

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 October 2018

Public Authority: Cheshire East Council
Address: C/O Municipal Building
Earle Street
Crewe
Cheshire
CW1 2BJ

Decision (including any steps ordered)

1. The complainant has requested recorded information held by Cheshire East Council concerning the suspension and resignation of the Council's former Monitoring Officer. The Council has refused to comply with the complainant's request on the grounds that all of the information is subject to the exemption provided by section 40(2) of the FOIA and certain pieces are subject to the section 41 exemption.
2. The Commissioner's decision is that Cheshire East Council has correctly applied section 40(2) of the FOIA to all of the information requested by the complainant.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 13 March 2017, the complainant wrote to Cheshire East Council and requested information in the following terms:
 1. "Please disclose the report compiled for the council's Disciplinary and Investigation Committee (IDC) by the independent investigator appointed by that committee, into former Monitoring Officer [name redacted].
 2. Please disclose a summary of the reasons the council's former Monitoring Officer [name redacted] was suspended.

3. If still within the cost limit, please disclose any correspondence sent to the committee by [name redacted]. This should include, but not be limited to, his resignation letter.
4. If still within the cost limit, please disclose any correspondence to and from members of the Disciplinary and Investigation Committee into the setting up of the committee in relation to [name redacted]."
5. The complainant acknowledged that proceedings are continuing into other individuals and he asserted that the information he had requested could still be disclosed with necessary redactions. The complainant also asserted that any reports and correspondence do not need to be withheld in their entirety.
6. The complainant drew the Council's attention to ICO case FER0489371 which he considered set a precedent in this area by requiring the release of a Designated Independent Person's report into the allegations against senior officers in relation to the development of a waste transfer station at Lyme Green. The complainant asserted that "This information [...] is therefore directly comparable with the Lyme Green DIP report of 2013. The same arguments therefore apply".
7. The complainant also said that he appreciated, "...some redactions may be necessary under those regulations and regulation 12 (4)(e), but not to the extent that no information can be released".
8. The Council responded to the complainant's request on 12 April 2018. The Council confirmed that it holds the information the complainant had requested and advised him that it was withholding that information in reliance on section 40(2) – personal data and 41 – information provided in confidence.
9. The complainant wrote to the Council and asked it to conduct an internal review of its decision to withhold the information he has asked for. In the complainant email he set out his rebuttal of the Council's position in respect of each of the four parts of his request.
10. The Council waived its opportunity to conduct an internal review on the grounds that it was unable to identify anyone with sufficient seniority to undertake such a review. The Council advised the complainant that its response had been considered by its Deputy Monitoring Officer.

Scope of the case

11. The complainant contacted the Commissioner on 19 April 2018 to complain about the way his request for information had been handled.

12. The Commissioner advised the complainant that the focus of her investigation would be to determine whether Cheshire East Council has handled his request in accordance with the FOIA, and specifically, whether the Council is entitled to withhold the information he has requested in reliance on section 40(2) and 41 of the FOIA.

Reasons for decision

13. The Council has provided the Commissioner with copies of all of the information which the complainant has requested. It has confirmed that it relies on sections 40(2) and 41 of the FOIA to withhold this information.

Section 40(2) – personal data of third parties

14. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester; and where the disclosure of that personal data would be in breach of any of the data protection principles.
15. The first step for the Commissioner to determine is whether the withheld information constitutes personal data.
16. Personal data is defined by section 1 of the Data Protection Act 1998 ("the DPA"). If the information is not personal data then the Council will not be able to rely on section 40.
17. Section 1 of 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 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 intention of the data controller or any other person in respect of the individual."

18. The Commissioner notes that all of the information which the complainant has requested concerns the Council's former Monitoring Officer, whom the complainant has named in each part of his information request.
19. That being the case, the Commissioner agrees with the Council that all of the withheld information is the personal data of the former Monitoring Officer, and that the information can properly be characterised as relating to a staffing matter.

