Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 January 2015

Public Authority: Luton Borough Council
Address: Town Hall
George Street
Luton
Bedfordshire
LU1 2BQ

Decision (including any steps ordered)

1. The complainant has requested information about refurbishment work to the interior of a residential property maintained by the council, with associated reports and reviews. The council withheld some of the requested information under section 40(2), but provided the reminder.

2. The Commissioner's decision is that in relation to parts 1 to 4 of the request, the council has correctly applied section 40(2) to withhold the information, but that it should also have applied section 40(1) in addition for a smaller proportion of it. The Commissioner has also decided that in relation to part 5 and part 7, all information has been disclosed.

3. The Commissioner does not require any steps to be taken.

Request and response

4. On 18 March 2014, the complainant wrote to the council and requested information in the following terms:

    1. *All relevant paperwork relating to the case at [redacted address] and the incident that occurred in another property as indicated on the hse paperwork".*
    2. *[redacted name]'s investigation paperwork.*
    3. *[redacted name]'s enquiry details/email exchanges with Keepmoat.*

4. *All the damage record photos taken by [redacted name].*
5. *[redacted name]'s reports/investigation.*
6. *Phone call logs exchanged between [redacted name] and Keepmoat.*
7. *A copy of your (LBC's) review on your policies and procedures.*

5. The council responded on 21 March 2014. It refused the request under section 40(2).

6. Following an internal review the council wrote to the complainant on 22 April 2014. It stated that:

- For parts 1 - 4 it held information but that it was exempt under section 40(2).
- For part 5 it had previously provided the report on 14 March 2014.
- For part 6 it did not hold recordings of phone calls.
- For part 7 the review was in the process of being drafted in light of the report provided in respect of part 5.

Scope of the case

7. The complainant initially contacted the Commissioner on 11 February 2014 to complain about the way a previous request for information had been handled. During the course of the Commissioner's investigation, the complainant submitted a new request to the council that clarified the information he sought. Following the council's response to this new request, and to conserve the resources of all parties, the Commissioner agreed to consider this second request as the basis of his investigation.

8. The complainant subsequently confirmed by telephone on 13 August 2014 that he disputed the withholding of information under section 40(2) in relation to parts 1 – 4 of the request.

9. Following the Commissioner writing to both parties to advise the basis of the investigation, the complainant further contested on 26 August 2014 that he had not been provided the information requested in parts 5 and 7 of the request.

10. The Commissioner therefore considers that the scope of this case is the determination of whether the council has correctly applied the exemption provided by section 40(2) to parts 1 - 4 of the request, and whether the council has complied with the duty under section 1(1) to provide all held information in response to parts 5 and 7 of the request.

Reasons for decision

Section 40(2) – Third party personal data

11. 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."*

12. 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 withheld information personal data?

13. Personal data is defined by section 1 of the Data Protection Act 1998 ("the DPA") 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 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 data controller or any person in respect of the individual…"*

14. In order for the exemption to apply the information being requested must constitute personal data as defined by section 1 of the DPA. In this instance the Commissioner is aware that the complainant has requested information pertaining to a specified residential address that is managed by the council. The Commissioner has reviewed the withheld information, which is composed of email communications, and has identified that it expressly relates to the specified address and the tenant who resides there. The Commissioner is further aware that the complainant and tenant are known to each other. On this basis, the

Commissioner is satisfied that the withheld information can be clearly connected to the tenant, and therefore constitutes their personal data.

Would disclosure breach the data protection principals?

15. The data protection principles are set out in schedule 1 of the DPA. The Commissioner considers that the first data protection principle is most relevant in this case. The first principle states that personal data should only be disclosed in fair and lawful circumstances, the conditions of which are set out in schedule 2 of the DPA.

16. The Commissioner's considerations below have focused on the issues of fairness in relation to the first principle. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the data subject and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations of the data subject

17. When considering whether the disclosure of personal data is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the data subject. 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.

18. In this case the council has explained that the tenant would not have a reasonable expectation of their personal data being publically disclosed in response to an FOIA request. The council has provided the Commissioner with a copy of a public leaflet about refurbishment, in which it is explained to tenants that their information will be kept confidential, and only used for the purpose of undertaking refurbishment in their home.

19. The council has detailed that the complainant is personally known to the tenant, and it has spoken to the tenant to enquire whether they will give consent for the personal data to be provided to the complainant. The tenant did not give clear permission for this.

The consequences of disclosure

20. The council considers that the tenant is clearly aware that the complainant has requested the information, but has not provided clear consent for the information to be provided. As such, the council considers that disclosure under the FOIA would be against the wishes of the tenant.

21. The Commissioner further considers that the release of the withheld personal data would disclose highly specific information about the tenant and their residential address, and that whilst it may not provide a strong risk of harm to the individual, it would still be outside their expectation. This is particular so due to the council's advice to tenants that such information is held in confidence.

