description specified in your request. The duty in s.1(1)(a) of the Freedom of Information Act 2000 does not apply, by virtue of Section(s) 40, 41 & 30 of that Act."

6. On 8 January 2014 the complainant wrote to the Council again. He provided the following clarification of his request:

"I think that my original request may have been misleading or unclear.

The second part of what I was asking was "were any benefits paid or made to members of staff, or ex-members of staff at the John Daniel Centre over the period 2011 to December 2013". I wasn't intending that names should be disclosed...I merely mentioned [a named individual] and [another named individual] as possible examples. For example there may have been compromise agreements or other payments. Hope this clarifies things."

7. The email in which the complainant clarified his request was taken by the Council as a request for an internal review. The Council completed its review on 5 February 2014 and the reviewer advised the complainant that she supported the original decision.

Scope of the case

8. The complainant contacted the Commissioner on 17 February 2014 to complain about the way his request for information had been handled. The complainant stated:

"My request is to know how much money the authority has spent in "compromise" and other agreements with staff from the John Daniel Centre, from November 2011 to date. I was the subject of a compromise agreement, and am aware that others have been subject to this too. I am asking how much the Authority has paid in such agreements. I am also concerned that the Authority may have paid off ex-members of staff who have "whistle blown" maliciously."

9. The question for the Commissioner to consider in this notice is whether the Council is entitled to neither confirm nor deny holding the

information sought by the complainant in reliance of the exemptions provided by sections 40, 41 and 30 of the FOIA

10. The Commissioner will consider issues of the letter of resignation and the alleged payments to staff at the Centre separately.

Reasons for decision

Alleged payments to staff at the John Daniel Centre

Background concerning the circumstances leading to the request for information

11. The John Daniel Centre in Penzance caters for up to 80 vulnerable adults with learning disabilities.
12. In November 2011 an investigation was launched by the Council after concerns were raised about the care of some of the centre's clients. A number of staff members were suspended during the investigation and three individuals were later charged with ill-treating people in their care.
13. The suspension of staff at the centre and the arrest and charging of individuals was widely reported in the local and regional press.
14. Three individuals appeared at Truro Crown Court on 7 June 2013 and pleaded not guilty to the charges brought against them. These individuals were later found not guilty by the Court after the Crown Prosecution failed to offer any evidence to support their conviction.

Section 40 – Personal information

15. The Council has relied on section 40(5) of the FOIA to neither confirm nor deny whether it holds the information which the complainant seeks.
16. In order to rely on the exemption provided by section 40, the information being sought must constitute personal data as defined by the Data Protection Act 1998 ("the DPA"). The DPA defines personal data as:

'...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 or, 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 intention of the data controller or any other person in respect to the individual.'

17. Section 40(5) states:

"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

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

18. The Commissioner has considered the nature of the information sought by the complainant.

19. In the Commissioner's opinion, any information which might be held by the Council in respect of payments made ex-employees of the John Daniel Centre would be the personal data of identifiable individuals. This is made evident by the complainant's reference to two named individuals in his request.

20. In order to rely on the provisions of section 40(5) the Council, in confirming whether it holds the information sought by the complainant, would contravene at least one of the eight data protection principles.

21. The Commissioner considers that the first data protection principle is the one most relevant to this case. The first data protection principle states:

"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.”

22. In his request for information the complainant makes reference to 'compromise agreements'.
23. Compromise agreements are properly called 'settlement agreements' and they are prepared under section 111A of the Employment Rights Act 1996. They constitute legally binding contracts which generally prohibit the disclosure of certain types of information and prevents the parties to that agreement from taking further action.
24. The effect of settlement agreements is to provide certainty for the parties and to allow for a clean break.
25. Settlement agreements are almost always subject to explicit confidentiality clauses which both parties to the agreement accept.
26. In the Commissioner's opinion the information sought by the complainant is likely to be contained within settlement agreements.
27. The Commissioner considers that the parties to those agreements would have more than a reasonable expectation that details associated with the termination of their employment would not be made public by their employer. Such details would include any payments made to those individuals for the purpose of severance.
28. Having taken into consideration the nature of settlement agreements, their obligations and effects, the Commissioner has decided that disclosure of that information sought by the complainant would be unfair to the individuals concerned and would contravene the first data protection principle.
29. Having decided that disclosure of the information would be unfair, the Commissioner has not gone on to consider whether any of the conditions for processing in Schedule 2 of the DPA could be met.

The public interest test

30. The Council's reliance on section 40(5) is subject to consideration of the public interest test.

The public interest factors which favour disclosure

31. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities.
32. Disclosure of information can assist the public in understanding the basis and how public authorities make their decisions and this in turn may help foster greater trust in public authorities. This is particularly important in those cases which involve the expenditure of the public's finances.
33. The Commissioner also considers that disclosure of the requested information, if it was held, would potentially allow further explanation of a case which already had a high media profile.

