

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 July 2013

Public Authority: Durham County Council
Address: County Hall
Durham
DH1 5UF

Decision (including any steps ordered)

1. The complainant requested a copy of a report of an investigation carried out by Durham County Council (the Council) into problems at a pupil referral unit. The Council refused to disclose this information under several exemptions.
2. The view of the Commissioner is that the entirety of the report constitutes the personal data of individuals other than the complainant. In line with this view he has considered the exemption provided by section 40(2) (personal information) of the FOIA and found that this is engaged in relation to the entire report. The Council is not, therefore, required to disclose the report.

Request and response

3. On 16 November 2013, the complainant wrote to the Council and requested information in the following terms:
"A copy of the investigation report from the [Broom Cottages Pupil Referral Unit] re safeguarding allegations."
4. The Council responded on 18 January 2013, outside 20 working days from receipt of the request. It stated that the request was refused and cited the exemptions provided by sections 30(1) (information held for the purposes of an investigation), 40(2) (personal information) and 41(1) (information provided in confidence) of the FOIA.
5. The complainant responded on 25 January 2013 and requested an internal review. The Council responded with the outcome of the internal review on 15 February 2013. The Council maintained that the report

could not be disclosed, but no longer relied on sections 30(1) and 41(1). Instead, it now cited section 31(1)(g) / (2)(b) (prejudice to the exercise by the Council of its functions for the purpose of ascertaining whether any person is responsible for any conduct which is improper), as well as section 40(2).

Scope of the case

6. The complainant contacted the Commissioner on 11 March 2013 to complain about the refusal of his information request. The complainant indicated at this stage that he did not agree with the exemptions cited by the Council.
7. In correspondence with the Commissioner, the Council also cited the exemption provided by section 38(1) of the FOIA. The final position of the Council was, therefore, that it relied on the exemptions provided by the following sections of the FOIA:
 - 31(1)(g) / (2)(b) (prejudice to the exercise by the Council of its functions for the purpose of ascertaining whether any person is responsible for any conduct which is improper)
 - 38(1) (endangerment to health and safety)
 - 40(2) (personal information).
8. Whilst the Council cited section 40(2) only in relation to a minority of the content of the report, the Commissioner has considered that exemption in relation to the entirety of the report. In line with his dual role as regulator of the Data Protection Act 1998 (DPA) as well as the FOIA, the Commissioner will pro-actively consider whether section 40(2) may apply, even where this exemption has not been cited by the public authority, if he considers it appropriate to do so in order to guard against inappropriate disclosures of personal data.
9. In this case the view of the Commissioner was that the arguments that the Council had advanced ostensibly in support of the citing of section 31(1)(g) / (2)(b) in fact reflected that the concerns of the Council about disclosure were more relevant to section 40(2). For the reasons given below, the view of the Commissioner was that the report in its entirety constituted personal data and so it was appropriate to consider section 40(2) in relation to the entire report.
10. Previously the complainant had requested the ICO to carry out an assessment under section 42 of the DPA, since he had requested the report under section 7 of the DPA on the basis that it may have

constituted, or contained, the personal data of his son. The conclusion of that assessment was that there was unlikely to have been any breach of the DPA as the report did not constitute, or contain, the personal data of the complainant's son.

11. The Commissioner would stress that this decision notice is not to be taken as implying that the report is the personal data of the complainant's son. That the report is the personal data of some of the Pupil Referral Unit staff does not alter the fact that the complainant has no right to access it under the DPA.

Reasons for decision

Section 40

12. Section 40(2) of the FOIA provides an exemption for information that 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. Consideration of this exemption is a two-stage process; first, the information must constitute the personal data of a third party. Secondly, disclosure of this personal data must be in breach of at least one of the data protection principles.
13. Covering first whether the requested information is the personal data of any third party, the definition of personal data is given in section 1(1) of the Data Protection Act 1998 (DPA):

"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".

