

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 24 September 2014

**Public Authority:** Bournemouth Borough Council  
**Address:** Town Hall  
Bourne Avenue  
Bournemouth  
BH2 6DY

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to how the council handled a safeguarding concern regarding a vulnerable adult. The Commissioner's decision is that Portsmouth City Council has correctly applied the exemption for personal data at section 40(2) of the FOIA. He does not require any steps to be taken to ensure compliance with the legislation.

#### **Request and response**

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2. On 18 February 2014, in response to a complaint investigation letter, the complainant wrote to the council and requested information in the following terms:

"To assist me with this I am exercising my right under the Freedom of Information Act 2000, to request you supply me with the information you relied upon in investigating this matter & making your reply.

In addition, I would also make a request for information of the following:

1. The strategy meeting notes held on 12<sup>th</sup> December 2013.
2. Information used & relied upon to make the 'Best practise' decision.

3. Welfare POA checks & proof you relied upon to establish the solicitor was authorised to take this decision to move the resident without consultation with the NOK."
3. The council responded on 24 March 2014 and refused to provide the requested information citing the personal data exemption at section 40(2) of the FOIA. The council also said it may hold some further recorded information that is relevant to the request but is considering whether qualified exemptions apply to that material.
4. The complainant requested an internal review on 2 April 2014. Following the intervention of the Information Commissioner, the council provided an internal review response on 13 June 2014. It maintained its original position that the requested information is exempt under section 40(2) of the FOIA.

### **Scope of the case**

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5. The complainant contacted the Commissioner on 28 April 2014 to complain about the way the request for information had been handled.
6. The Commissioner considers whether the council was correct to apply the exemption for personal data at section 40(2) of the FOIA to the requested information.
7. During the Commissioner's investigation, the council also applied the exemption for prejudice to commercial interests at section 43(2) of the FOIA. This exemption was applied to some of the information that the council also applied section 40(2) to; that being information relating to the residential home that the data subject resided at. The council said that such information is inextricably linked to the personal data of the data subject.
8. As the Commissioner has decided that section 40(2) applies to all of the requested information, he has not deemed it necessary to consider the application of section 43(2).

### **Reasons for decision**

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#### **Section 40(2)**

9. 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 Act would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').

10. 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.”
11. 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 said that disclosure would breach the first data protection principle.

### **Is the withheld information personal data?**

13. As explained above, the first consideration is whether the withheld information is personal data. The information relates to a vulnerable adult, about who there were safeguarding concerns. It consists of 'Strategy Meeting notes', a 'Discharge Support Referral' and 'case note documentation' which includes correspondence with relatives or third parties authorised to act on the individual's behalf. The information is directly referenced to the individual and forms part of her adult social care record. Therefore the Commissioner is satisfied that the withheld information constitutes the personal data of the vulnerable adult.

### **Is any of the information sensitive personal data?**

14. Section 2 of the DPA defines sensitive personal data as personal data which consists of information on the following:
- an individual's mental or physical health,
  - their political opinions,
  - their sex life,

- their racial or ethnic origin
  - their religious beliefs
  - whether they are a member of a trade union
  - the commission or alleged commission of an offence by them, or any proceedings for any offence they have committed or are alleged to have committed.
15. The Commissioner accepts that much of the personal data falls into the first of the above categories, and therefore constitutes sensitive personal data about the data subject.

**Does the disclosure of the information contravene any of the data protection principles?**

16. The council considers that the disclosure of the information would contravene the first data protection principle. This 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".
17. 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 subject, the consequences of disclosure on the data subject and balanced the rights and freedoms of the data subjects with the legitimate interests in disclosure.

**Nature of the information and reasonable expectations**

18. The council said that the data subject would have no expectation that sensitive personal data about her would be disclosed into the public domain. It also said that, given her medical condition, the data subject is not able to provide informed consent and it is of the view that consent would not be provided by persons identified as having power of attorney and it would not be appropriate under the circumstances to seek such disclosure.
19. In this case, given the nature of the information, the Commissioner is satisfied that the data subject would have a strong expectation of confidentiality and privacy.

**Consequences of disclosure**

20. In order to assess the impact of the consequence of disclosure on whether disclosure would be fair, it is necessary to consider whether disclosure of the information would cause unwarranted damage or distress to the data subjects.
21. In this case, the complainant has said that it cannot see how a prejudice could result from disclosure of the requested information and that it would not be within the nature of its profession and responsibility as carers to cause a prejudice.
22. The Commissioner considers that the consequence of disclosing the information would be an infringement of the data subject's privacy which could cause distress. He draws attention to the fact that disclosure under the FOIA is akin to disclosure to the public at large rather than to the requester alone.

### **Balancing the rights and freedoms of the data subjects with the legitimate interests in disclosure**

23. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for its own sake along with specific interests which in this case is knowing the details of why a specific 'Best Practise' decision was made.
24. The complainant has said that it, as the care home provider, has a legitimate reason to request the information. Again, the Commissioner notes that disclosure is not limited to the requester and that the FOIA is both applicant and motive blind.

### **Conclusion on fairness**

25. The Commissioner considers it is clear that it is outside the reasonable expectations of the individual that her personal data, which in most instances constitutes her sensitive personal data, would be disclosed. Sensitive personal data, by its very nature, is information that individuals regard as the most private information about themselves and disclosure of this type of information, which is not in the public domain, is likely to have a detrimental or distressing effect on the data subject. He considers that the reasonable expectations of the data subject are not outweighed by any legitimate public interest in knowing the specifics of why a 'Best Practise' decision was made in a particular case and accepts that disclosure of the personal data in this case would be unfair. The Commissioner therefore considers that the exemption at section 40(2), by way of section 40(3)(a)(i), is engaged and that the council was correct to withhold the requested information.

26. 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, or in the case of sensitive personal data, a Schedule 3 condition, for processing the information in question.

## **Other matters**

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27. The council has drawn the Commissioner's attention to the fact that this request was made as part of a complaint regarding the council's 'Best Practise' decision and that the complainant has not exhausted the council's complaint procedure regarding that decision. It has said that had the complainant done so it is likely that a position would have been arrived at where some information may have been disclosed, but in an environment capable of observing the confidentiality requirements of the data subject and the care home. It has said that its Information Governance Manager is happy to meet with the Service Director for Adult Social Care Services to recommend that the original complaint should be escalated in accordance with its complaints procedure.
28. The Commissioner notes that information within the scope of this request may be released to the complainant as part of the escalated complaint and draws attention to the fact that any such disclosure would not constitute a disclosure under the FOIA.

## Right of appeal

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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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**