

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

### Decision notice

**Date:** 16 August 2012

**Public Authority:** Portsmouth City Council  
**Address:** Civic Offices  
Guildhall Square  
Portsmouth  
PO1 2AL

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to a complaint about a specific councillor made to the Standards Assessment Sub-Committee. Portsmouth City Council ('the council') relied on the exemption at section 41(1) of the FOIA that the information cannot be disclosed as it would constitute an actionable breach of confidence. The Commissioner's decision is that the council incorrectly withheld the information under section 41(1) of the FOIA. However, despite the council not citing the exemption for personal data at section 40(2) of the FOIA, the Commissioner's decision is that the personal data exemption applies and therefore the requested information should not be disclosed. The Commissioner does not require any steps to be taken.

#### Request and response

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2. On 8 January 2012 the complainant made the following request for information under the FOIA:

"Please provide the following information with reference to [specific councillor] where she provided a letter admitting her guilt to Portsmouth City Council where she had a pecuniary [sic] interest in Consultancy matters.

To help guide you, I have been provided with evidence, where [specific councillor] was in communication with the 'Standards Chairman' and others.

The information which is specifically required are copies of;

- .All communications between [specific councillor] and the Standards Committee or Chairman on this matter
  - .All communications between council officers, councillors and any other persons on this matter.
  - .Dates of all communications between [specific councillor] and the Standards Chairman on this matter.
  - .A copy of the letter, where [specific councillor] admitted her guilt."
3. The complainant then wrote to the council on 9 January 2012 to clarify that he required all dates of communications between the parties.
  4. The council responded on 6 February 2012 and provided some information within the scope of the request but refused to provide the letter from the Chairman of the Standards Assessment Sub-Committee to the specific councillor citing exemption at section 41 of the FOIA as its basis for doing so. Further information was released on the 8 February 2012 which appears to be as a result of correspondence sent from the complainant on the 6 and 7 February 2012.
  5. An internal review of the council's decision was requested on 15 February 2012 and a response was provided on 16 March 2012. The council maintained its original position in relation to the exemption at section 41 of the FOIA and identified two further documents that had not been initially provided. The council provided one of these documents and withheld one under the legal professional privilege exemption at section 42 of the FOIA. However, this document was then disclosed to the complainant on 30 April 2012 due to an appeal decision relating to another request.

### **Scope of the case**

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6. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
7. The Commissioner has considered whether the exemption at section 41 of the FOIA applies.
8. As the Commissioner is also responsible for the ensuring compliance with the Data Protection Act 1998, and he considers the information requested to be personal data belonging to a third party, he has deemed it necessary to consider whether section 40(2) of the FOIA applies. Although the council has not cited this exemption, it would not be appropriate for the Commissioner to order disclosure under the FOIA which could breach the Data Protection Act 1998.

## Reasons for decision

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### Section 41 Information Provided in Confidence

9. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and the disclosure would constitute an actionable breach of confidence.

#### **Was the information obtained from another person?**

10. The first step is for the Commissioner to consider whether the information was obtained by the council from any other person in order to satisfy the requirement of section 41(1)(a).
11. The withheld information in this case is the letter from the Chairman of the Standards Assessment Sub-Committee ('the committee') to the specific councillor. The Commissioner understands that the committee is part of the council. The letter itself is on council headed paper and the publically available Decision Notice from the committee in relation to the complaint about the specific councillor refers to the 'Standards Assessment Sub-Committee of Portsmouth City Council...'.
12. The Commissioner's guidance on section 41<sup>1</sup> states that this exemption will not apply to information that the public authority has generated itself. This reflects the fact that the exemption is not just concerned with the sensitivity of the information but that it also requires the information be obtained from another party. For the reasons stated above, it is clear to the Commissioner that the information has been generated entirely within the council, rather than being obtained by the council from any other person, and therefore the requirement of section 41(1)(a) has not been met. The Commissioner has therefore not gone on to consider whether the disclosure would constitute an actionable breach of confidence.

### Section 40(2)

13. 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').
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[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/CONFIDENTIALINFORMATION\\_V4.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/CONFIDENTIALINFORMATION_V4.ashx)

14. 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.”

15. 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 considers in this case that disclosure of third party personal data could breach the first data protection principle.

16. The first data protection principle 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. As explained above, the first consideration is whether the withheld information is personal data. The information is a letter from the Chairman of the committee to a specific councillor relating to a complaint made against that councillor. The Commissioner is satisfied that this is the personal data of the specific councillor.

18. As the Commissioner is satisfied that the withheld information is personal data, he now needs to consider whether disclosure would breach the first data protection principle, i.e. would disclosure be unfair and/or unlawful.

19. 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 subjects, the consequences of disclosure on those data subjects and balanced the rights and freedoms of the data subjects with the legitimate interests in disclosure.