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

22. The council has not advised the Commissioner of any legitimate interests in disclosure that it has identified. However, the Commissioner considers that the need to promote transparency and accountability on the part of the council, and particularly in relation to the refurbishment of council-maintained properties and associated asbestos concerns, to be a legitimate argument for the fairness of disclosure.

23. Notwithstanding this, the Commissioner is aware that the withheld information relates to a residential address, and the tenant has not given express agreement for the information to be disclosed to the complainant. It is evident that any further dispute about the substantive matter would need to be taken forward by the tenant.

    Conclusion

24. There is always some legitimate public interest in the disclosure of any information held by public authorities. This is because disclosure of information helps to promote transparency and accountability amongst public authorities. This in turn may assist members of the public in understanding decisions taken by public authorities and perhaps even to participate more in decision-making processes.

25. However, in the circumstances of this request, the Commissioner has identified that there is limited justification for why the tenant's personal data should be publically disclosed under the FOIA. The information relates to refurbishment work undertaken in the tenant's residence, which is maintained by a local authority, and the tenant has given no clear indication that they consent to the information being provided to the complainant under the terms of the FOIA. While the Commissioner has considered the complainant's motives for requesting the information, it has been found that these are personal, and not representative of a wider public interest. It is clear that the FOIA is not in appropriate means to access such information, which is likely to have been requested without an understanding of what public disclosure under the FOIA constitutes.

Section 40(1) – personal data of the requester

26. Section 40(1) provides that:

"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".

27. Section 40(1) of provides an exemption for information when it represents the personal data of the requester. This exemption is absolute: no consideration of the data protection principles is necessary when considering this subsection and it requires no public interest test to be conducted. In addition, in relation to such information public authorities are not obliged to comply with the obligation to confirm or deny whether they hold the requested information, by virtue of section 40(5)(a).

Is the requested information personal data?

28. As detailed in paragraph 13, the definition of personal data is provided in section 1 of the DPA. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, or has them as its main focus or else impacts on them in any way.

29. Having considered the information that the council has withheld in response to the request, the Commissioner has identified that a small proportion of it relates to the complainant, due to being either correspondence deriving from him, or else addressed to him, as part of the substantive matter between the tenant and the council.

30. The Commissioner is therefore satisfied that a smaller proportion of the withheld information constitutes the personal data of the complainant. On this basis, the Commissioner considers that it is appropriate that any decision as to whether or not a data subject is entitled to be provided with their personal data should be made in accordance with the DPA, and not the FOIA.

Section 1(1) – Duty to make information available on request

31. Section 1(1) states that any person making a request for information is entitled to be informed by the public authority whether it holds the information, and if so, to have that information communicated. This is subject to any exemptions or exclusions that may apply.

32. In respect of part 5 of the request the council has informed the Commissioner that the information sought was provided to the complainant on 14 March 2014, as part of the council's 'stage 3' response to a complaint that he had submitted to the council. A copy of this response has been provided to the Commissioner, who has noted that that it contains the council officer's "report and findings" in relation to the substantive matter, as sought by the complainant. Additionally,

the council has informed the Commissioner that it has consulted with council officers involved in the substantive matter, who have confirmed that this letter represents the only relevant held information that is applicable to this part of the request, and on this basis the council would not expect further relevant information to be held.

33. In respect of part 7 of the request the council has informed the Commissioner that the sought information was not held at the time of the request due to still being drafted, and the council's response advised that it would be provided once complete. The council has confirmed that the requested information is an "Asbestos Management Plan", and that was provided to the complainant by email following the plan's release on 3 April 2014. A copy of the report, in addition to a copy of the covering email, has been provided to the Commissioner, who has noted that the report release date is recorded on its front cover. The council considers this to be the only relevant information that it would expect to hold in respect of part 7.

Conclusion

34. In the circumstances of this complaint, the Commissioner must decide on the balance of probabilities whether any further recorded information is likely to be held by the council in respect of part 5 and part 7. In reaching a decision on this case, the Commissioner has considered the information that has so far been provided to the complainant, the steps the council has undertaken to ensure that its disclosure is complete, and the absence of any evidence that the council's disclosure is incomplete. Based on these factors, the Commissioner has come to the conclusion that it is unlikely the council holds further recorded information that is relevant to part 5 and part 7 of the complainant's request

Other matters

35. The Commissioner would draw the council's attention to the necessity of identifying the correct legislation to apply when an information request is received. While the Commissioner appreciates that the substantive matter is complex due to the relationship between the complainant and the tenant whose personal data he has requested, any request for information must be considered under the correct legislation based on the identity of the requester.

Right of appeal

36. 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

37. 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.

38. 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