14. When citing section 40(2) in relation to a minority of the content of the report, the Council took the approach that only those parts of the content of the report that referred specifically to individuals by their initials or job title was personal data. It is the case that the remaining content does not initially appear to be personal data. However, part (b) of the quote from the DPA above makes clear that other information that may result in the identification of an individual can be taken into account when considering whether information constitutes personal data.

15. The view of the Commissioner is that it is clear that the report *relates* to all of the staff who were suspended as a result of the allegations referred in the wording of the complainant's request. The introduction to the report refers to it providing background information about those suspensions.
16. As to whether they can be *identified* from that information, the Commissioner relies here on there being existing knowledge held by other individuals at the time of the request about the identities of the suspended staff. He believes that it will have been the case that a number of people would have been aware of the identities of those individuals, such as pupils at the Pupil Referral Unit and other, non-suspended staff of the unit.
17. The view of the Commissioner is, therefore, that the report both relates to and can be combined with other information in the form of existing knowledge to identify the suspended staff. This means that the report in its entirety constitutes the personal data of those staff members.
18. Turning to whether disclosure of that personal data would be in breach of any of the data protection principles, the Commissioner has focussed here on the first data protection principle. The first principle requires that personal data be processed fairly and lawfully and the particular focus here is on whether disclosure would be, in general, fair to the data subjects. In forming a view on whether disclosure would be fair, the Commissioner has taken into account the reasonable expectations of the data subjects, the consequences of disclosure upon the data subjects and whether there is legitimate public interest in the disclosure of the information in question.
19. On the issue of the reasonable expectations of the data subjects, the Council has stated that its discipline policy is specific that the discipline process is confidential. Having been given an undertaking that this process will be confidential, the subjects of this process would clearly hold an expectation that this information would not be disclosed.
20. Furthermore, the investigation remains ongoing at the time of writing and so clearly it was ongoing at the time of the request. Whilst a stronger argument could be made in favour of disclosure in relation to information about a completed investigation, and particularly about information concerning allegations that the investigation concludes did carry weight, the view of the Commissioner is that the subjects of this investigation would hold a strong and reasonable expectation that information would not be disclosed whilst this investigation is ongoing.
21. As to the consequences of disclosure upon the data subjects, having found that these individuals would hold a strong expectation of privacy

in relation to this information, it follows from this that disclosure in contravention of this expectation would result in distress to these individuals. Disclosure could also harm the professional reputations of the data subjects and, as a result, their employment prospects. This would be particularly unfair whilst the investigation is ongoing and responsibility for any of the allegations that are substantiated has yet to be formally established.

22. On the issue of whether there is any legitimate public interest in this information, the Commissioner recognises that there is public interest in this information in order to promote understanding and accountability in relation to the alleged problems within the Pupil Referral Unit. Disclosure would also improve public knowledge about the steps taken by the Council to address the allegations about the Pupil Referral Unit.
23. In conclusion, the Commissioner's view is that the data subjects would hold a legitimate expectation that this information would not be disclosed, and that disclosure of this information contrary to this expectation would be likely to result in damage and distress. He also, however, has recognised that there is a legitimate public interest in the disclosure of this information.
24. A key factor here is that the investigation was ongoing at the time of the request. As noted above, a stronger argument in favour of disclosure may exist once this investigation is complete. In the event, however, the view of the Commissioner is that the expectations of the data subjects and the harm that would be likely to result given that the investigation was ongoing at the time of the request means that disclosure would be unfair to those individuals and in breach of the first data protection principle.
25. The Commissioner has found that the report in question is, in its entirety, the personal data of individuals other than the requester and that the disclosure of that personal data would be unfair and in breach of the first data protection principle. The exemption provided by section 40(2) of the FOIA is, therefore, engaged and the Council is not required to disclose the report.

Other matters

26. A record has been made of the failure by the Council to respond to the complainant's request within 20 working days of receipt. If evidence from other cases suggests that there is a systemic problem within the Council in responding to information requests within 20 working days, this issue may be revisited.

Right of appeal

27. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

28. 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.
29. 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

Jon Manners
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