20. None of the withheld information satisfies the definition of sensitive personal data which is provided by section 2 of the DPA 1998.
21. It is the Council's position that disclosing the requested information to the complainant would constitute a contravention of the first data protection principle.
22. The Council considers that disclosure of the information would be unfair to its former Monitoring Officer – the data subject. It asserts that the information relates to the individual's employment in a senior role and as such it impacts both his private and public life.
23. In the Council's opinion, the data subject holds a reasonable expectation that this confidential staffing matter will remain confidential between himself and his former employer.
24. The Council has not contacted the data subject to seek his consent to disclose the requested information as it was not considered appropriate in the circumstances of this case.
25. In addition to being unfair to the data subject, the Council asserts that disclosure of the withheld information would not meet any of the conditions in Schedule 2 of the DPA.
26. The Commissioner has examined the withheld information. She agrees with the Council's characterisation of that information as relating to a confidential staffing matter. The Commissioner considers that condition 6 in Schedule 2 of the DPA is most relevant to this case.
27. Condition 6 of Schedule 2 allows disclosure of personal data if:

“The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”
28. In this case, the provisions of condition 6 need to be considered against the purpose which lies behind the creation of the requested information.
29. The Commissioner recognises the high position held by the Council's former Monitoring Officer. That position is such that the Commissioner readily accepts that there is a necessary and legitimate interest in the public knowing the nature of the allegations made against the data subject and knowing what the independent investigator's conclusions and recommendations are in respect of those allegations.
30. The key to the Commissioner's decision is not the fact that necessary legitimate interests exist, rather it is whether those interests are greater

than the prejudice to the rights and interests of the data subject should the requested information be disclosed.

31. The Commissioner understands that allegations were made about the Council's former Monitoring Officer which, under the Council's constitution, required referral to the Council's Investigation and Disciplinary Committee – the IDC.
32. Those allegations were investigated by an independent investigator and a report was produced for consideration by the IDC. The report is dated 16 November 2017.
33. On 11 December 2017, the Council's Monitoring Officer resigned from his employment with immediate effect. At that point, the data subject ceased to be an employee of the Council.
34. The data subject's resignation came before the Council's IDC was able to consider the conclusions and recommendations of the independent investigator.
35. Since the data subject was no longer a council employee, the IDC was not able to take any action in respect of the allegations made against him. Had the data subject remained in the employ of the Council, the IDC would have been entitled to consider the report and then reject or accept the independent investigator's conclusions and recommendations.
36. This did not occur: The IDC's business was terminated at the point the data subject tendered his resignation. The IDC was not required to adjudicate on the IDC report and therefore the investigatory and disciplinary process was never concluded.
37. The circumstances described above cannot be ignored. Essentially the Commissioner is required to consider the disclosure of a report, and associated information, which was created for a purpose which proved to be redundant.
38. The Commissioner notes that the independent investigator's report is marked 'Management in Confidence'. This corroborates the Council's assertion that all of the withheld information concerns a confidential staffing matter. The Commissioner considers that this official marking creates a clear expectation of confidence on the part of the Council and a legitimate expectation on the part of the data subject that matters concerning his employment would remain confidential.
39. The Commissioner considers that the data subject should be treated no differently than any other staff member involved in an employment disciplinary process. She must also recognise that the data subject resigned from his position before the final hearing into the matter was

held and consequently no determination of misconduct or otherwise was reached.

40. It is clear to the Commissioner that disclosure of the requested information would result in significant detriment to the data subject. It is not difficult to adduce detriment to the data subject's future employment and in respect of his home life. The Commissioner is in no doubt disclosure of the requested information would cause unwarranted stress to the data subject and his family.
41. The Commissioner has reviewed her decision in case FER0489371 which the complainant referred to in his correspondence with the Council. She finds that the circumstances of that case are materially different to those in this case: where the requested information concerns an internal staffing matter and where much of the information which has been generated has not resulted in any determination concerning the Council's former Monitoring Officer.
42. Having carefully considered this complaint, the Commissioner has determined that disclosure of the requested information would be unfair to the data subject and would not meet the requirements of condition 6 of Schedule 2 of the DPA. The Commissioner's decision is that Cheshire East Council has correctly applied section 40(2) of the FOIA to all of the information which the complainant has requested.
43. In view of the Commissioner's foregoing decision, she has not gone on to consider the Council's additional application of the exemption provided by section 41 – where information is provided in confidence.

Right of appeal

44. 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

45. 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.
46. 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
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SK9 5AF