### **Nature of the information and reasonable expectations**

20. The Commissioner recognises that information relating to complaints against individuals carries a strong general expectation of privacy due to the likelihood that disclosure could cause the data subjects' distress and could also cause permanent damage to their future prospects and general reputation.
21. In his guidance, 'Access to information about public authority employees'<sup>2</sup>, the Commissioner states that a factor to take into account when considering whether to release information is whether the information is about the employees' professional or personal life and that the threshold for releasing professional information will generally be lower than that for releasing truly personal sensitive information e.g. that found in an employee's occupational health record. The guidance also states that arguments in favour of disclosure are stronger where a disciplinary measure is being taken against a senior member of staff over a serious allegation of impropriety or criminality, particularly the case where an external agency is involved in an investigation, and that arguments in favour of disclosure are weaker where the information is about an internal disciplinary procedure concerning a relatively minor matter.
22. The council has stated that the letter addressed the councillor's approach to the complaint and her attitude which it felt was outside of the committee's consideration of the complaint itself. Having seen the withheld information, the Commissioner agrees that this is the case but also considers that the letter addresses the failure to declare an interest and the breach of the Code of Conduct.
23. The Commissioner notes, from the publically available Decision Notice referred to in paragraph 11 above, that the committee considered that a serious breach and error of judgement had taken place but no disciplinary action was to be taken.
24. He also acknowledges that part of the withheld information is of a personal nature, in that it relates to the councillors attitude and but that attitude is in relation to the actions taken as a councillor. However, this does not distract from the general expectation of privacy that is held in

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[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Data\\_Protection/Detailed\\_specialist\\_guides/PUBLIC\\_AUTHORITY\\_STAFF\\_INFO\\_V2.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Data_Protection/Detailed_specialist_guides/PUBLIC_AUTHORITY_STAFF_INFO_V2.ashx)

relation to information concerning the investigation of complaints against individuals.

25. Although the Commissioner considers that the withheld information in this case relates to the data subjects' public function rather than their private life, he is satisfied that the data subject in this case would have an expectation of confidentiality and privacy in relation to the withheld letter.

### **Consequences of disclosure**

26. 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 withheld information would cause unwarranted damage or distress to the data subject.
27. As stated above, the Commissioner is aware that the committee's Decision Notice is publically available and states that the committee considered that a serious breach and error of judgement had taken place.
28. The council has stated that the withheld letter is not accessible to anyone other than the relevant elected members and the specific councillor. It explained that this request was the 10<sup>th</sup> in a series of 16 requests under the FOIA and that together with defamatory material about the data subject in her role as councillor, the data subject saw this as a personal vendetta and was becoming very distressed. It added that as the data subject had refused consent to the letter being disclosed, to do so would have caused her further distress.
29. The Commissioner considers that disclosure of information relating to the data subjects attitude and approach to a complaint would be an intrusion of privacy, would cause distress, and could also cause permanent damage to the data subjects' future prospects and general reputation.

### **Legitimate interests in disclosure**

30. 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 the legitimate interest in the handling of a complaint against a councillor. He acknowledges that councillors should be open to scrutiny and accountability because they are elected members of local government.
31. The complainant has submitted that 'it is in the public interest for transparency when public office holders are held to account'. He also stated that it is important for the public to have confidence in a system where

powers have been delegated to local authorities to arbitrate on matters of misconduct by public figures.

32. The Commissioner believes that the scrutiny by the committee along with the statements in the Decision Notice that a strong letter of censure be sent to the councillor, that the councillor is to be retrained and that all members be reminded of the need to be vigilant in recognising personal and prejudicial interests, goes some way to satisfying the legitimate interest in the handling of a complaint. Nevertheless, the Commissioner is satisfied that there is a legitimate public interest in disclosure in this case.

### **Conclusion on Section 40(2)**

33. The Commissioner appreciates that it is important that the council is seen to be taking transparent action when a councillor has breached the Code of Conduct. However, as the complaint was subject to scrutiny by the committee and the decision of the committee is publicly available, the Commissioner does not consider that the legitimate interest in the handling of a complaint against a councillor outweighs the legitimate interests of the privacy of the data subjects. The data subject would not expect the detail of the withheld letter to be disclosed and disclosure of this type of information is likely to have a detrimental and distressing effect on the data subject.
34. Taking all this into account, the Commissioner concludes that it would be unfair to the data subject concerned to release the requested information as he considers that their right to privacy in relation to complaints against them outweighs the interests of the public in knowing the detail of a letter sent to the subject of a Code of Conduct complaint. The Commissioner has therefore decided that the council was entitled to withhold the information under section 40(2), by way of section 40(3)(a)(i).
35. 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 for processing the information in question.

## Right of appeal

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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: 0116 249 4253

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

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

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**  
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**Information Commissioner's Office**  
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