Arguments in favour of maintaining the exemption

34. Central to the public interest in this exemption is the ability of the Council to enter into settlement agreements with its former employees.
35. The Commissioner has already noted that settlement agreements constitute a form of contract, which if revealed, could be an actionable breach.
36. The Commissioner considers that it is generally in the public interest for a public authority to be able to enter into settlement agreements. He considers that they can offer an efficient and cost effective method of avoiding and/or resolving employment-related disputes.
37. The Commissioner made enquiries of the Council about any payments it might have made to individuals at the John Daniel Centre. He was advised that such payments, if made, would not fall under the type of accounting arrangements which would require the Council to disclose the specific details of those payments under the Accounts and Audits Act. The Commissioner is satisfied that, should any payments have been made, disclosure of that information would only be to the extent required for the narrow purpose of auditing. He is satisfied that, should any payment have been made, those payments would have been properly accounted for by the appropriate payroll service.
38. The Commissioner has noted the significant media interest in this case, at the time that the allegations were made public and up to the point where the Crown Court case against three individuals was terminated.
39. The Commissioner considers that the case has already received significant exposure in the media spotlight and he is aware that some of

the individuals were named in the press prior to their court cases being dropped.

40. The Commissioner is mindful that the allegations associated with this request were subjected to an internal investigation and consideration by the Crown Prosecution Service. He believes that the combined effect of the media exposure and of the naming of the individuals in this case could result in further speculation about their guilt or culpability in the events at the John Daniel Centre. He considers that renewed interest in those events, which may follow from this information request, could result in a renewed interest into the events at the Centre and this in turn could lead to unwarranted intrusion into the privacy of the individuals concerned.

Balance of the public interest

41. The Commissioner has carefully considered the withheld information and the representations made by the complainant and the Council. The Commissioner has also weighed what he considers are the main arguments germane to the public interest test.
42. The Commissioner is obliged to point out that that an investigation into the events at the John Daniel Centre did take place. Those events were also considered by the Police prior to referral to the Crown Prosecution Service.
43. The Commissioner considers that the fact of the investigations and of the significant media interest in this case is sufficient to assure the public that the Council has properly executed its duties.
44. The Commissioner considers that the Council must be able enter into settlement agreements in situations where it is proper to do so. He believes that this ability, in itself, is in the public interest.
45. The Commissioner must acknowledge the inherent sensitivity of the allegations in this case, both in terms of the vulnerable adults at the Centre and in respect of the persons who were the focus of those allegations. This sensitivity must be given sufficient weight in terms of this case and the application of section 40(5) to the requested information.
46. In view of the considerations outlined above, the Commissioner has decided that greater weight must be given to those arguments which favour maintaining the exemption. The Commissioner has therefore decided that that the Council is entitled to rely on section 40(5) of the FOIA and is correct to neither confirm nor deny holding information

relating to settlement agreements and to payments made under those agreements.

The letter of resignation

47. The Council's response to the Commissioner's enquiries identified that the letter of resignation constitutes the personal data of its author and of its recipient. The Council therefore considers that the letter of resignation falls to be considered under section 40(2) of the FOIA.

48. Section 40(2) relates to:

“(1) any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) 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.”

49. The Commissioner has examined that letter and agrees with the Council that it is the author's personal data and that section 40(2) is the appropriate exemption to consider.

50. Again the Commissioner has considered the first data protection principle and in particular to the first principle.

51. It is the Commissioner's opinion that the letter's author would have no legitimate expectation that it would be made public by the Council by virtue of the FOIA or otherwise. Having read the letter, it is clear to the Commissioner that the author had no intention for it to be made public and that he had a likely expectation that the contents of the letter would be treated in confidence.

52. The Commissioner understands that there has been no consent for the letter to be released.

53. For the reasons stated above, the Commissioner is obliged to conclude that disclosure of the letter would be unfair to its author. He is particularly mindful of the potential consequences that disclosure would have to the author; particularly in respect of his professional reputation.

54. The letter makes frequent reference to the events at the John Daniel Centre and to individuals – mentioned by name, who were associated with the investigation of the allegations. The nature of the allegations were such that the Commissioner is satisfied that the information

contained in the letter can properly be characterised as being sensitive personal data, satisfying the definition of sensitive personal data at section 2(g) of the DPA:

“Section 2(g): In this Act “sensitive personal data” means personal data consisting of information as to— the commission or alleged commission by him of any offence.”

55. The Commissioner is unable to find any condition in Schedule 2 of the DPA which would allow for the letter to be disclosed into the public domain.
56. The fact that the letter contains sensitive personal data means that the Council must also satisfy one of the conditions for processing contained in Schedule 3 of the DPA. Again the Commissioner is unable to find any appropriate condition in Schedule 3 that would allow disclosure.
57. The Commissioner’s decision is that the Council is entitled to rely on section 40(2) to withhold the letter of resignation.
58. Notwithstanding his decision above, the Commissioner has also decided that the Council should have confirmed to the complainant that it holds the letter of resignation and that it should not have relied on section 40(5) to neither confirm nor deny that fact.
59. It is clear to the Commissioner that the letter relates to a high profile and well publicised case and that the letter’s author would have had some expectation that the fact of his resignation from the investigation would have been made public.
60. The Commissioner is further drawn to this conclusion because the Council itself had referred to the investigator’s resignation letter in an email sent to the complainant on 16 May 2013.

Right of appeal

61. 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

62. 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.
63. 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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